

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/STOP PRESS: MARINE AND COASTAL ACCESS ACT 2009

## **WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS**

### **STOP PRESS:**

The Marine and Coastal Access Act 2009 makes provision in relation to marine functions and activities; makes provision about migratory and freshwater fish; makes provision for and in connection with the establishment of an English coastal walking route and of rights of access to land near the English coast; enables the making of Assembly Measures in relation to Welsh coastal routes for recreational journeys and rights of access to land near the Welsh coast; makes further provision in relation to Natural England and the Countryside Council for Wales; makes provision in relation to works which are detrimental to navigation; and amends the Harbours Act 1964. The Act received the royal assent on 12 November 2009 and the following provisions came into force on that day: ss 316-320, 322-325, Sch 5 (in part). Further provisions came into force on 12 January 2010: ss 1-3, 14-22, 24, 26-28, 31, 32-40, 42-64, 65-84 (England), 190-216, 217 (in part), 220-222, 223 (in part), 224-232, 233 (in part), 235, 237-239, 243-262, 264-313, 315, 321 (in part), Schs 1-3, 16 (in part), 17, 18, 21, 22 (in part): s 324, SI 2009/3345. Further provisions came into force on 1 April 2010: ss 9-13, 23, 25, 29, 30 and 234, Sch 8 paras 7, 8, and Sch 22 (in part) (SI 2010/298). Further provisions come into force on 1 January 2011, so far as not already in force: ss 215-233, Sch 16 and Sch 22 Pt 5 (SI 2010/298). The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-40) The Marine Management Organisation***

#### *Chapter 1 (ss 1-3) Establishment*

Section 1 establishes a body to be known as the Marine Management Organisation ('MMO'), and introduces Schs 1, 2, which make further provision as to the status and constitution of the MMO. The MMO is to act as the United Kingdom Government's strategic delivery body in the marine area, and s 2 sets out the MMO's general objective in relation to its marine functions, which is to ensure that activity in its marine area is managed, regulated and controlled with the objective of making a contribution to the achievement of sustainable development. The Secretary of State is to set objectives and performance indicators for the MMO which it must endeavour to meet: s 3.

#### *Chapter 2 (ss 4-13) Licensing of fishing boats*

Section 4 transfers to the MMO the function of the Secretary of State in relation to the granting of fishing licences within British fishery limits. Section 5 provides for the MMO to be subject to a duty to vary a licence following a successful appeal against certain provisions in the licence restricting the amount of time that a vessel may spend at sea. The functions of the Secretary of State in licensing vessels involved in the trans-shipment of fish are also transferred to the MMO by virtue of s 6. Section 7 makes provision supplementary to ss 4 and 6. The functions of the Secretary of State relating to the authorisation of fishing operations for scientific and other

purposes are transferred to the MMO by s 8, and the functions of the Secretary of State in granting licences in England and the English inshore region for the killing or taking of seals are transferred to the MMO by s 9. Section 10 provides that the powers under the Wildlife and Countryside Act 1981 s 16 to grant licences in certain circumstances for otherwise prohibited activities are to be exercised by the MMO, instead of the Secretary of State or Natural England, in the case of any such activities in the sea adjacent to England that lies seaward of mean low water mark out to 12 nautical miles. The 2009 Act s 11 amends the Sea Fisheries (Wildlife Conservation) Act 1992, to place the MMO under the same duty as the Secretary of State, when discharging any sea fisheries functions, to have regard to the conservation of marine flora and fauna and to try to achieve a reasonable balance between that consideration and any other considerations to which it is required to have regard. By virtue of s 12, certain of the functions of the Secretary of State in issuing consents under the Electricity Act 1989 s 36 relating to the construction, extension and use of offshore generating stations are also transferred to the MMO, and by virtue of the 2009 Act s 13, the MMO will also be able to issue notices under the Energy Act 2004 s 95 declaring safety zones around those offshore generating stations (described as renewable energy installations) for which it issues those consents.

#### *Chapter 3 (ss 14-22) Agreements involving the MMO for the exercise of functions*

Section 14 allows the Secretary of State to enter into agreements with the MMO authorising the MMO to perform marine functions currently performed by the Secretary of State. With the approval of the Secretary of State, s 15 enables the MMO, to make agreements with bodies listed in s 16 authorising those bodies to perform the MMO's functions on its behalf. Those functions which may not be delegated to the MMO or an eligible body are set out in s 17. By virtue of s 18, the maximum amount of time that an agreement between the Secretary of State and the MMO or an agreement between the MMO and an eligible body may last is 20 years. Section 19 provides that an agreement may still be entered into with a body which is already involved with the function in some way. Additional provision in relation to agreements with harbour authorities which are local authorities is made by s 20. Section 21 makes supplementary provision with respect to agreements, and s 22 is interpretational.

#### *Chapter 4 (ss 23-40) Miscellaneous, general and supplemental provisions*

Section 23 amends certain sections of the Planning Act 2008 to set out the MMO's role in relation to development consents. The MMO has powers, by virtue of the 2009 Act s 24, to undertake research on matters relevant to its functions or its general objective, either by itself or in association with others, and to commission or support others to undertake such research. The MMO's duties and powers to provide advice and assistance, and the use of training facilities, to the Secretary of State, public bodies and any other person, are specified by s 25. Section 26 enables the MMO to publish documents and provide information about anything relating to its general objective or any of its functions, and s 27 enables the MMO to make a reasonable charge for any services it provides (on a cost-recovery basis). The MMO is to be accountable to the Secretary of State, who will from time to time require, in writing, information from the MMO relating to the performance of its functions: s 28. The MMO is to have responsibilities for enforcement in the marine area, including bringing prosecutions where appropriate, and s 29 makes provision with respect to the powers of the MMO to pursue criminal proceedings and proceedings for the recovery of monetary penalties imposed under the Act. By virtue of s 30, the MMO may continue prosecutions that have already been started by the Secretary of State, including prosecutions started by the Marine and Fisheries Agency, where those prosecutions are for offences related to functions transferred to the MMO or are for offences under fisheries legislation. Section 31 allows the MMO to take action which will help it to exercise its functions and meet its general objective, such as borrowing money, holding property, and investing money. Section 32 enables the Secretary of State to make the appropriate funds available to the MMO by way of grant, and s 33 allows the MMO to borrow money as necessary to enable it to carry out its functions. By virtue of s 34, the MMO's ability to borrow is limited to £20m, although the Secretary of State may increase this (up to £80m)

by order, subject to approval by the House of Commons. Section 35 enables the Secretary of State to lend money to the MMO and makes the loan subject to any appropriate repayment conditions. The Secretary of State may guarantee loans, interest and other financial obligations of the MMO: s 36. Under s 37, the Secretary of State may, following consultation, give general or specific directions to the MMO regarding the exercise of its functions, including directions in relation to international agreements to which the United Kingdom or European Union is a party. Section 38 provides for the Secretary of State to issue guidance to the MMO regarding the exercise of its functions, and the MMO must have regard to any guidance issued. Section 39, Sch 3 enable the Secretary of State to make schemes to transfer to the MMO property, rights and liabilities of the Department for Environment, Food and Rural Affairs (including those of the Marine and Fisheries Agency), other government departments, ministers and statutory bodies, and also allows the transfer of any property, rights and liabilities from the MMO to ministers, government departments and statutory bodies. The Secretary of State may require a government department, minister or other statutory body to make staff, premises or other facilities available to the MMO on a temporary basis: s 40.

## ***Part 2 (ss 41-43) Exclusive Economic Zone, UK marine area and Welsh zone***

Section 41, Sch 4 allow for the declaration of an Exclusive Economic Zone to replace the existing zones, namely the areas within British fishery limits, the Renewable Energy Zone, the Pollution Zone, and the Gas Importation and Storage Zone, in order to simplify the management of the United Kingdom's offshore maritime areas. Section 42 defines the UK marine area for the purposes of managing the United Kingdom's maritime space; it includes those areas of the sea and seabed over which the United Kingdom enjoys sovereignty in addition to those offshore areas over which the United Kingdom is able to assert its sovereign rights. The Government of Wales Act 2006 s 158(1) is amended by the 2009 Act s 43 to insert a definition of the Welsh zone.

## ***Part 3 (ss 44-64) Marine planning***

### *Chapter 1 (ss 44-48) Marine policy statement*

Section 44 describes what is meant by a 'marine policy statement' ('MPS') and defines the MPS as a document that is prepared and adopted by the policy authorities, in accordance with the process laid down in Sch 5, and which sets out their policies for contributing to the sustainable development of the UK marine area. By virtue of s 45, the policy authorities may prepare an MPS by acting jointly; an MPS may also be adopted by the Secretary of State acting jointly with only one or two of the other policy authorities, or alone if necessary. Policy authorities must review the MPS whenever they consider it appropriate to do so: s 46. Section 47 enables an MPS to be amended, but only the policy authorities which originally prepared and adopted an MPS may amend it. If any one of the policy authorities which originally adopted an MPS comes to the conclusion that the MPS no longer reflects their policy, and that authority does not want to, or cannot, correct the problem by making an amendment to the MPS, s 48 enables the authority to withdraw from the MPS by first notifying the other policy authorities of their intention, and then placing a notice in the London, Belfast and Edinburgh Gazettes.

### *Chapter 2 (ss 49-54) Marine plans*

Section 49 identifies each of the component 'regions' within the UK marine area for the purposes of identifying who will be responsible for planning in that region, and s 50 sets out which marine plan authorities are to have responsibility for the different regions of the UK marine area. Provision is made by s 51 for the creation of marine plans, and certain basic requirements as to their content and the way in which they are to be prepared are set out. A marine plan authority may amend a marine plan, and any such amendment must be prepared and adopted in accordance with Sch 6 in exactly the same way as the original plan: s 52. If the

marine plan authority comes to the conclusion that there is a problem with the plan which it does not want to, or cannot, rectify by making an amendment, a marine plan may be withdrawn: s 53. Section 54 requires the marine plan authorities to keep under review matters which may affect their functions of identifying marine plan areas, and preparing plans for them.

#### *Chapter 3 (ss 55-57) Delegation of functions relating to marine plans*

Section 55 enables a marine plan authority to direct another public body to carry out some of its marine planning functions, by giving it a direction, and s 56 contains a number of additional rules about directions issued under s 55. Where a marine plan authority has delegated some of its planning functions by directions under s 55, s 57 enables the marine plan authority to give further directions to a public body to which it has delegated functions, setting out how those functions should be performed.

#### *Chapter 4 (ss 58-61) Implementation and effect*

Section 58 makes provision about the effect which 'the appropriate marine policy documents' are to have on the taking of certain decisions by public authorities; the documents that may be appropriate marine policy documents are the MPS and any marine plans. The rules for determining whether the MPS or any particular marine plan is an appropriate marine policy document in any article case are set out in s 59 (as read with s 60). By virtue of s 61, each marine plan authority must monitor and report on the effects and effectiveness of its existing plans, and report every six years until 2030 on the way it has used, and intends to use, its marine planning powers.

#### *Chapter 5 (ss 62-64) Miscellaneous and general provisions*

Section 62 sets out how people may challenge the content of marine policy documents, or amendments to them, in court, and s 63 sets out the powers of a court hearing a challenge to the validity of a marine policy document. Section 64 deals with interpretation.

### ***Part 4 (ss 65-115) Marine licensing***

#### *Chapter 1 (ss 65-73) Marine licences*

By virtue of s 65, anyone undertaking an activity mentioned in s 66 will need to obtain a licence from the appropriate licensing authority, subject to any exemption provided for in the Act. The licensing authority, by virtue of ss 67, 68, may specify in what form an application for a marine licence should be submitted and may charge an application fee. When determining an application for a marine licence the licensing authority must have regard to the need to protect the environment, the need to protect human health, the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant (s 69), and the appropriate licensing authority may cause an inquiry to be held in connection with the determination of an application for a marine licence (s 70). The licensing authority may, by virtue of s 71, impose conditions on any licence it grants. Under s 72, the licensing authority may vary, suspend or revoke a licence in certain cases by notice. Each appropriate licensing authority is under an obligation to establish a mechanism through which an applicant for a marine licence may appeal against its decision to refuse to grant a licence or against any of the conditions attached to one: s 73.

#### *Chapter 2 (ss 74-84) Exemptions and special cases*

By virtue of s 74, the licensing authority may, by order, either exempt activities from the need for a licence completely, or specify conditions which, if met, will mean the activity may be exempted from the need for a licence. Section 75 provides exemptions for certain dredging activities. Marine licensing as described in Pt 4 does not apply to any dredging done, in the exercise of specified functions, in the Scottish zone for the purpose of extracting minerals: s 76. Section 77 exempts from the need to obtain a marine licence certain activities licensable under

the Petroleum Act 1998 or the Energy Act 2008. Where a marine licence is required and an application for a harbour order has been, or is likely to be, made, the 2009 Act s 78 provides that in such cases the authority granting, or likely to grant, the harbour order, in conjunction with the marine licensing authority, if it is a different body, may issue a notice to the applicant stating that both the application for a harbour order and the application will be subject to the same administrative procedure. Where both a marine licence and consent under the Electricity Act 1989 s 36 (in relation to offshore generating stations) are required, the 2009 Act s 79 provides that the authority to determine consent under the 1989 Act s 36, in conjunction with the marine licensing authority, if it is a different body, may issue a notice to the applicant stating that both the application for a s 36 consent and the application for a marine licence will be subject to the same administrative procedure. The 2009 Act s 80 removes the obligation for an operator to apply to the Secretary of State for a licence under the Electronic Communications Code as set out in the Telecommunications Act 1984 Sch 2. In the case of certain submarine cables, the 2009 Act s 81 restricts the application of the marine licensing regime as respects their laying or maintenance. In cases where an activity requires a licence under the Act, and would otherwise also require consent under the Water Resources Act 1991 s 109, the Environment Agency may remove the need for separate consent under the 1991 Act by issuing a notice to that effect to the applicant: 2009 Act s 82. In cases where an activity requires a licence under the 2009 Act, and would otherwise also require consent from the Admiralty under any local legislation, the Secretary of State may remove the need for that separate consent by issuing a notice to that effect: s 83. In cases where an activity requires a licence under the 2009 Act, and would otherwise also require consent from the Environment Agency under any of its byelaws under the 1991 Act Sch 25, the Environment Agency may remove the need for that separate consent by issuing a notice to that effect: 2009 Act s 84.

### *Chapter 3 (ss 85-97) Enforcement*

By virtue of s 85, it is an offence for a person to carry out a licensable activity without a licence or to do so in a manner that breaches any conditions of a licence. However, if a person undertakes a licensable activity without a licence but does so for the purpose of securing the safety of a vessel, aircraft or structure, or for the purpose of saving life, s 86 provides a defence against a charge under s 85 provided certain conditions are fulfilled. Section 87 provides a defence against such a charge where the activity is for the purpose of carrying out emergency works to electronic communications. A further defence to the undertaking of certain activities without a licence is provided by s 88. It is an offence for a person who is applying for a new licence, or for the variation or transfer of an existing licence or who, in complying, or purporting to comply, with obligations imposed either by Pt 4 or a licence, knowingly or recklessly supplies false or misleading information, or intentionally fails to disclose any material particular: s 89. Under s 90, a person carrying on a licensed activity in a manner that breaches the conditions of the licence may be issued with a notice requiring compliance. A person who has carried on or is in the process of carrying on a licensable activity, either without a licence or with a licence but in a manner that breaches the conditions of the licence and who has caused, is causing or is likely to cause any of the results described, may be issued with a remediation notice: s 91. Section 92 provides that all compliance and remediation notices must be in writing, must be served on the person carrying on or in control of the activity in question, and may, if a licence has been granted for that activity to another person, also be served on the licensee. Section 93 enables the licensing authority by order to grant to the appropriate enforcement authority the power to issue a fixed monetary penalty to a person in relation to an offence under Pt 4. Certain minimum requirements, that the licensing authority must ensure that any fixed monetary penalty regime includes, are specified in s 94. By virtue of s 95, the licensing authority may by order grant to the appropriate enforcement authority the power to issue a variable monetary penalty to a person in relation to an offence under Pt 4. Section 96 specifies certain minimum requirements that the licensing authority must ensure that any variable monetary penalty regime includes. Further provision in relation to the civil sanctions that may be imposed under Pt 4 is made by s 97, Sch 7.

#### *Chapter 4 (ss 98-100) Delegation*

Section 98 provides that the licensing authority may by order delegate any of its delegable marine licensing functions (as defined) to such other body as the licensing authority considers appropriate, and s 99 enables further provision to be made in an order concerning the exercise of any delegated functions. Where a licensing authority has delegated any of its licensing or enforcement functions under s 98, s 100 enables the licensing authority to give further directions to a person to whom it has delegated functions, setting out how those functions should be performed.

#### *Chapter 5 (ss 101-115) Supplementary*

By virtue of s 101, each licensing authority must maintain a register of information relating to applications and licences for which it is responsible and must make the register available to the public. An enforcement authority may issue a stop notice to a person prohibiting the person from carrying on a licensable marine activity if that activity is causing or is likely to cause serious harm to the environment or to human health or is causing or is likely to cause serious interference with legitimate uses of the sea: s 102. Stop notices must be in writing, must be served on the person carrying on or in control of the activity and, if a licence has been granted for that activity to another person, may also be served on the licensee: s 103. Sections 104, 105 make provision for emergency safety notices to be issued to a person if it appears that serious interference with legitimate uses of the sea is occurring, or is likely to occur, as a result of licensable works; the notice may require the provision of lights, signals or other aids to navigation or the stationing of guard ships until the serious interference, or threat of interference, is removed. Where it appears that a licensable marine activity has been carried on without a licence or in breach of the conditions of a licence, the appropriate licensing authority may carry out any works that appear to be necessary or expedient for the purpose of protecting the environment or human health, preventing interference with legitimate uses of the sea, preventing or minimising, or remedying or mitigating the effects of, any harm to the environment or any interference with legitimate uses of the sea, or restoring the condition of any place affected by any such harm or interference: s 106. At any person's request, the licensing authority may, by virtue of s 107, perform tests on substances for their effect on the marine environment, and the authority may charge for that testing. Provision as to appeals against notices under Pt 4 is made by s 108. In any proceedings for an offence under Pt 4, it is a defence under s 109 to prove that the person charged took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. Proceedings for an offence under Pt 4 may be taken, and the offence may for all incidental purposes be treated as having been committed, in any part of the United Kingdom even if it was in fact committed at sea: s 110. Section 111 deals with application to the Crown, and ss 112, 113, Schs 8, 9 make amendments and transitional provisions. Section 113 contains the rules for determining who is the appropriate licensing authority for any area, and ss 114, 115 provide definitions of terms used in Pt 4.

### ***Part 5 (ss 116-148) Nature conservation***

#### *Chapter 1 (ss 116-147) Marine conservation zones*

Section 116 provides a power for the Welsh Ministers, Scottish Ministers and the Secretary of State to designate, as the appropriate authority, areas as marine conservation zones ('MCZs') by means of local orders. Section 117 sets out the circumstances in which ministers may designate an MCZ. Further provision as to orders designating MCZs is made by s 118, including the requirement to specify the boundaries of the designated area. By virtue of s 119, ministers must carry out public consultation before designating an MCZ, and s 120 makes provision for ministers to publish notice of the making of an order. Section 121 allows ministers to hold hearings before deciding whether to make an order under s 116 to designate an MCZ, and s 122 allows an order designating an MCZ to be amended or revoked by a further order. By

virtue of s 123, the appropriate authority is under a duty to designate MCZs so as to contribute to the creation of a network of marine sites. The Secretary of State, the Welsh Ministers and the Scottish Ministers must report to Parliament, the Welsh Assembly and the Scottish Parliament, as appropriate, on progress in designating a network of MCZs: s 124. Section 125 places a general duty on public authorities to carry out their functions in the manner that they consider best furthers, or least hinders, the conservation objectives set for MCZs, and s 126 requires a public authority to inform the relevant statutory nature conservation body if it believes a proposed activity will hinder the achievement of the conservation objectives of an MCZ. Powers and duties are conferred by s 127 on the statutory nature conservation bodies (Natural England, the Joint Nature Conservation Committee and the Countryside Council for Wales) to give advice or guidance to public authorities in respect of MCZs. The relevant statutory nature conservation body is able, by virtue of s 128, to obtain an explanation if it thinks a public authority has failed to exercise its functions to further, or where permissible, least hinder, the conservation objectives of an MCZ, failed to notify the appropriate conservation body where it believes that an act requiring authorisation may have a significant risk of hindering the achievement of the conservation objectives of an MCZ, or failed to act in accordance with the guidance provided by the statutory nature conservation body. Section 129 gives the MMO the power to make byelaws to protect MCZs in the English inshore region and help further their conservation objectives; there is no power to make byelaws in the offshore region. The MMO must carry out public consultation before making a byelaw (s 130), and provision is made for emergency byelaws (s 131) and interim byelaws (s 132). Section 133 sets out the administrative and notification requirements in relation to byelaws, whether they are made urgently or not, and interim byelaws. Section 134 gives the Welsh Ministers the power to make conservation orders, in order to protect MCZs in the Welsh inshore region and help further their conservation objectives, and s 135 requires the Welsh Ministers to consult before making a conservation order, and to publish notice of the making of the order and to ensure that interested individuals are aware of the publication. By virtue of s 136, the Welsh Ministers may make interim orders to protect features where there may be reasons to designate an MCZ and where there is an urgent need to protect the feature. Administrative and notification requirements in relation to Welsh conservation orders, whether made urgently or not, and interim orders, are set out in s 137. Section 138 makes provision for the Secretary of State to hold a hearing before deciding whether to confirm a byelaw or revoke an emergency or interim byelaw, and also makes provision for the Welsh Ministers to hold hearings before deciding whether to make a conservation order or an interim order. Breaching any byelaw or conservation order is an offence: s 139. Section 140 creates a general offence where a person intentionally or recklessly causes damage or harm to the protected features of an MCZ. Section 141 sets out the circumstances in which a person will not be guilty of an offence under s 139 or 140. By virtue of s 142, the Secretary of State or the Welsh Ministers may make an order which confers a power on an enforcement authority to issue fixed monetary penalties for the breach of byelaws or conservation orders. Certain minimum requirements that must be included in any fixed monetary penalty regime are set out in s 143. Section 144 gives effect to the further provisions about fixed monetary penalties set out in Sch 10. Section 145 deals with application to the Crown and s 146, Schs 11, 12 make consequential and transitional provision. Section 147 is interpretational.

#### *Chapter 2 (s 148) Other conservation sites*

Section 148 introduces Sch 13 which amends the Wildlife and Countryside Act 1981.

### ***Part 6 (ss 149-193) Management of inshore fisheries***

#### *Chapter 1 (ss 149-186) Inshore fisheries and conservation authorities*

Section 149 provides for the Secretary of State to establish inshore fisheries and conservation districts ('IFC districts') which are to be established by order and are to consist of one or more

local authority areas that have a seashore. By virtue of s 150, there must be an inshore fisheries and conservation authority ('IFC authority') for every IFC district; the IFC authority is a committee, or a joint committee (in the case of more than one local authority), of the local authority or authorities falling within the district. An order establishing an IFC district must provide for the membership of the IFC authority for that district (s 151), and the Secretary of State may amend or revoke an order that established an IFC district (s 152). Each IFC authority is placed under a duty, by s 153, to manage the exploitation of sea fisheries resources in its district. Each IFC authority must exercise its powers to seek to ensure that the conservation objectives of any MCZ in its district are furthered: s 154. Section 155 provides a power for an IFC authority to make byelaws which must be observed in its district, and s 156 sets out a non-exhaustive list of the types of activities for which IFC authorities may make byelaws, including emergency byelaws, to manage sea fisheries resources in their district. By virtue of s 157, an IFC authority may make an emergency byelaw which takes effect without first being confirmed by the Secretary of State. Supplementary provision concerning byelaws is made by s 158, and s 159 allows the Secretary of State to revoke or restrict the application of any byelaw made by an IFC authority where it appears to the Secretary of State that the byelaw is unnecessary, inadequate or disproportionate. Section 160 allows the Secretary of State to make regulations about the procedure to be followed by an IFC authority when making byelaws, including emergency byelaws. Provision as to inquiries is made by s 161, and s 162 provides that the production of a signed copy of a byelaw is conclusive evidence of the byelaw. A person is guilty of an offence if he contravenes any byelaw made by an IFC authority. Where a vessel is used in contravention of a byelaw the master, owner and charterer, if any, will each be guilty of an offence, and liable on summary conviction to a maximum fine of £50,000: s 163. Where a person is convicted of an offence, the court may order forfeiture of any fishing gear used in the commission of the offence or any fish in respect of which an offence was committed: s 164. Section 165 provides that inshore fisheries and conservation officers ('IFC officers') may be appointed by IFC authorities. The enforcement powers which are available to an IFC officer and the legislation in respect of which they may be exercised are set out in s 166. Section 167 gives an IFC authority the power, with the approval of the Secretary of State, to make an agreement with an 'eligible body' (defined by s 168), authorising the body to perform any of the IFC authority's functions on its behalf. Provision for the review, variation and cancellation of agreements made between IFC authorities and eligible bodies is made by s 169. Section 170 makes provision for cases where a body that is authorised to carry out a function under an agreement is already involved with the function in some way. By virtue of s 171, agreements, and approvals for them, must be in writing and agreements must be published in such a way as to bring them to the attention of persons likely to be affected. Provision is made by s 172 for an IFC authority to take such measures as it considers necessary in order to develop any fishery for sea fisheries resources in its district. Section 173 provides for IFC authorities to enter into arrangements, with or without charge, with another person or body for the provision of services by the IFC authority to that person or body. Section 174 requires an IFC authority to take such steps as it considers appropriate to co-operate with certain other public organisations that have functions relating to the regulation and enforcement of activities in any part of the sea within the IFC district and to co-operate with other IFC authorities that share a boundary with the IFC authority. Under s 175, IFC authorities must collect certain information and provide certain information to the Secretary of State, and under s 176, IFC authorities must keep proper accounts and proper records in relation to those accounts. Every IFC authority must make and publish a plan setting out the authority's main objectives and priorities for the year (s 177), and, as soon as is reasonably practicable after the end of each financial year, must publish a report on its activities in that year (s 178). The miscellaneous powers of an IFC authority are set out in s 179 and include matters necessary for the exercise of any of its other functions and the acquisition or disposal of land or other property. Section 180 establishes the funding arrangements for IFC authorities, and s 181 provides that an IFC authority may bring proceedings under the 2009 Act in its own name as well as bringing or defending any other proceedings in its own name. By virtue of s 182, no member or employee of an IFC authority acting in good faith is liable for anything done in connection with the discharge of the



authority's functions. The Secretary of State is required, by s 183, to lay a report before Parliament on the conduct and operation of IFC authorities. Section 184, Sch 14 make minor and consequential amendments, s 185 deals with application to the Crown, and s 186 is interpretational.

#### *Chapter 2 (ss 187, 188) Local fisheries committees*

Section 187 repeals the Sea Fisheries Regulation Act 1966, and the 2009 Act s 188 provides for the appropriate national authority to make any provision necessary as a consequence of the repeal of the 1966 Act, including any transitional, consequential, incidental or supplemental provision or savings.

#### *Chapter 3 (ss 189-193) Inshore fisheries in Wales*

Section 189 confers power on the Welsh Ministers to make any provision by order which the IFC authorities may make by byelaw, but only to the extent that the Welsh Ministers do not already have the power to make such provision, and s 190 provides that it is an offence for a person or vessel to contravene any provision of an order made under s 189. Section 191 confers various powers on the court following conviction of a person for an offence under s 190. By virtue of s 192, the Welsh Ministers may enter into arrangements, with or without charge, with third parties (private fishery owners and grantees of several and regulating orders) for marine enforcement officers to undertake enforcement activities within those third party fisheries. Miscellaneous amendments to the Coast Protection Act 1949 and the Wildlife and Countryside Act 1981 are made by s 193.

### **Part 7 (ss 194-234) Fisheries**

#### *Chapter 1 (ss 194-201) The Sea Fish (Conservation) Act 1967*

The 2009 Act s 194 amends the Sea Fish (Conservation) Act 1967 s 1 to provide for all the current powers available under orders made under that provision to apply to any requirements as to size, rather than minimum size limits only, and for the prohibition on carriage to apply to all relevant British vessels. Section 3 is amended by the 2009 Act s 195 so that fishing restrictions apply equally to persons fishing from the shore of England and Wales as to persons fishing from a boat, and to create new offences for any person fishing from the shore in contravention of any such restrictions and to allow for orders to exempt persons from the restrictions imposed. Section 196 amends the 1967 Act s 4 to enable ministers to specify the amount of the charge for commercial sea fishing vessel licences, to make provision as to how the charge should be determined or to provide that in specified circumstances no charge will be payable. Section 4 is further amended by the 2009 Act s 197 to allow the imposition of conditions in fishing licences for marine environmental purposes. By virtue of amendments made by s 198 to the 1967 Act, orders made under s 5 may now be made in relation to persons fishing from the shore. The 2009 Act s 199 amends the 1967 Act in relation to the penalties for offences. Section 12 is replaced by the 2009 Act s 200 and now provides that where offences under the 1967 Act ss 1-6 have been committed by a body corporate, then any officer, as defined, of the body corporate may be found to be guilty of that offence and liable to proceedings and fines. The 2009 Act s 201, Sch 15 makes further minor and consequential amendments to the 1967 Act.

#### *Chapter 2 (ss 202-214) The Sea Fisheries (Shellfish) Act 1967*

The 2009 Act s 202 amends the Sea Fisheries (Shellfish) Act 1967 s 1 to allow for orders to be made in relation to all types of shellfish including those not already listed, without the present requirement for regulations to be made each time the Secretary of State or the Welsh Ministers wishes to add a new type of shellfish to the list. Section 1 is further amended by the 2009 Act s 203 to enable several and regulating orders to be varied or revoked in order for development of the sea shore affected by such orders to be carried out. The 1967 Act s 3 is amended by the

2009 Act s 204 to set out the powers of grantees of regulating orders who have the right to regulate the fishery, and establish that grantees may spend monies collected by way of tolls and royalties for purposes connected with the regulation of the fishery, not just for the improvement of the fishery as currently provided. Section 205 amends the 1967 Act ss 3 and 7 so that the maximum fine that may be imposed by a court is increased to £50,000 in line with that for other fisheries legislation. Section 3 is amended by the 2009 Act s 206 to provide that, where a fishing boat is used in the commission of an offence, the master, owner and charterer, if any, of the boat are each guilty of an offence. The 1967 Act s 3 is also amended by the 2009 Act s 207 to ensure that where a regulating order enables a grantee to impose restrictions or make regulations about the dredging, fishing for and taking of shellfish, the grantee is able to carry into effect and enforce those restrictions and regulations in the same way as may be done for regulations imposed by and restrictions made in the order itself. Amendments made by s 208 to the 1967 Act s 4 allow for the removal of licences from a holder after a single conviction for a breach of licence or of the provisions of the regulating order. The 2009 Act s 209 adds new provision to the 1967 Act to require grantees of regulated fisheries to hold a register of current licence-holders' names and addresses and make it available for inspection free of charge. Section 7 is amended by the 2009 Act s 210 to extend the protection afforded to private oyster beds under that provision to all privately owned shellfish beds for the particular type of shellfish to which their rights of ownership relate. Section 211 amends the 1967 Act in relation to the use of implements of fishing, and amendments made by the 2006 Act s 212 provide exemptions from the offence of taking certain edible crabs and lobsters where a person has authorisation to take such shellfish for scientific purposes. Amendments made by s 213 allow the Secretary of State or the Welsh Ministers to make an order to introduce protection for lobsters under the 1967 Act s 17 independently of any other devolved administration, and amendments made by the 2009 Act s 214 remove the requirement to appoint an inspector and provide the Secretary of State or the Welsh Ministers with a discretionary power in making decisions on the appointment of an inspector and calling public inquiries.

### *Chapter 3 (ss 215-233) Migratory and freshwater fish*

Section 215 amends the Salmon and Freshwater Fisheries Act 1975 s 1 to add to the list of instruments the use of which is prohibited for taking fish. The 2009 Act s 216 amends the 1975 Act s 2 to extend the prohibition on the use of roe for the purpose of fishing to lampreys, smelt, shad, and to any other specified fish. Section 25 is amended by the 2009 Act s 217 so as to extend the list of kinds of fish to which the licensing system applies to include lampreys, smelt and any fish specified in an order. Amendments made by s 218 to the 1975 Act s 26 allow orders under that provision to be made in respect of any kind of licence issued under s 25. The 2009 Act s 219 adds new provisions to the 1975 Act so as to (1) give the Environment Agency power to authorise a person to use any means (other than a licensable means of fishing) to fish for salmon, trout, eels, lampreys, smelt and freshwater fish, and other specified fish; and (2) make it an offence to fish for or take fish using any means of fishing, other than an instrument for which a licence is required, without an authorisation. Amendments relating to enforcement under the 1975 Act are made by the 2009 Act s 220. New provision added by s 221 to the 1975 Act empowers the appropriate national authority to specify additional species of fish to which ss 1, 2, 25, and 27A and the Salmon Act 1986 s 32 apply, and the 2009 Act s 222 adds new provision to the 1975 Act setting out the procedure for making such an order. The 2009 Act s 223 amends the 1975 Act to give amended definitions for eels and freshwater fish and new definitions for freshwater crayfish and smelt. The Water Resources Act 1991 is amended by the 2009 Act s 224 in relation to the Environment Agency's powers to make fisheries byelaws. The 1991 Act is further amended by the 2009 Act ss 225-227 in relation to emergency procedures for making byelaws, enforcement of byelaws, and compensation for byelaws. Section 228 raises the penalty for committing the offence of taking or destroying fish under the Theft Act 1968 to £5,000. The 2009 Act s 229 extends the offence, under the Salmon Act 1986 s 32, of handling salmon or sea trout in suspicious circumstances to eels, lampreys, smelt, freshwater

fish, and other specified fish. The Environment Act 1995 s 6 is amended by the 2009 Act s 230 to extend the duty of the Environment Agency to maintain, improve and develop salmon fisheries, trout fisheries, freshwater fisheries and eel fisheries to include lampreys and smelt fisheries, and fisheries of other specified fish. The Scotland Act 1998 s 111, which relates to Tweed and Esk fisheries, is amended by the 2009 Act s 231. Section 232 allows the appropriate national authority to make regulations to prohibit persons from keeping any fish, introducing any fish into inland waters or removing any fish from inland waters without prior authorisation. Consequential amendments are made by s 233.

#### *Chapter 4 (s 234) Obsolete fisheries enactments*

Section 234 repeals six redundant Acts of Parliament relating to sea fisheries and part of another such Act.

### **Part 8 (ss 235-295) Enforcement**

#### *Chapter 1 (ss 235-244) Enforcement officers*

Section 235 allows the MMO and the Welsh Ministers to appoint marine enforcement officers ('MEOs'), and s 236 sets out the areas in which and the vessels and installations in relation to which an MEO may exercise his enforcement powers for the purposes of enforcing the marine licensing regime set out in Pt 4. The areas in which and the vessels and installations in relation to which an MEO may exercise his enforcement powers for the purposes of enforcing legislation relating to nature conservation are set out in s 237, and s 238 sets out the areas in which and the vessels and installations in relation to which an MEO may exercise his enforcement powers for the purposes of enforcing sea fisheries legislation. By virtue of s 239, MEOs are automatically made British seafishery officers ('BSFOs') on appointment but where MEOs are able to exercise common enforcement powers under the Act, they cannot use their BSFO powers. Under s 240, the Secretary of State will be able to appoint persons to enforce Pt 4, to the extent that it relates to the licensing of activities relating to various reserved matters. Section 241 allows the Department of the Environment in Northern Ireland to appoint persons for the purpose of enforcing Pt 4, and s 242 enables Scottish Ministers to appoint persons for the purposes of enforcing licensing under Pt 4 in the Scottish offshore region. Section 243 enables Scottish Ministers to appoint officers with the common powers for the purpose of enforcing s 140, which creates the offence of damaging etc protected features of MCZs, in the Scottish offshore region. Section 244 is interpretational.

#### *Chapter 2 (ss 245-262) Common enforcement powers*

Section 245 introduces the purpose of Pt 8 Ch 2, which is to set out the powers available to MEOs and other enforcement officers, and defines key terms. The powers in s 246 enable enforcement officers to board and inspect any vessels and marine installations, subject to the need for a warrant pursuant to s 249 if the vessel or installation is a dwelling, to carry out their functions. The powers in s 247 enable enforcement officers to enter and inspect any premises, subject to the need for a warrant pursuant to s 249, to carry out any relevant functions. Section 248 enables enforcement officers to enter and inspect any vehicle at any time, subject to the need for a warrant pursuant to s 249 if the vehicle is a dwelling; an officer may also require the vehicle to be taken to an appropriate place to be inspected, and may require assistance as necessary from people in the vehicle or the registered keeper. By virtue of s 249, an enforcement officer may not enter a dwelling unless a justice has issued a warrant authorising entry; Sch 17 sets out further provisions relating to warrants. The powers in s 250 allow an enforcement officer, when exercising a power of inspection, to search those premises and examine anything in it, and further allow the officer to stop someone and detain them to perform a search of anything in their possession or control. Section 251 gives enforcement officers the power to require a person on or in the relevant premises being inspected to produce documents or records that they have. An enforcement officer may seize and detain or

remove anything found on premises or, where a person has been undertaking an activity in respect of which the officer has enforcement powers, any item in the person's possession or control: s 252. Further provision about seizure is made by s 253. Section 254 allows items seized during an investigation to be kept for as long as is necessary for the investigation and any trial proceedings, unless a photograph or copy would provide sufficient evidence. Under s 255, enforcement officers have powers to use any device to take visual images of anything connected with the relevant premises for evidence in the investigation of a suspected offence. If the officer believes someone has committed an offence, that person may be required to give the officer their name and address: s 256. Section 257 provides that if the officer believes someone has been undertaking an activity which needs a licence, permit, etc, the officer may require that person to show that licence. Where an officer has boarded a vessel or marine structure or entered any premises he may require the attendance of those persons listed: s 258. Section 259 gives enforcement officers the power to direct a vessel or marine installation to the port they consider to be the nearest convenient port and detain it there where an officer believes that an offence has been committed and it would not be practical to carry out their duties without first taking the vessel or marine installation to port and detaining it there, or where the officer believes that the vessel itself is evidence of the commission of an offence and the only way to preserve the evidence is to take it into port. By virtue of s 260, enforcement officers may take other people and anything necessary, including equipment and materials, to assist them in their duties, and by virtue of s 261, enforcement officers and their assistants may use reasonable force wherever necessary to carry out their functions. Section 262 is interpretational.

#### *Chapter 3 (s 263) Licensing enforcement powers*

Section 263 enables enforcement officers to require a person to give details of any substance or objects on board a vehicle, vessel, aircraft or marine structure; people may also be required to declare information about substances or objects lost or missing from a vehicle, vessel, aircraft or marine structure.

#### *Chapter 4 (ss 264-287) Fisheries enforcement powers*

Section 264 provides enforcement officers with powers to inspect any object found in the sea which it is believed has been or is being used for or in connection with fishing, and, if necessary, to lift the object out of the sea for inspection. The reporting requirements that an enforcement officer must follow after inspecting objects under s 264, are set out in s 265. Provision is made by s 266 for the retention by the relevant authority of any objects seized under s 264. Section 267 sets out arrangements for the disposal of objects seized under s 264 where the relevant authority no longer wishes to retain the object or the relevant authority is required to make the object available for collection. Under ss 268, 269, an enforcement officer may seize fish or fishing gear for the purpose of forfeiture. Section 270 creates an obligation on the enforcement officer who seizes any fish or fishing gear under s 268 or 269 to serve a written notice on every person who appears to the officer to be the owner or one of the owners at the time the fish or gear were seized, and sets out other persons on whom the notice must be served, depending on the location from which the property was seized. The relevant authority is provided with the power, by virtue of s 271, to retain any fish or fishing gear seized under s 268 or 269. Section 272 allows the owner of any property, or the owner or charterer of the vessel if the property was seized from there, seized under s 268 or 269 and being retained under s 271, to lodge a bond with the relevant authority in return for its release. By virtue of s 273, the relevant authority has the power to sell any fish it has retained under s 271. Where the relevant authority no longer wishes to retain fish or fishing gear seized under s 268 or 269, or where it is required to make such property available for collection under s 271, s 274 requires a notice of collection to be served on every person who appears to be the owner, or owners, of the property. Section 275 provides a power for certain fishing gear seized by an enforcement officer to be forfeited to the relevant authority for disposal. A forfeiture power in respect of fish that fail to meet size requirements which corresponds to the forfeiture power in

respect of fishing gear in s 275, is provided by s 276. Section 277, Sch 18 make detailed provision in respect of the forfeiture under s 275 or 276 of gear or fish which fail to meet size requirements. Where, after a successful prosecution under fisheries legislation, the court orders the forfeiture of the fish or gear in respect of which the offence was committed, s 278 provides that the relevant authority will be ordered to take possession of the property and may dispose of it as it sees fit; the proceeds of any sale may be retained by the relevant authority and the court may order the defendant to pay the costs of the relevant authority in storing the property. By virtue of s 279, an enforcement officer may detain a vessel to ensure the attendance of the alleged offenders in court and the payment of any fine on conviction. Provision is made by s 280 for the release of a vessel which is being detained under s 279. Where a vessel has been detained under s 279, s 281 provides a power for the court to order the release of the vessel if it is satisfied that the continued detention of the vessel is no longer necessary. Section 282 gives the relevant authority power to enter into an agreement with the owner or charterer of the vessel, or any of the owners or charterers of the vessel, to release a vessel detained under s 279 when a monetary security has been paid. Where a bond has been paid pursuant to s 282, and the notice of detention withdrawn, the court may order repayment of the bond to the person who provided the security if it is satisfied that the continuation of the bond is not necessary to ensure the attendance in court of the master, owner or charterer, or that, had the bond not been given, the court would not have ordered the detention of the vessel: s 283. An enforcement officer may request anybody on board a fishing boat to produce any automatic recording or transmitting equipment: s 284. Section 285 specifies the means by which notices required to be served under Pt 8 Ch 4 must be served, and s 286 establishes a means of determining when proceedings have been concluded. Section 287 deals with interpretation.

#### *Chapter 5 (ss 288-292) Common enforcement provisions*

Section 288 defines enforcement officer as someone who has powers under Pt 8, save those who have powers by virtue of being an assistant to an officer, and s 289 obliges enforcement officers who are exercising the common enforcement powers to show evidence that they have the authority to carry out their enforcement functions, when asked to do so. In conjunction with s 289, enforcement officers are also obliged to state their name, the power they are intending to use and reason for its use whenever they are requested to do so, although the officer may defer complying with the request if the immediate situation requires it: s 290. Unless an enforcement officer acts in bad faith or if there were no reasonable grounds for the officer to act in such manner, s 291 provides that enforcement officers and their assistants will be protected from liability in any civil or criminal proceedings for anything done or not done as a result of carrying out their functions. Section 292 provides for a number of offences that may be committed in relation to enforcement officers or people assisting them.

#### *Chapter 6 (ss 293-295) Miscellaneous and supplementary*

Section 293 amends the Fisheries Act 1981 s 30 so that it applies both to enforceable Community restrictions and enforceable Community obligations. The 2009 Act s 293 introduces powers for the Secretary of State (in relation to England or vessels outside the Welsh zone) or the Welsh Ministers (in relation to Wales or vessels within the Welsh Zone) to apply Fixed Administrative Penalties to domestic fisheries offences, namely offences which do not originate in Community law. Section 295 deals with application to the Crown.

### ***Part 9 (ss 296-310) Coastal access***

Section 296 imposes a duty, described as the 'coastal access duty', on the Secretary of State and Natural England by reference to two objectives. The first objective is that there is a route around the whole of the English coast consisting of one or more long-distance routes and available to the public for recreational journeys on foot or by ferry. The second objective, is that there is a margin of land along the length of the coast which the public may enjoy. Section 297

sets out the requirements imposed on Natural England and the Secretary of State as regards considerations that they have to take into account in discharging the coastal access duty. Under ss 298, 299, Natural England must draw up a scheme setting out the approach it will take when discharging its coastal access duty, and must review the coastal access scheme from time to time. Section 300 defines the English coast for these purposes by reference to its adjacency to the sea. Where the coast is interrupted by a river, s 301 provides that Natural England may treat the relevant upstream waters of any river as if they were the sea. New provisions, which all refer to the coastal access duty and reports prepared pursuant to that duty, are added to the National Parks and Access to the Countryside Act 1949 by the 2009 Act s 302, Sch 19. Section 303 makes provision with regard to access to the coastal margin. Section 304, Sch 20 make further provision about the establishment and maintenance of the English coastal route. Section 305 makes clear that Natural England does not have unlimited responsibility for the safety of people who choose to use the route or associated access land. Provision is made by s 306 for the exclusion of occupiers' liability. Section 307 relates to the application of the Act to the Isles of Scilly, and s 309 deals with application to the Crown. Interpretation of Pt 9 is dealt with by s 309. Section 310 amends the Government of Wales Act 2006 to confer legislative competence on the National Assembly for Wales.

### ***Part 10 (ss 311-315) Miscellaneous***

Section 311 amends the Natural Environment and Rural Communities Act 2006 s 1 in order to clarify the area over which Natural England may exercise its functions. The Civil Contingencies Act 2004 is amended by the 2009 Act s 312 in order to remove Natural England from the lists of category 1 responders. Section 313 amends the Environmental Protection Act 1990 in order to clarify the area over which the Countryside Council for Wales may exercise its functions. The 2009 Act s 314 inserts a new navigational consenting regime into the Energy Act 2008 and provides a variety of powers for the enforcement of that regime. A number of miscellaneous amendments of the Harbours Act 1964 are set out in the 2009 Act s 315, Sch 21.

### ***Part 11 (ss 316-325) Supplementary provisions***

Section 316 contains general provisions for making regulations and orders, and s 317 contains details for making directions. Section 318 provides for individual liability in some cases where there is also corporate liability. By virtue of s 319, the Territorial Waters Jurisdiction Act 1878 s 3, which provides that a person who is not a British subject may not be prosecuted for an indictable offence committed in the territorial sea without the consent of the Secretary of State, is disapplied in relation to proceedings for offences committed under the 2009 Act. Section 320 allows the Secretary of State to make, by order, transitional provisions and savings. Section 321 gives effect to Sch 22, which makes various repeals. Section 322 deals with interpretation, s 323 deals with extent, and s 324 makes provision concerning commencement. Section 325 specifies the short title.

### ***Amendments, repeals and revocations***

Subscribers should note that the lists below mention repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that these lists are not exhaustive.

The following Acts are repealed in full: White Herring Fisheries Act 1771; Seal Fishery Act 1875; North Sea Fisheries Act 1893; Behring Sea Award Act 1894; Seal Fisheries (North Pacific) Act 1895; Seal Fisheries (North Pacific) Act 1912; Sea Fisheries Regulation Act 1966.

Specific provisions of a number of Acts are repealed. These include: Fisheries Act 1891 s 13; Sea Fish (Conservation) Act 1967 ss 13, 17; Port of London Act 1968 ss 86, 87, 163; Salmon and Freshwater Fisheries Act 1975 ss 3, 6-8, 16, 17, 19-24, Sch 1; Fisheries Act 1981 s 28; Wildlife and Countryside Act 1981 ss 36, 37; Salmon Act 1986 s 37; Merchant Shipping Act 1988 s 36; Environment Act 1995 s 102; Planning Act 2008 ss 148, 149.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(1) SCOPE OF THE TITLE/1. Scope of the title.

## **1. INTRODUCTION**

### **(1) SCOPE OF THE TITLE**

#### **1. Scope of the title.**

This title covers the law relating to the regulation<sup>1</sup> and organisation<sup>2</sup> of the water industry, water resources<sup>3</sup> and water supply<sup>4</sup>, and general powers relating to land and works in respect of those areas<sup>5</sup>. Also covered is the law relating to the sea and the seashore<sup>6</sup> and inland waters<sup>7</sup>, coast protection<sup>8</sup>, flood defence, land drainage and damage by water<sup>9</sup>, amenity, recreation and environment<sup>10</sup>, and navigation<sup>11</sup>; and the law relating to inland waterways<sup>12</sup>, and to ferries<sup>13</sup>. The principal statutes included are, in relation to water and the water industry, the Water Industry Act 1991, the Water Resources Act 1991, the Statutory Water Companies Act 1991, the Water Act 2003 and the Reservoirs Act 1975; in relation to coast protection the Coast Protection Act 1949; and in relation to flood prevention the Land Drainage Act 1991. In relation to inland waterways, the principal statutes are the Transport Act 1962, the Transport Act 1968, the British Waterways Act 1995 and the Transport and Works Act 1992.

This title does not cover the law relating to water pollution<sup>14</sup>, or that relating to certain other areas which have a connection with water and waterways<sup>15</sup>. These are dealt with elsewhere in this work<sup>16</sup>.

1 See PARA 7 et seq.

2 See PARA 108 et seq.

3 See PARA 187 et seq.

4 See PARA 317 et seq.

5 See PARA 453 et seq.

6 See PARA 31 et seq.

7 See PARA 63 et seq.

8 See PARA 499 et seq.

9 See PARA 556 et seq.

10 See PARA 674 et seq.

11 See PARA 688 et seq.

12 See PARA 713 et seq.

13 See PARA 832 et seq.

14 See PARA 25 et seq; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23.

15 See PARAS 2-6.

16 See notes 14, 15.



## **UPDATE**

### **1 Scope of the title**

TEXT AND NOTES--For provision as to marine functions and activities see Marine and Coastal Access Act 2009 and PARAS 30A-30I.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(1) SCOPE OF THE TITLE/2. Fisheries.

## **2. Fisheries.**

The law relating to public and private fisheries, salmon and freshwater fisheries, fish farming, the regulation of sea fisheries, the Sea Fish Industry Authority and financial assistance for the sea fish industry, and whaling and sealing, is covered elsewhere in this work<sup>1</sup>.

<sup>1</sup> See **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 789 et seq.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(1) SCOPE OF THE TITLE/3. Ports and harbours.

### **3. Ports and harbours.**

The law relating to the creation and formation of ports and harbours in England and Wales, their administration, management and development by harbour authorities, harbour conservancy, the safety of harbours and the environmental protection of harbours, is covered elsewhere in this work<sup>1</sup>.

1 See **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 449 et seq.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(1) SCOPE OF THE TITLE/4. Protection of the environment and public health.

#### **4. Protection of the environment and public health.**

The law relating to pollution control in general, waste management, contaminated land, injurious and hazardous substances, statutory nuisances, sewers and drains, and public health in general, is covered elsewhere in this work<sup>1</sup>.

<sup>1</sup> See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH; NUISANCE.**

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(1) SCOPE OF THE TITLE/5. Shipping and maritime law.

## **5. Shipping and maritime law.**

The law relating to private maritime law including the domestic jurisdiction over merchant shipping and matters of navigation (including safety at sea and the avoidance of collisions), and marine salvage is covered elsewhere in this work<sup>1</sup>. Also dealt with elsewhere in this work are the rules that govern international relations between states in shipping and maritime matters<sup>2</sup>, marine insurance<sup>3</sup> and the carriage of goods by sea<sup>4</sup>.

1 See **SHIPPING AND MARITIME LAW** vols 93, 94 (2008).

2 See **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 121 et seq.

3 See **INSURANCE** vol 25 (2003 Reissue) PARA 215 et seq.

4 See **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 205 et seq.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(1) SCOPE OF THE TITLE/6. Fuel and energy.

## **6. Fuel and energy.**

The law relating to the exploitation of the continental shelf for the purposes of obtaining its fuel and energy reserves (including such matters as offshore workings, offshore storage and installations and submarine pipelines), and the offshore production of renewable energy is dealt with elsewhere in this work<sup>1</sup>.

<sup>1</sup> See **FUEL AND ENERGY**.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(i) European Community Legislation/7. The Water Framework Directive.

## **(2) LEGISLATION AND ADMINISTRATION**

### **(i) European Community Legislation**

#### **7. The Water Framework Directive.**

The Water Framework Directive<sup>1</sup> establishes a framework for Community action in the field of water policy. As set out in the EC treaty<sup>2</sup> and rehearsed in the preamble to the Directive<sup>3</sup>, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principles that preventive action should be taken, environmental damage should, as a priority, be rectified at source and that the polluter should pay<sup>4</sup>.

The purpose of the Directive is to establish a framework for the protection of inland surface waters<sup>5</sup>, transitional waters<sup>6</sup>, coastal waters<sup>7</sup> and groundwater<sup>8</sup> which:

- 1 (1) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;
- 2 (2) promotes sustainable water use based on a long-term protection of available water resources;
- 3 (3) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances<sup>9</sup> and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances<sup>10</sup>;
- 4 (4) ensures the progressive reduction of pollution<sup>11</sup> of groundwater and prevents its further pollution; and
- 5 (5) contributes to mitigating the effects of floods and droughts,

and thereby contributes to: (a) the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use; (b) a significant reduction in pollution of groundwater; (c) the protection of territorial and marine waters, and (d) achieving the objectives of relevant international agreements<sup>12</sup>.

Member states must establish a programme of measures for each river basin<sup>13</sup> which will implement the environmental objectives set out in the Directive<sup>14</sup>. Specific objectives are set in relation to surface waters<sup>15</sup>, groundwater<sup>16</sup> and protected areas<sup>17</sup>. Where more than one such objective relates to a given body of water, the most stringent is to apply<sup>18</sup>; but member states may aim to achieve less stringent objectives than those required for specific bodies of water in certain circumstances<sup>19</sup>. Member states must ensure that for each river basin district<sup>20</sup> or for the portion of an international river basin district falling within their territory, an analysis of its characteristics, a review of the impact of human activity on the status of surface waters and on groundwater, and an economic analysis of water use is undertaken<sup>21</sup>. They must also ensure the establishment of a register or registers of all areas lying within each river basin district which have been designated as requiring special protection under specific Community

legislation for the protection of their surface water and groundwater or for the conservation of habitats and species directly depending on water<sup>22</sup>.

Member states must identify, within each river basin district, all bodies of water used for the abstraction of water intended for human consumption providing more than 10 cubic metres a day as an average or serving more than 50 persons, and those bodies of water intended for such future use<sup>23</sup>. They must monitor<sup>24</sup> those bodies of water which provide more than 100 cubic metres a day as an average<sup>25</sup>. For each body of water so identified, in addition to meeting the environmental objectives<sup>26</sup>, member states must ensure that under the water treatment regime applied, and in accordance with Community legislation, the resulting water will meet the relevant water quality standards<sup>27</sup>. They must also ensure the necessary protection for the bodies of water identified with the aim of avoiding deterioration in their quality in order to reduce the level of purification treatment required in the production of drinking water; and may establish safeguard zones for those bodies of water<sup>28</sup>.

Member states must ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district<sup>29</sup>. They must take account of the principle of recovery of the costs of water services, including environmental and resource costs<sup>30</sup>, and in accordance in particular with the polluter pays principle<sup>31</sup>. They must ensure by 2010 that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of the Water Framework Directive; they must also ensure an adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services<sup>32</sup>; in so doing they may have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected<sup>33</sup>.

Provision is made for the control of discharges into surface waters<sup>34</sup>. Each member state must ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures<sup>35</sup> in order to achieve the environmental objectives of the Directive<sup>36</sup>. It must also ensure that a river basin management plan is produced for each river basin district lying entirely within its territory<sup>37</sup>. Copies of the river basin management plans and all subsequent updates must be sent to the European Commission and to any other member state concerned within three months of their publication<sup>38</sup>. Member states must encourage the active involvement of all interested parties in the implementation of the Water Framework Directive, in particular in the production, review and updating of the river basin management plans<sup>39</sup>.

The Directive provides for the European Parliament and the Council to adopt specific measures against pollution of water by individual pollutants or groups of pollutants presenting a significant risk to or via the aquatic environment, including such risks to waters used for the abstraction of drinking water<sup>40</sup>, and specific measures to prevent and control groundwater pollution<sup>41</sup>. A number of the existing European Directives dealing with water pollution are prospectively repealed, subject to transitional provisions<sup>42</sup>.

Member states must determine penalties applicable to breaches of the national provisions adopted pursuant to the Water Framework Directive and such penalties must be effective, proportionate and dissuasive<sup>43</sup>.

The domestic laws, regulations and administrative provisions necessary to comply with the Directive were to be brought into force by 22 December 2003<sup>44</sup>. In the United Kingdom, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003<sup>45</sup>, the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003<sup>46</sup>, and the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004<sup>47</sup>, have been made for the purpose of implementing the Directive. These regulations are discussed in a later part of this title<sup>48</sup>.



1 le European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) (amended by European Parliament and EC Council Decision 2455/2001 (OJ L331, 15.12.2001, p 01); European Parliament and EC Council Directive 2008/32 (OJ L 81, 20.3.2008, p 60)).

2 See the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 174 (formerly art 130R and renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). As to the consolidated version of the Treaty see OJ C325, 24 December 2002.

3 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) preamble para (11).

4 See notes 2-3.

5 'Inland water' means all standing or flowing water on the surface of the land, and all groundwater on the landward side of the baseline from which the breadth of territorial waters is measured; and 'surface water' means inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it also includes territorial waters: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(1), (3). As to the territorial waters of the United Kingdom see PARA 31.

6 'Transitional waters' are bodies of surface water in the vicinity of river mouths which are partly saline in character as a result of their proximity to coastal waters but which are substantially influenced by freshwater flows: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(6).

7 'Coastal water' means surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(7).

8 'Groundwater' means all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(2).

9 'Priority substances' means substances identified in accordance with the European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 16(2) and listed in Annex X: art 2(30).

10 'Priority hazardous substances' means substances identified in accordance with European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 16(3), (6) for which measures have to be taken in accordance with art 16(1), (8); and 'hazardous substances' means substances or groups of substances that are toxic, persistent and liable to bio-accumulate, and other substances or groups of substances which give rise to an equivalent level of concern. art 2(29), (30).

11 'Pollution' means the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(33). As to water pollution see further PARA 25 et seq.

12 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 1. The international agreements mentioned in head (d) in the text include those which aim to prevent and eliminate pollution of the marine environment, by Community action under art 16(3) (adoption of specific measures against pollution of water) to cease or phase out discharges, emissions and losses of priority hazardous substances, with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances: see art 1.

13 'River' means a body of inland water flowing for the most part on the surface of the land but which may flow underground for part of its course; and 'river basin' means the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(4), (13). 'Lake' means a body of standing inland surface water; and 'body of surface water' means a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water: art 2(5), (10).

14 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 3.

15 In making operational the programmes of measures specified in the river basin management plans for surface waters (see European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) arts 11, 13; and the text to notes 35-37), member states must: (1) implement the necessary measures to prevent

deterioration of the status of all bodies of surface water, subject to the application of art 4(6), (7) (see note 19) and without prejudice to art 4(8) (see note 19); (2) protect, enhance and restore all bodies of surface water, subject to the application of head (3) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of the Water Framework Directive (ie 22 December 2003: see art 25), in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with art 4(4) (see note 18) and to the application of art 4(5)-(7) without prejudice to art 4(8); (3) protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of the Directive (ie 22 December 2003: see art 25), in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with art 4(4) and to the application of art 4(5)-(7) without prejudice to art 4(8); (4) implement the necessary measures in accordance with art 16(1), (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances, without prejudice to the relevant international agreements referred to in art 1 for the parties concerned: art 4(1)(a). 'Artificial water body' means a body of surface water created by human activity; and 'heavily modified water body' means a body of surface water which as a result of physical alterations by human activity is substantially changed in character, as designated by the member state in accordance with the provisions of Annex II: art 2(8), (9). 'Good ecological potential' is the status of a heavily modified or an artificial body of water, so classified in accordance with the relevant provisions of Annex V; 'surface water status' is the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status; 'good surface water status' means the status achieved by a surface water body when both its ecological status and its chemical status are at least 'good'; and 'good surface water chemical status' means the chemical status required to meet the environmental objectives for surface waters established in art 4(1)(a), ie the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under art 16(7), and under other relevant Community legislation setting environmental quality standards at Community level: art 2(17), (18), (23), (24). 'Ecological status' is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V; and 'good ecological status' is the status of a body of surface water, so classified in accordance with Annex V: art 2(21), (22). Member states may designate a body of surface water as artificial or heavily modified, when the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on: (a) the wider environment; (b) navigation, including port facilities, or recreation; (c) activities for the purposes of which water is stored, such as drinking-water supply, power generation or irrigation; (d) water regulation, flood protection, land drainage; or (e) other equally important sustainable human development activities; and when the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option: art 4(3). Such designation and the reasons for it must be specifically mentioned in the river basin management plans required under art 13 and reviewed every six years: art 4(3).

16 In making operational the programmes of measures specified in the river basin management plans for groundwater, member states must: (1) implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 4(6), (7) and without prejudice to art 4(8) (see note 19) and subject to the application of art 11(3)(j); (2) protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of the Directive (ie 22 December 2003: see art 25), in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with art 4(4) (see note 18) and to the application of art 4(5)-(7) without prejudice to art 4(8) and subject to the application of art 11(3)(j); (3) implement the measures necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity in order progressively to reduce pollution of groundwater; and measures to achieve trend reversal must be implemented in accordance with art 17(2), (4), (5) (see the text to note 41), taking into account the applicable standards set out in relevant Community legislation, subject to the application of art 4(6), (7) and without prejudice to art 4(8): art 4(1)(b).

'Body of groundwater' means a distinct volume of groundwater within an aquifer or aquifers; and 'aquifer' means a subsurface layer or layers of rock or other geological strata of sufficient porosity and permeability to allow either a significant flow of groundwater or the abstraction of significant quantities of groundwater: art 2(11), (12). 'Groundwater status' is the general expression of the status of a body of groundwater, determined by the poorer of its quantitative status and its chemical status; and 'good groundwater status' means the status achieved by a groundwater body when both its quantitative status and its chemical status are at least 'good': art 2(19), (20). 'Good groundwater chemical status' is the chemical status of a body of groundwater, which meets all the conditions set out in Annex V table 2.3.2: art 2(25). 'Quantitative status' is an expression of the degree to which a body of groundwater is affected by direct and indirect abstractions; and 'good quantitative status' is the status defined in Annex V table 2.1.2: art 2(26), (28).

17 In making operational the programmes of measures specified in the river basin management plans for protected areas (as to which see European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000,

p 01) art 6; and the text to note 22), member states must achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of the Directive (ie 22 December 2003: see art 25), unless otherwise specified in the Community legislation under which the individual protected areas have been established: art 4(1)(c).

18 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 4(2). The deadlines established under art 4(1) (see notes 15-17) may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when all of the following conditions are met: (1) member states determine that all necessary improvements in the status of bodies of water cannot reasonably be achieved within the timescales there set out for at least one of the following reasons: (a) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility; (b) completing the improvements within the timescale would be disproportionately expensive; (c) natural conditions do not allow timely improvement in the status of the body of water; (2) extension of the deadline, and the reasons for it, are specifically set out and explained in the river basin management plan required under art 13 (see the text to note 37); (3) extensions are to be limited to a maximum of two further updates of the river basin management plan except in cases where the natural conditions are such that the objectives cannot be achieved within this period; (4) a summary of the measures required under art 11 (see the text to note 36) which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan.

A review of the implementation of these measures and a summary of any additional measures must be included in updates of the river basin management plan: art 4(4).

19 Member states may aim to achieve less stringent environmental objectives than those required under European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 4(1) (see notes 15-17) for specific bodies of water when they are so affected by human activity, as determined in accordance with art 5(1) (see the text to note 21), or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive, and all the following conditions are met: (1) the environmental and socio-economic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs; (2) member states ensure, for surface water, the highest ecological and chemical status possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution; for groundwater, the least possible changes to good groundwater status, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution; (3) no further deterioration occurs in the status of the affected body of water; (4) the establishment of less stringent environmental objectives, and the reasons for it, are specifically mentioned in the river basin management plan required under art 13 (see the text to note 37) and those objectives are reviewed every six years: art 4(5). Temporary deterioration in the status of bodies of water is not to be in breach of the requirements of the Directive if this is the result of circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen, when all of the following conditions have been met: (a) all practicable steps are taken to prevent further deterioration in status and in order not to compromise the achievement of the objectives of the Directive in other bodies of water not affected by those circumstances; (b) the conditions under which circumstances that are exceptional or that could not reasonably have been foreseen may be declared, including the adoption of the appropriate indicators, are stated in the river basin management plan; (c) the measures to be taken under such exceptional circumstances are included in the programme of measures and will not compromise the recovery of the quality of the body of water once the circumstances are over; (d) the effects of the circumstances that are exceptional or that could not reasonably have been foreseen are reviewed annually and, subject to the reasons set out in art 4(4)(a) (see note 18), all practicable measures are taken with the aim of restoring the body of water to its status prior to the effects of those circumstances as soon as reasonably practicable; and (e) a summary of the effects of the circumstances and of such measures taken or to be taken in accordance with heads (a) and (d) above are included in the next update of the river basin management plan: art 4(6). Nor will member states be in breach of the Directive when failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities, and all the following conditions are met: (i) all practicable steps are taken to mitigate the adverse impact on the status of the body of water; (ii) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under art 13 and the objectives are reviewed every six years; (iii) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in art 4(1) are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and (iv) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option: art 4(7). When applying art 4(3)-(7), a member state must ensure that the application does not permanently exclude or compromise the achievement

of the objectives of the Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation: art 4(8). Steps must be taken to ensure that the application of the new provisions, including the application of art 4(3)-(7), guarantees at least the same level of protection as the existing Community legislation: art 4(9).

20 'River basin district' means the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters, which is identified under European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 3(1) (see the text to note 14) as the main unit for management of river basins: art 2(15).

21 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 5.

22 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 6. As to the conservation of natural habitats see further PARAS 11, 679.

23 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 7(1).

24 Ie in accordance with European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) Annex V.

25 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 7(1).

26 'Environmental objectives' means the objectives set out in European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 4 (see the text to notes 15-19): art 2(34).

27 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 7(2). The quality standards referred to are those of the Drinking Water Directive (EC Council Directive 98/83 (OJ L330, 05.12.98, p 32)): see PARA 371.

28 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 7(3).

29 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 8 (amended by European Parliament and EC Council Directive 2008/32 (OJ L 81, 20.3.2008, p. 60)).

30 Ie having regard to the economic analysis conducted according to European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) Annex III.

31 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 9(1).

32 'Water services' means all services which provide, for households, public institutions or any economic activity: (1) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater; (2) waste-water collection and treatment facilities which subsequently discharge into surface water: European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 2(38).

33 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 9(1).

34 Member states must ensure that all discharges referred to in European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 10(2) into surface waters are controlled according to the combined approach set out in art 10: art 10(1). They must ensure the establishment and/or implementation of: (1) the emission controls based on best available techniques; or (2) the relevant emission limit values; or (3) in the case of diffuse impacts the controls including, as appropriate, best environmental practices, set out in: (a) EC Council Directive 96/61 (OJ L257, 10.10.96, p 26) concerning integrated pollution prevention and control (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23); (b) EC Council Directive 91/271 (OJ L135, 30.05.91, p 40) concerning urban waste-water treatment (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 30); (c) EC Council Directive 91/676 (OJ L375, 31.12.91, p 01) concerning the protection of waters against pollution caused by nitrates from agricultural sources (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 31); (d) the Directives adopted pursuant to European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 16 (see the text to note 40); (e) the Directives listed in Annex IX; (f) any other relevant Community legislation, at the latest 12 years after the date of entry into force of the Water Framework Directive (ie 22 December 2003: see art 25), unless otherwise specified in the legislation concerned: art 10(2). Where a quality objective or quality standard, whether established pursuant to the Water Framework Directive, in the Directives listed in Annex IX, or pursuant to any other Community legislation, requires stricter conditions than those which would result from the application of art 10(2), more stringent emission controls must be set accordingly: art 10(3).

35 Ie taking account of the results of the analyses required under European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 5: see the text to note 21.

36 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 11. As to the environmental objectives see art 4; and the text and notes 15-19.

37 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 13. See also art 4; and the text and notes 15-19. As to river basin management plans see PARA 202 et seq.

38 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 15(1). Member states must also submit summary reports of the analyses required under art 5 (see the text to note 21), and the monitoring programmes designed under art 8 (see the text to note 29) undertaken for the purposes of the first river basin management plan within three months of their completion (art 15(2)); and, within three years of the publication of each river basin management plan or update under art 13 (see the text to note 37), submit an interim report describing progress in the implementation of the planned programme of measures (art 15(3)).

39 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 14.

40 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 16. As to European legislation relating to the pollution of waters see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23.

41 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 17.

42 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 22.

43 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 23.

44 European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 24(1).

45 *Ie the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003*, SI 2003/3242.

46 *Ie the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003*, SI 2003/3245.

47 *Ie the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004*, SI 2004/99.

48 See PARA 198 et seq.

## UPDATE

### 7 The Water Framework Directive

NOTE 8--Directive 2000/60 Annex X replaced: European Parliament and EC Council Directive 2008/105 on environmental quality standards in the field of water policy (OJ L348, 24.12.2008, p 84): art 10, Annex II.

NOTE 29--See EC Commission Directive 2009/90 (OJ L201, 1.8.2009, p 36) laying down technical specifications for chemical analysis and monitoring of water status in accordance with Directive 2000/60 art 8(3).

NOTE 36--Directive 2000/60 art 11 amended: European Parliament and EC Council Directive 2009/31 (OJ L140, 5.6.2009, p 114).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(i) European Community Legislation/8. Other European Directives and protective measures.

## 8. Other European Directives and protective measures.

There are a number of European Directives directly concerned with or having an impact on water resources<sup>1</sup>, water supply<sup>2</sup>, pollution<sup>3</sup>, the water environment<sup>4</sup>, and flood risks<sup>5</sup>. The relevant Directives are discussed below in the appropriate parts of this title<sup>6</sup>.

The protective measures adopted pursuant to the EC Treaty to achieve the Community's environmental objectives<sup>7</sup> do not prevent any member state from maintaining or introducing more stringent protective measures<sup>8</sup>. Such measures must be compatible with the Treaty, and must be notified to the European Commission<sup>9</sup>.

1 See eg EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) (the 'EIA Directive'), on the assessment of the effects of certain public and private projects on the environment; and PARA 10. As to water resources generally see PARA 187 et seq.

2 See eg EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) (the 'Drinking Water Directive'); and PARA 371. As to water supply generally see PARA 317 et seq. As to water meters see European Parliament and EC Council Directive 2004/22 (OJ L135, 30.04.2004, p 01); and PARA 431. As to the sale and supply of bottled water see eg Council Directive 80/777 (OJ L229, 30.8.1980, p 1); and PARA 447. As to the sale and supply of bottled water generally see PARA 447 et seq.

3 As to Directives relating to water pollution see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23. A number of the specific Directives relating to pollution are prospectively repealed by the Water Framework Directive (European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01)) and will be replaced by the provisions of that Directive and any further measures adopted under it, subject to transitional provisions made by that Directive: see art 22.

4 See eg European Parliament and EC Council Directive 2003/4 (OJ L41, 14.02.2003, p 26) (the 'Directive on Public Access to Environmental Information'); and PARA 674. As to the water environment generally see PARA 674 et seq.

5 See European Parliament and EC Council Directive 2007/60 (OJ L288, 6.11.2007, p 27) on the assessment and management of flood risks; and PARA 557.

6 See the text and notes 1-5.

7 Ie the protective measures adopted pursuant to EC Treaty art 175 (ie the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 175 (formerly art 130S, renumbered by virtue of the Treaty of Amsterdam (see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ)), and amended by the Treaty of Nice), which lays down the procedures for taking action to achieve the Community's environmental objectives set out in art 174 (see PARA 7). As to the consolidated version of the Treaty see OJ C325, 24 December 2002.

8 Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 176 (formerly art 130T, renumbered by virtue of the Treaty of Amsterdam (see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ)).

9 Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 176 (as renumbered: see note 8).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(i) European Community Legislation/9. Strategic environmental assessment of plans and programmes.

## **9. Strategic environmental assessment of plans and programmes.**

The Directive on the Assessment of the Effects of Certain Plans and Programmes on the Environment (the 'Strategic Environmental Assessment Directive')<sup>1</sup> aims to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes<sup>2</sup> with a view to promoting sustainable development, by ensuring that, in accordance with the Directive, an environmental assessment<sup>3</sup> is carried out of certain plans and programmes which are likely to have significant effects on the environment<sup>4</sup>.

Regulations have been made for the purpose of implementing the Directive<sup>5</sup>. These provide that a responsible authority must carry out, or secure the carrying out of, an environmental assessment, in accordance with the regulations, during the preparation of certain plans or programmes and before their adoption or submission to the legislative procedure<sup>6</sup>. Such plans and programmes include those prepared for water management<sup>7</sup>, and those which, in view of the likely effect on sites, has been determined to require an assessment<sup>8</sup> pursuant to the Habitats Directive<sup>9</sup>. The position as to which water management plans and programmes may require assessment pursuant to the regulations is, as yet, unclear and may depend, in any event, on the precise content of the plan or programme concerned. However, the following may require assessment: river basin management plans<sup>10</sup>, flood plans for reservoirs<sup>11</sup>, water resources management plans<sup>12</sup>, drought plans<sup>13</sup>, shoreline management plans<sup>14</sup>, water level management plans<sup>15</sup>, forward work programmes prepared by the Water Services Regulation Authority<sup>16</sup> and the Consumer Council for Water<sup>17</sup>, and asset management plans<sup>18</sup>.

The regulations are covered in detail elsewhere in this work<sup>19</sup>.

1    Ie European Parliament and EC Council Directive 2001/42 (OJ L197, 21.07.2001, p 30).

2    'Plans and programmes' means plans and programmes, including those co-financed by the European Community, as well as any modifications to them, which (1) are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and (2) are required by legislative, regulatory or administrative provisions: European Parliament and EC Council Directive 2001/42 (OJ L197, 21.07.2001, p 30) art 2.

3    'Environmental assessment' means the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with European Parliament and EC Council Directive 2001/42 (OJ L197, 21.07.2001, p 30) arts 4-9; and 'environmental report' means the part of the plan or programme documentation containing the information required in art 5 and Annex I: art 2.

4    European Parliament and EC Council Directive 2001/42 (OJ L197, 21.07.2001, p 30) art 1.1. An environmental assessment must be carried out for the following plans and programmes which are likely to have significant environmental effects: art 3.1. Subject to art 3.3, an environmental assessment must be carried out for all plans and programmes: (1) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) (the 'EIA Directive') Annexes I and II (see PARA 10); or (2) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) (the 'Habitats Directive') art 6 or 7 (see PARA 11); European Parliament and EC Council Directive 2001/42 (OJ L197, 21.07.2001, p 30) art 3.2. Plans and programmes referred to in art 3.2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in art 3.2 require an environmental assessment only where the member states determine that they are likely to

have significant environmental effects: art 3.3. Member states must determine whether plans and programmes, other than those referred to in art 3.2, which set the framework for future development consent of projects, are likely to have significant environmental effects: art 3.4. Member states must determine whether plans or programmes referred to in arts 3.3 and 3.4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose member states must in all cases take into account specified relevant criteria, in order to ensure that plans and programmes with likely significant effects on the environment are covered by the Directive: art 3.5. The specified relevant criteria are:

- 1 (a) the characteristics of plans and programmes, having regard, in particular, to (i) the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources; (ii) the degree to which the plan or programme influences other plans and programmes including those in a hierarchy; (iii) the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development; (iv) environmental problems relevant to the plan or programme; (v) the relevance of the plan or programme for the implementation of Community legislation on the environment (eg plans and programmes linked to waste-management or water protection);
- 2 (b) characteristics of the effects and of the area likely to be affected, having regard, in particular, to: (i) the probability, duration, frequency and reversibility of the effects; (ii) the cumulative nature of the effects; (iii) the transboundary nature of the effects; (iv) the risks to human health or the environment (eg due to accidents); (v) the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected); (vi) the value and vulnerability of the area likely to be affected due to: (A) special natural characteristics or cultural heritage; (B) exceeded environmental quality standards or limit values; (C) intensive land-use; (D) the effects on areas or landscapes which have a recognised national, Community or international protection status: Annex II.

In the case-by-case examination and in specifying types of plans and programmes in accordance with art 3.5, the authorities which must be consulted are those authorities designated by member states which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes: see arts 3.6, 6.3. Member states must ensure that their conclusions pursuant to art 3.5, including the reasons for not requiring an environmental assessment pursuant to arts 4-9, are made available to the public: art 3.7. The following plans and programmes are not subject to the Directive: (aa) plans and programmes the sole purpose of which is to serve national defence or civil emergency; (bb) financial or budget plans and programmes: art 3.8. The Directive does not apply to plans and programmes co-financed under certain other Directives: see art 3.9.

5 le the Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633, and the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, SI 2004/1656: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 60 et seq. The Government has issued guidance on the application of the Directive: see *A Practical Guide to the Strategic Environmental Assessment Directive* (Department for Communities and Local Government, September 2005). The guidance is available on the Department of Communities and Local Government website at [www.communities.gov.uk](http://www.communities.gov.uk).

6 See the Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633, reg 5(1); Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, SI 2004/1656, reg 5(1): and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 60 et seq.

7 See the Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633, reg 5(2); Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, SI 2004/1656, reg 5(2): and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 60 et seq.

8 le pursuant to EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) on the conservation of natural habitats and of wild fauna and flora, art 6 or 7: see PARA 11.

9 See the Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633, reg 5(3); Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, SI 2004/1656, reg 5(3): and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 60 et seq.

10 See PARA 202 et seq.

11 See PARA 288.

12 See PARA 321.

13 See PARA 323.



- 14 See PARA 647.
- 15 See PARA 647.
- 16 See PARA 111.
- 17 see PARA 120.
- 18 See PARA 324.
- 19 See **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 60 et seq.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(i) European Community Legislation/10. Environmental impact assessment.

## 10. Environmental impact assessment.

The Environmental Impact Directive<sup>1</sup> applies to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment<sup>2</sup>, and requires member states to adopt measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an environmental impact assessment with regard to their effects<sup>3</sup>.

Regulations have been made for the purpose of implementing the Directive in England and Wales<sup>4</sup> whereby planning permission for development of the types referred to in the Directive may not be granted without consideration of environmental information<sup>5</sup>. Specific provision has also been made requiring an environmental impact assessment to be carried out before consent may be given for certain water management projects for agriculture<sup>6</sup>, and before the carrying out by a drainage body of improvement works<sup>7</sup>.

1    le EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) (amended by EC Council Directive 97/11 (OJ L73, 14.03.97, p 05) and European Parliament and EC Council Directive 2003/35 (OJ L156, 25.06.2003, p 17)) on the assessment of the effects of certain public and private projects on the environment (the 'EIA Directive'): see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 10.

2    See EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) art 1.1.

3    See EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) art 2.

4    le the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 487 et seq.

5    The types of development include the following:

3    (1)   (a) groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres; (b) works for the transfer of water resources other than piped drinking water (i) between river basins where the transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres per year; and (ii) in all other cases, between river basins where the multi-annual average flow of the basin of abstraction exceeds 2,000 million cubic metres per year and where the amount of water transferred exceeds 5% of this flow; (c) dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres (see the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293, Sch 1; and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 489); and

4    (2)   where the development is likely to have significant effects on the environment by virtue of factors such as its nature, size or location: (a) inland-waterway construction not included in head (1) above, canalisation and flood-relief works, where the area of the works exceeds 1 hectare; (b) dams and other installations designed to hold water or store it on a long-term basis, unless included in head 1 (above), where the area of the works exceeds 1 hectare; (c) installations of long-distance aqueducts, where the area of the works exceeds 1 hectare; (d) all development consisting of coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works; (e) groundwater abstraction and artificial groundwater recharge schemes not included in head (1) above, where the area of the works exceeds 1 hectare; (f) works for the transfer of water resources between river basins not included in head (1) above, where the area of the works exceeds 1 hectare (see the Town and

Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293, Sch 2; and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 490).

6 See the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164; and PARA 271 et seq.

7 See the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783; and PARA 649 et seq.

## **UPDATE**

### **10 Environmental impact assessment**

NOTE 1--Directive 85/337 further amended: European Parliament and EC Council Directive 2009/31 (OJ L140, 5.6.2009, p 114).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(i) European Community Legislation/11. European Community conservation obligations.

## **11. European Community conservation obligations.**

The Habitats Directive<sup>1</sup> aims to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the member states<sup>2</sup>. Regulations have been made for the purpose of implementing the Directive and these are covered in detail elsewhere in this work<sup>3</sup>.

The regulations impose a duty on the Secretary of State<sup>4</sup> and the Welsh Ministers<sup>5</sup> to exercise their functions relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive<sup>6</sup>; and they and every other competent authority<sup>7</sup> in the exercise of any of their functions generally, must have regard to the requirements of the Directive so far as they may be affected by the exercise of those functions<sup>8</sup>.

The Directive provides that, in relation to special areas of conservation established in member states, any plan or project<sup>9</sup> not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives<sup>10</sup>. A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on protected conservation sites (either alone or in combination with other plans or projects), and is not directly connected with or necessary to the management of the site, must make an appropriate assessment of the implications for the site in view of that site's conservation objectives<sup>11</sup>. Thus plans or projects relating to water management<sup>12</sup>, flood defence and land drainage<sup>13</sup> or coast protection<sup>14</sup> may require assessment of their implications for conservation sites, and a failure to undertake such an assessment may invalidate the undertaking or authorisation of the plan or project<sup>15</sup>.

1    le EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) (on the conservation of natural habitats and of wild fauna and flora).

2    See EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) art 2.1.

3    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728 et seq.

4    As to the Secretary of State see PARA 15 note 1.

5    As to the Welsh Ministers see PARA 16 note 5.

6    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(2); and PARA 679.

7    'Competent authority' includes any minister, government department, public or statutory undertaker, public body of any description or person holding a public office, and also includes any person exercising any function of a competent authority in the United Kingdom: Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 6(1). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'United Kingdom' see PARA 22 note 5. 'Public body' includes any local authority, joint board or joint committee; and 'public office' means an office under Her Majesty, an office created or continued in existence by a public general Act of Parliament, or an office the remuneration in respect of which is paid out of money provided by Parliament or money paid out of the Scottish Consolidated Fund: reg 6(2) (amended by SI 1999/1820). 'Local authority' means, in relation to (1) England, a county council, district council or London borough council, the Common Council of the City of London, the Sub-treasurer of the Inner Temple, the Under-treasurer of the Middle Temple or a parish council; (2) Wales, a county council, county borough council or community council or a National Park

authority: Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 6(3) (amended by SI 1996/525). 'Joint board' means a joint planning board within the meaning of the Town and Country Planning Act 1990 s 2 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 30); and 'joint committee' means a joint committee appointed under the Local Government Act 1972 s 102(1)(b) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 371); Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 6(3) (amended by virtue of SI 1996/534). The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, apply to National Park authorities as if they were local authorities for these purposes: see the National Park Authorities (Wales) Order 1995, SI 1995/2803, art 18 Sch 5, para 20; the National Park Authorities (England) Order 1996, SI 1996/1243, art 18, Sch 5 para 14; the New Forest National Park Authority (Establishment) Order 2005, SI 2005/421, art 16, Sch 3 Pt 2 para 11. The functions of a minister of the Crown as the competent authority, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 32. As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

8 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(4); and PARA 679.

9 An activity such as mechanical cockle fishing is covered by the concept of plan or project set out in EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) art 6.3. The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive: Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, interveniend)* [2005] All ER (EC) 353, [2004] All ER (D) 50 (Sep), ECJ. A 'project' is (among other things) an intervention in the natural surroundings and landscape; and a 'plan' is a formal statement of an intended course of future action in respect of the authorisation of such interventions: see *R (on the application of Boggis) v Natural England* [2008] EWHC 2954 (Admin), (2009) Times, 25 February, [2009] All ER (D) 26 (Jan).

10 See EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) art 6.3. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of art 6.4, the competent national authorities must agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public: see art 6.3. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the member state must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected: see art 6.4. 'Natura 2000' is a coherent European ecological network of special areas of conservation: see art 3.

A plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects. EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) art 6.3 subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned. In the light, in particular, of the precautionary principle by reference to which the Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned: Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, interveniend)* [2005] All ER (EC) 353, [2004] All ER (D) 50 (Sep), ECJ.

11 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 48(1) (amended by SI 2007/1843); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748. As to the application of this obligation see *R (on the application of Boggis) v Natural England* [2008] EWHC 2954 (Admin), (2009) Times, 25 February, [2009] All ER (D) 26 (Jan).

12 As to the management of water resources see PARA 187 et seq. As to water supply see PARA 317 et seq.

13 As to flood defence and land drainage see PARA 559 et seq.

14 Eg an order restricting the excavation or removal of materials from the seashore: see PARAS 58-60. As to coast protection generally see PARA 499 et seq.

15 See *R (on the application of Boggis) v Natural England* [2008] EWHC 2954 (Admin), (2009) Times, 25 February, [2009] All ER (D) 26 (Jan).

## **UPDATE**

### **11 European Community conservation obligations**

NOTES 9, 10--*Landelijke*, cited, applied: *R (on the application of Akester (on behalf of the Lymington River Association)) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin), [2010] All ER (D) 181 (Feb).

NOTES 11, 15--*Boggis*, cited, reversed in part: *Boggis v Natural England* [2009] EWCA Civ 1061, [2009] All ER (D) 229 (Oct).

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## **(ii) Domestic Legislation**

### **12. The 1991 legislation and subsequent amending legislation.**

The Water Industry Act 1991, the Water Resources Act 1991, the Statutory Water Companies Act 1991 and the Land Drainage Act 1991 consolidate the previous enactments relating to water<sup>1</sup>. The consolidation legislation came into force on 1 December 1991 and has since been substantially amended, in particular by the Competition and Service (Utilities) Act 1992, the Land Drainage Act 1994, the Environment Act 1995, the Water Industry Act 1999, the Enterprise Act 2002 and the Water Act 2003<sup>2</sup>. Coast protection, however, was not included in the 1991 legislation and continues to be subject to the Coast Protection Act 1949, as subsequently amended<sup>3</sup>; and the provisions of the Reservoirs Act 1975, as subsequently amended, continue to apply to reservoirs<sup>4</sup>.

The Water Industry Act 1991 is mainly concerned with the regulation of water supply<sup>5</sup> and the Water Resources Act 1991 with the regulation of water resources<sup>6</sup>, while the Land Drainage Act 1991 deals with flood defence (but not with coastal erosion) and with land drainage<sup>7</sup>. The Statutory Water Companies Act 1991 is concerned with the powers of certain companies holding appointments as water undertakers<sup>8</sup> which were authorised to supply water under previous legislation and with their conversion to registered limited companies<sup>9</sup>.

The Environment Act 1995 established the Environment Agency, which replaced the former National Rivers Authority<sup>10</sup>, and makes numerous amendments, particularly to the Water Resources Act 1991 and the Land Drainage Act 1991, in the light of the Agency's establishment and functions. The 1995 Act sets out the Agency's general and specific functions, including those in relation to flood defence<sup>11</sup> and the control of pollution<sup>12</sup>.

The Water Industry Act 1999 provides new entitlements for water customers, in particular by prohibiting the disconnection of the water supply to homes, and certain other premises, for reasons of non-payment<sup>13</sup>. Many customers were given new rights to choose the basis on which they are charged for water and sewerage services<sup>14</sup> and the use of rateable value as a basis of unmeasured charging, which was, under the 1991 legislation, to have been discontinued after 31 March 2000<sup>15</sup>, is now permitted to continue<sup>16</sup>. The 1999 Act also enables regulations to be made concerning particular charges to be applied to particular groups of customers<sup>17</sup>.

1   le including certain provisions of the Public Health Act 1936, the Public Health (Drainage of Trade Premises) Act 1937, the Public Health Act 1961, the Water Resources Act 1963, the Land Drainage Act 1976, the Water (Fluoridation) Act 1985, the Water Act 1989, and related enactments, with amendments to give effect to recommendations of the Law Commission made in their *Report on the Consolidation of the Legislation Relating to Water* (Law Com No 198; Cm 1483). Provision for repeals, consequential amendments, transitional matters and savings is made by the Water Consolidation (Consequential Provisions) Act 1991.

2   As to the Water Act 2003 see PARA 13.

3   As to coast protection see PARA 499 et seq.

4   See PARA 277 et seq. Significant amendments to the Reservoirs Act 1975 have been made by the Water Act 2003; in particular, the enforcement authority in England and Wales under the Reservoirs Act 1975 is now the Environment Agency: see the Water Act 2003 s 74; and PARA 279 note 1.

5 As to the organisation of the water industry see PARA 108 et seq; and for the provisions of the Water Industry Act 1991 relating to water supply see PARA 318 et seq. As to general land and works powers under that Act see PARA 453 et seq.

6 For the provisions of the Water Resources Act 1991 relating to water resources see PARA 191 et seq; and as to general land and works powers under that Act see PARA 453 et seq.

7 For the provisions of the Land Drainage Act 1991 see PARA 569 et seq. Certain flood defence provisions are contained in the Water Resources Act 1991: see eg PARA 574.

8 As to the meaning of 'water undertaker' see PARA 137 note 4.

9 For the provisions of the Statutory Water Companies Act 1991 see PARA 134 et seq. As to the registration of statutory water companies as limited companies see PARA 135.

10 As to the Environment Agency see PARA 17.

11 See PARA 559 et seq.

12 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 75. As to the pollution of water see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270 et seq.

13 See the Water Industry Act 1999 s 1(1), (2), Sch 1 adding the Water Industry Act 1991 s 61(1A), Sch 4A; and PARA 358. See also the Water Industry Act 1999 s 2 adding the Water Industry Act 1991 s 63A; and PARA 361.

14 See the Water Industry Act 1999 ss 6, 7 adding the Water Industry Act 1991 ss 144A, 144B; and PARAS 427-428. See also the Water Industry Act 1999 s 11 adding the Water Industry Act 1991 s 209A; and PARA 429.

15 See the Water Industry Act 1991 s 145 (now repealed).

16 See the Water Industry Act 1999 ss 8, 15(2), Sch 4 Pt I repealing the Water Industry Act 1991 s 145.

17 See the Water Industry Act 1999 s 5 adding the Water Industry Act 1991 s 143A; and PARA 421.



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### **13. The Water Act 2003.**

The Water Act 2003 amends and supplements the 1991 legislation<sup>1</sup>. The explanatory notes to the 2003 Act produced by the Department for Environment, Food and Rural Affairs summarise the four broad aims of the Act as: (1) the sustainable use of water resources; (2) strengthening the voice of consumers; (3) a measured increase in competition; and (4) the promotion of water conservation<sup>2</sup>.

The Water Act 2003 amends the Water Resources Act 1991 in order to improve long-term water resource management<sup>3</sup>; and the Water Industry Act 1991 so that water companies are given a duty to prepare and publicise drought plans<sup>4</sup>, are placed under a duty to agree and publicise water resources management plans<sup>5</sup>, and are placed under an enforceable duty to further water conservation<sup>6</sup>.

The 2003 Act introduces provisions for the better operation and regulation of the water industry by amending the Water Industry Act 1991 to: (a) replace the Director General of Water Services with a regulatory authority known as the Water Services Regulation Authority<sup>7</sup>; (b) set up a new independent Consumer Council for Water<sup>8</sup>; (c) require the Authority and the Council to consult on and publish forward work programmes and annual reports<sup>9</sup>; (d) give both the Authority and Council a new duty to contribute to sustainable development<sup>10</sup>; and (e) give the Authority a duty to further the consumer objective wherever appropriate, through promoting effective competition<sup>11</sup>.

The Water Act 2003 includes provisions which aim to increase the opportunities for competition in the supply of water services, by setting up a system to license new entrants to supply water to large commercial and industrial customers based on a water consumption threshold and providing the Water Services Regulation Authority with new regulatory powers to administer the competition framework<sup>12</sup>. The 2003 Act also amends the Water Industry Act 1991 to include a new statutory obligation for water companies to accede to requests from strategic health authorities (in relation to England) and the Welsh Ministers<sup>13</sup> (in relation to Wales) to enter into arrangements to fluoridate water supplies, thereby transferring responsibility for the decision to fluoridate from the undertaker to the strategic health authority and the Welsh Ministers, in consultation with local communities<sup>14</sup>.

To further the principles of sustainable use of water resources, better regulation of the water industry, competition and water conservation, the Water Act 2003 contains a number of miscellaneous provisions<sup>15</sup>. To further water conservation the Act contains new provisions to place a duty on the Secretary of State<sup>16</sup> and the Welsh Ministers to take appropriate steps to encourage water conservation<sup>17</sup>, and to place a duty on public authorities to take into account the desirability of conserving water supplies to premises<sup>18</sup>. The Act amends the Water Industry Act 1991 to: (i) require fire authorities or owners of commercial or industrial premises to pay for replacement fire hydrants removed during water mains renewal or refurbishment work<sup>19</sup>; and (ii) allow developers to enter into an agreement with water undertakers to lay water mains and communication pipes in accordance with standards set by the undertaker<sup>20</sup>.

The Water Act 2003 enhances reservoir safety by amending the Reservoirs Act 1975 to transfer enforcement powers from local authorities to the Environment Agency in England and Wales<sup>21</sup> and to empower the Secretary of State and the Welsh Ministers to direct owners of large raised reservoirs to prepare and maintain flood plans<sup>22</sup>. The Water Act 2003 includes various amendments to facilitate arrangements for flood defence organisation and funding by:

- 6 (A) including powers to revoke local flood defence schemes and allow the creation of additional regional flood defence committees<sup>23</sup>;
- 7 (B) enabling ministers to make block grants to the Environment Agency for flood defence works and flood warning schemes<sup>24</sup>;
- 8 (C) reinstating the power of the internal drainage boards to borrow to fund contributions to the Environment Agency<sup>25</sup>; and
- 9 (D) enabling the Welsh Ministers to make provisions regarding the membership of Welsh regional flood defence committees<sup>26</sup>.

Additionally, the Water Act 2003 provides new powers under the Coal Industry Act 1994 for the Coal Authority to take action to prevent and clean up mine water pollution from abandoned coal mines<sup>27</sup>.

The Secretary of State may by regulations<sup>28</sup> make such supplementary, incidental or consequential provision, or such transitory, transitional or saving provision, as he considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to any provision of the Water Act 2003<sup>29</sup>; and nothing in that Act is to be read as affecting the generality of that provision<sup>30</sup>. The power to make such regulations is also exercisable by the Welsh Ministers, in relation to provision dealing with matters with respect to which functions are exercisable by them<sup>31</sup>.

1 As to the 1991 legislation see PARA 12.

2 See the Explanatory Notes to the Water Act 2003 (Crown Copyright) para 9.

3 ie in relation to the control of abstraction and impounding: see PARA 214.

4 See the Water Industry Act 1991 ss 39B, 39C; and PARA 323.

5 See the Water Industry Act 1991 ss 37A-37D; and PARAS 321-322.

6 See the Water Act 2003 s 82 amending the Water Industry Act 1991 s 3(2)(a); and PARA 676.

7 As to the Water Services Regulation Authority see PARA 109 et seq.

8 As to the Consumer Council for Water see PARA 115 et seq.

9 See PARAS 111-112, 120, 124.

10 See PARAS 119, 130.

11 See PARA 130.

12 See PARA 152 et seq.

13 As to the Welsh Ministers see PARA 16 note 5.

14 See the Water Act 2003 s 58; and PARA 410 et seq.

15 See the Explanatory Notes to the Water Act 2003 (Crown Copyright) para 18.

16 As to the Secretary of State see PARA 15 note 1.

17 See the Water Act 2003 s 81; and PARA 188.

18 See the Water Act 2003 s 83; and PARA 188.

19 See the Water Act 2003 s 84 amending the Water Industry Act 1991 ss 57, 58; and PARAS 348-349.

20 See the Water Industry Act 1991 ss 51A-51E; and PARA 338.

- 21 See the Water Act 2003 s 74; and PARA 279.
- 22 See the Water Act 2003 ss 77, 78(2) adding the Reservoirs Act 1975 ss 12A, 12B; and PARA 288.
- 23 See the Water Act 2003 ss 66, 68 making various amendments to the Environment Act 1995; and PARA 563 et seq.
- 24 Ie by repealing the Water Resources Act 1991 ss 147-149: see the Water Act 2003 s 69(1).
- 25 Ie by amending the Land Drainage Act 1991 s 55: see the Water Act 2003 s 101(1), Sch 7 para 40(1), (3); and PARA 640.
- 26 See the Water Act 2003 s 67 adding the Environment Act 1995 ss 16A, 16B; and PARA 562.
- 27 See the Water Act 2003 s 85, Schs 5, 6; and **MINES, MINERALS AND QUARRIES**.
- 28 As to the making of regulations see PARA 21.
- 29 Water Act 2003 s 103(1). The provision which may be made under s 103(1) includes provision: (1) amending or repealing any enactment, instrument or document (including in particular any instrument appointing a company to be a water or sewerage undertaker); (2) conferring functions, powers or duties on any person: s 103(2). The provision which may be so made also includes, in particular, provision for or in relation to the payment by the Environment Agency of compensation to any person who: (a) before the coming into force of any provision of the Water Act 2003 was not required by or by virtue of the Water Resources Act 1991 to have a licence under Pt II Ch II (ss 24-72) (see PARA 227 et seq) in respect of any abstraction; (b) following the coming into force of any provision of the Water Act 2003 does require such a licence in respect of that abstraction; and (c) has suffered loss or damage as a result of his having been (i) refused such a licence in respect of that abstraction; or (ii) granted such a licence, but in respect of an abstraction of more limited extent than that of the abstraction he was carrying out before the coming into force of the provision in question, or who is a person who falls within s 103(4): s 103(3). A person falls within s 103(4) if he satisfies the Agency of the following: (A) that the nature of his operations, or proposed operations, requires him to make plans about the abstraction of water; (B) that before the coming into force of any provision of the Water Act 2003 he would not have required a licence under the Water Resources Act 1991 Pt II Ch II in respect of any such abstraction for which he had reasonably planned (or, if there has already been such an abstraction, he did not require such a licence in respect of it); (C) that following the coming into force of any such provision he does require such a licence in respect of it; and (D) that he has suffered loss or damage as a result of his having been (aa) refused a licence under the Water Resources Act 1991 Pt II Ch II in respect of that abstraction; or (bb) granted such a licence, but in respect of an abstraction of more limited extent than he had reasonably applied for, and he applies for compensation before any deadline provided for in the regulations under the Water Act 2003 s 103(1): s 103(4). 'Person', unless the contrary intention appears, includes a body of persons corporate or unincorporate: Interpretation Act 1978 s 5, Sch 1. As to bodies corporate and unincorporate see **COMPANIES; CORPORATIONS**.
- The provision which may be made under s 103(1) also includes, in particular, provision for or in relation to the payment by the Water Services Regulation Authority of compensation to any person who: (i) before 31 July 2002 was carrying on any activities in respect of the supply of water; (ii) following the coming into force of any provision of the Water Act 2003 is unable to continue to carry on those activities as a result of their having been prohibited, is unable to continue to carry on those activities as a result of a licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) (see PARA 152 et seq) having been required in respect of them and his not having applied for, or his having been refused, a licence, or is unable to continue to carry on those activities in the same manner as a result of his having been granted a licence the effect of which is to restrict the carrying on of the activities; and (iii) has suffered loss or damage as a result of those activities having been prohibited, a licence not having been granted, or those activities having been restricted: Water Act 2003 s 103(5). The following regulations have been made: the Water Act 2003 (Consequential and Supplementary Provisions) Regulations 2005, SI 2005/2035; the Unfair Terms in Consumer Contracts (Amendment) and Water Act 2003 (Transitional Provision) Regulations 2006, SI 2006/523; the Water Supply (Water Quality) Regulations 2001 (Amendment) Regulations 2007, SI 2007/3374. Where relevant to this title the provisions of these regulations are cited in the appropriate paragraphs of this title.
- 30 Water Act 2003 s 103(8).
- 31 Water Act 2003 s 103(7). This function was originally vested in the National Assembly for Wales but is now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(ii) Domestic Legislation/14. Local legislation.

#### **14. Local legislation.**

Many local enactments made before 1989 are still in force<sup>1</sup>. There is no longer any need for many of these enactments and their interaction with the Water Act 1989<sup>2</sup> and the 1991 consolidation legislation<sup>3</sup> is complex<sup>4</sup>.

Since 1989, water undertakers<sup>5</sup> have not needed the power of a statutory order before carrying out waterworks, therefore far fewer orders relating to water supply have been made since that date<sup>6</sup>. Some works do, however, need the power of an Act<sup>7</sup>. As companies<sup>8</sup>, water undertakers have power to promote local bills<sup>9</sup>.

If it appears to the Secretary of State<sup>10</sup> or, in relation to Wales, the Welsh Ministers<sup>11</sup>, to be appropriate to do so: (1) for the purposes of, or in consequence of, the coming into force of any enactment contained in the Environment Act 1995; or (2) in consequence of the effect or operation at any time after the transfer date<sup>12</sup> of any such enactment or of anything done under any such enactment, he or they may by order<sup>13</sup> repeal<sup>14</sup>, amend or re-enact, with or without modifications, any local statutory provision<sup>15</sup>. An order so made may:

- 10 (a) make provision applying generally in relation to local statutory provisions of a description specified in the order<sup>16</sup>;
- 11 (b) make different provision for different cases, including different provision in relation to different persons<sup>17</sup>, circumstances or localities<sup>18</sup>;
- 12 (c) contain such supplemental, consequential and transitional provisions as the Secretary of State or, as the case may be the Welsh Ministers, considers appropriate<sup>19</sup>; and
- 13 (d) in the case of an order made after the transfer date, require provision contained in the order to be treated as if it came into force on that date<sup>20</sup>.

Nothing in any such order may, however, abrogate or curtail the effect of so much of any local statutory provision as confers any right of way or confers on or preserves for the public any right of enjoyment of air, exercise or recreation on land<sup>21</sup> or any right of access to land for the purposes of exercise or recreation<sup>22</sup>.

Subject to any provision to the contrary<sup>23</sup>, nothing in any local statutory provision<sup>24</sup> passed or made before 1 September 1989 is to be construed as relieving any relevant undertaker<sup>25</sup> from any liability arising<sup>26</sup> in respect of any act or omission occurring on or after that date<sup>27</sup>.

The Secretary of State or, in relation to Wales, the Welsh Ministers<sup>28</sup>, by whom an order is made under certain provisions relating to the abstraction and impounding of water<sup>29</sup> also has specific powers by order<sup>30</sup> to repeal, amend or adapt any local enactment<sup>31</sup> passed or made before the relevant date<sup>32</sup> to such extent, or in such manner, as he or they may consider appropriate if it appears to him or them that that local enactment is inconsistent with any of the provisions of the order made by him or them, or that it requires to be amended or adapted, having regard to any of the provisions of that order<sup>33</sup>. Such an order modifying any local enactment may include such transitional, incidental, supplementary and consequential provisions as the Secretary of State or the Welsh Ministers may consider necessary or expedient<sup>34</sup>. These specific powers have effect without prejudice to the exercise of any other power to repeal, amend or adapt local enactments which is conferred by any other enactment<sup>35</sup>.

The powers under the Coast Protection Act 1949 to repeal local enactments are discussed in a later part of this title<sup>36</sup>. There is also a general power to repeal enactments when making an order or regulations under the Water Act 2003<sup>37</sup>.

1 Local enactments relating to water supply were divisible into local Acts of Parliament conferring special statutory powers upon water companies, local authorities and other water undertakers, provisional orders made under the Gas and Water Works Facilities Act 1870 (repealed), statutory orders under the Water Act 1945 (repealed), and orders under the Water Act 1973 (repealed). Also relevant were orders under the Water Resources Acts 1963 and 1971 (repealed) and the Land Drainage Acts 1930 and 1961 (repealed) and the Land Drainage Act 1976 (substantially repealed). As to the classification of legislation see **PARLIAMENT** vol 34 (Reissue) PARA 728 et seq.

2 Ie the privatisation legislation: see PARA 108.

3 As to the 1991 legislation see PARA 12.

4 Detailed consideration of specific local enactments is outside the scope of this title, although enactments relating to the London area and the River Thames are discussed briefly. Practitioners are, however, advised to check with the undertakers for the area in question or with the Environment Agency as to the existence and application of any relevant local legislation. The status of individual provisions may also be checked in the *Chronological Tables of Local Acts* which are published on the Office of Public Sector Information website at [www.opsi.gov.uk](http://www.opsi.gov.uk).

As to the interaction of local legislation with the provisions of the Water Act 1973 (repealed) see eg *R v Anglian Water Services, ex p Three Valleys Water* [2000] 03 LS Gaz R 38, QBD.

5 As to water undertakers see PARA 134 et seq.

6 As to compulsory works orders see PARA 455 et seq.

7 As to works orders under the Transport and Works Act 1992 where the works will interfere with rights of navigation etc see PARA 706.

8 Ie assuming the appropriate powers are set out in their memorandum and articles of association.

9 The procedure for promoting a local Bill is governed by the standing orders of each House of Parliament: see generally **PARLIAMENT** vol 78 (2010) PARAS 849, 929. A number of the standing orders have particular application to Bills concerning water supply or affecting water undertakers: see the HL Standing Orders (Private Business) (2005); HC Standing Orders (Private Business) (2005). As to the powers of the Welsh Ministers to promote and oppose private Bills see the Government of Wales Act 2006 s 65. As to the Welsh Ministers see PARA 16 note 5.

10 The Environment Act 1995 s 121 refers to 'the Secretary of State or the Minister', 'the Minister' being defined as meaning the Minister of Agriculture, Fisheries and Food: see s 121(1), (7). The Ministry of Agriculture, Fisheries and Food has been dissolved and the functions of the Minister of Agriculture, Fisheries and Food transferred to the Secretary of State: see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794, art 2. As to the Secretary of State see PARA 15 note 1.

11 The functions of the Secretary of State and the Minister under the Environment Act 1995 s 121 and of the Secretary of State under the Water Resources Act 1991 s 71 (see the text to notes 28-35), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. They are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

12 Ie 1 April 1996: see the Environment Act 1995 ss 2, 56(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 70.

13 In relation to the Secretary of State, the power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament, and is without prejudice to any power conferred by any other provision of the Environment Act 1995: s 121(5), (6). As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

14 The power to repeal or amend a local statutory provision includes power to modify the effect, in relation to any local statutory provision, of any provision of the Environment Act 1995 s 120(2), Sch 23 (transitional provisions): s 121(3). 'Local statutory provision' means: (1) a provision of a local Act, including an Act confirming a provisional order; (2) a provision of so much of any public general Act as has effect with respect to a particular area, with respect to particular persons or works or with respect to particular provisions falling within any of head (1) above, this head and heads (3)-(4) below; (3) a provision of an instrument made under any provision falling within head (1) or (2) above; or (4) a provision of any other instrument which is in the nature of a local enactment: s 121(7).

15 Environment Act 1995 s 121(1). The provisions that may be so repealed, amended or re-enacted include, in the case of an order by virtue of head (2) in the text, a provision amended by virtue of head (1) in the text: s 121(1). A similar power is contained in the Water Act 1989 enabling the Secretary of State to repeal, amend or re-enact any local statutory provision for the purposes of, or in consequence of, the coming into force of any enactment contained therein or in consequence of the effect or operation at any time after the transfer date of any such enactment or of anything done under any such enactment: see s 191(1). The power is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament, and includes power to modify the effect, in relation to any local statutory provision, of any provision of s 190, Sch 26 (transitional provisions): see s 191(3), (5). The transfer date for these purposes is 1 September 1989: see PARA 108.

16 Environment Act 1995 s 121(2)(a); and see also the Water Act 1989 s 191(2)(a).

17 As to the meaning of 'person' see PARA 13 note 29.

18 Environment Act 1995 s 121(2)(b); and see also the Water Act 1989 s 191(2)(b).

19 Environment Act 1995 s 121(2)(c); and see also the Water Act 1989 s 191(2)(c).

20 Environment Act 1995 s 121(2)(d); and see also the Water Act 1989 s 191(2)(d).

21 In any Act, unless the contrary intention appears, 'land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land: Interpretation Act 1978 s 5, Sch 1.

22 Environment Act 1995 s 121(4); and see also the Water Act 1989 s 191(4). As to water amenity and recreation see PARA 683 et seq. As to rights of navigation see PARA 688 et seq.

23 It is contained in the Water Act 1989 Sch 26 or in the Water Consolidation (Consequential Provisions) Act 1991: Water Industry Act 1991 s 220.

24 'Local statutory provision' means a provision: (1) of a local Act, including an Act confirming a provisional order; (2) of so much of a public general Act as has effect with respect to a particular area, with respect to particular persons or works or with respect to particular provisions falling within any of this head, head (1) above or heads (3)-(4) below; (3) of an instrument made under any provision falling within head (1) or (2) above; or (4) of any other instrument which is in the nature of a local enactment: Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1).

25 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

26 It is by virtue of the Water Industry Act 1991: see PARA 137 et seq.

27 Water Industry Act 1991 s 220; and see also the Water Act 1989 s 191(6).

28 See note 11.

29 It is under the Water Resources Act 1991 s 33 (repealed), s 66 (see PARAS 229, 233) and s 72(5) (see PARA 262): s 71(4). As from a day to be appointed the reference to s 33 is omitted: s 71(4) (prospectively amended by the Water Act 2003 s 101, Sch 7 Pt 1, paras 1, 9, Sch 9 Pt 3). At the date at which this volume states the law no such day had been appointed.

30 In relation to the Secretary of State, this power is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Water Resources Act 1991 s 71(3). As to the procedure in relation to Wales see note 13. Such orders, being local in effect, are not recorded in this work.

31 For these purposes, 'local enactment' means: (1) a local or private Act; (2) a public general Act relating to London; (3) an order or scheme made under an Act, confirmed by Parliament or brought into operation in accordance with special parliamentary procedure; or (4) an enactment in a public general Act amending a local or private Act or any such order or scheme: Water Resources Act 1991 s 71(5). 'Enactment' includes an

enactment contained in the Water Resources Act 1991 or in any Act passed after that Act: s 221(1). In the Water Industry Act 1991 'enactment' includes an enactment contained in the Water Industry Act 1991 or in any Act passed after that Act: s 219(1). In any Act, unless the contrary intention appears, 'enactment' does not include an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament; and 'Act' means an Act of Parliament: Interpretation Act 1978 s 5, Sch 1 (definitions added by the Scotland Act 1998 s 125, Sch 8 para 16(3)). As to the Scottish Parliament see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

32 For these purposes, 'relevant date' means the date which was the second appointed day for the purposes of the Water Resources Act 1963 s 133 (repealed) (ie 1 April 1965: see ss 3(4), 135(1) (repealed)): Water Resources Act 1991 s 71(5).

33 See the Water Resources Act 1991 s 71(1).

34 Water Resources Act 1991 s 71(2).

35 See the Water Resources Act 1991 s 71(6).

36 See PARA 504.

37 See PARA 21.

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### **(iii) Central Administration**

#### **15. The Secretary of State.**

At the date at which this title states the law, the Secretary of State for Environment, Food and Rural Affairs is the Secretary of State principally concerned with the regulation of matters relating to water<sup>1</sup>, and for the formulation of policy relating to flood defence and land drainage<sup>2</sup>. Under the Water Industry Act 1991, the regulatory functions relating to the water industry are shared between the Secretary of State and the Water Services Regulation Authority<sup>3</sup>. The Secretary of State is also responsible for the establishment of coast protection authorities<sup>4</sup> and for overseeing the performance by them of their duties<sup>5</sup>.

In exercising any power conferred by virtue of the Environment Act 1995, the Water Resources Act 1991, the Land Drainage Act 1991, the Water Industry Act 1991 or the Water Act 1989 in relation to, or to decisions of, the Environment Agency<sup>6</sup>, or any power which would fall to be exercised by the Agency but for a ministerial direction, it is the duty of the Secretary of State to take into account the Agency's general duty with respect to the water industry<sup>7</sup>. Under the Environment Act 1995, the Secretary of State has power to give directions of a general or specific character to the Agency with respect to the carrying out of any of its functions<sup>8</sup>.

In relation to Wales, the functions of the Secretary of State may be exercisable by him, or exercisable jointly with, or transferred to, the Welsh Ministers as discussed below<sup>9</sup>.

The specific powers and duties of the Secretary of State are considered in detail as they occur in this title.

1 In any enactment, 'Secretary of State' means one of Her Majesty's principal secretaries of state: see the Interpretation Act 1978 s 5, Sch 1. In the Water Resources Act 1991 the expressions 'the Minister', meaning the Minister of Agriculture, Fisheries and Food, and 'the Ministers', meaning the Secretary of State and the Minister, are used. The Ministry of Agriculture, Fisheries and Food has been dissolved and the functions of the Minister of Agriculture, Fisheries and Food transferred to the Secretary of State (see PARA 14 note 10) and in this title when referring to any functions given under the Water Resources Act 1991 to either the Minister or the Ministers the expression the Secretary of State is used.

As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355. In relation to navigation, the Secretary of State concerned is in some cases the Secretary of State for Transport. For current responsibilities see the most recent edition of the Civil Service Yearbook.

2 See PARA 558.

3 As to the Water Services Regulation Authority see PARA 109.

4 See PARA 508.

5 See PARA 507.

6 As to the Environment Agency see PARA 17.

7 See the Water Resources Act 1991 s 15(2) (amended by the Environment Act 1995 s 120(1), Sch 22 paras 128, 130). As to the Agency's general duty with respect to the water industry see the Water Resources Act 1991 s 15(1); and PARA 17.

8 See the Environment Act 1995 s 40; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 74.

9 See PARA 16.



## **UPDATE**

### **15-18 Central Administration**

The Marine and Coastal Access Act 2009 Pt 1 (ss 1-40) establishes an independent body, the Marine Management Organisation which is to discharge a number of marine functions on behalf of the UK Government. For provision as to marine management generally see PARAS 30A-30E. As to marine enforcement officers see PARA 30F. For provision as to common enforcement powers see PARA 30G; as to licensing enforcement powers see PARA 30H; and as to common enforcement provisions see PARA 30I.

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## 16. Wales.

Under the arrangements originally made<sup>1</sup> for devolved government in Wales<sup>2</sup>, various ministerial functions relating to water, coast protection and flood defence were transferred, subject to prescribed exceptions and qualifications, to the National Assembly for Wales<sup>3</sup>, while certain other functions were made exercisable by the Secretary of State only after consultation with, or with the agreement of, the Assembly<sup>4</sup>. Following the re-organisation of devolved government in Wales under the Government of Wales Act 2006, the functions transferred to the Assembly are now exercisable by the Welsh Ministers, whilst any requirement as to consultation or agreement requires consultation with, or the agreement of, the Welsh Ministers<sup>5</sup>.

Her Majesty may by Order in Council: (1) provide for the transfer to the Welsh Ministers, the First Minister or the Counsel General of any function so far as exercisable by a Minister of the Crown in relation to Wales; (2) direct that any function so far as so exercisable is to be exercisable by the Welsh Ministers, the First Minister or the Counsel General concurrently with the Minister of the Crown; or (3) direct that any function so far as exercisable by a Minister of the Crown in relation to Wales is to be exercisable by the Minister of the Crown only with the agreement of, or after consultation with, the Welsh Ministers, the First Minister or the Counsel General<sup>6</sup>.

Where it appears to the Secretary of State that the exercise of a relevant function<sup>7</sup> (or the failure to exercise a relevant function) in any particular case might have a serious adverse impact on:

- 14 (a) water resources in England<sup>8</sup>;
- 15 (b) water supply in England<sup>9</sup>; or
- 16 (c) the quality of water in England<sup>10</sup>,

the Secretary of State may intervene in that case, so that he may in that case exercise the function<sup>11</sup> and the person or persons on whom the function is conferred or imposed may not in that case exercise the function<sup>12</sup>. An intervention by the Secretary of State in relation to a function is to be made by giving notice to the person or persons on whom it is conferred or imposed<sup>13</sup>. Where an intervention has been made in a case, the Secretary of State must, in addition to that notice, give notice to: (i) any person who has previously been given notice of any steps taken, or proposed to be taken, in the case<sup>14</sup>; (ii) the Environment Agency<sup>15</sup>, if concerned in the case<sup>16</sup>; and (iii) any water undertaker or sewerage undertaker<sup>17</sup> concerned in the case<sup>18</sup>.

1 le under the Government of Wales Act 1998.

2 'Wales' means the combined area of the counties which were created by the Local Government Act 1972 s 20 (as originally enacted) (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 5, 37), but subject to any alteration made under s 73 (consequential alteration of boundary following alteration of watercourse) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 90): Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 s 1(3), Sch 2 PARA 9). As to local government areas see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; and as to boundary changes see **LOCAL GOVERNMENT** vol 69 (2009) PARA 56 et seq.

For the purposes of the Government of Wales Act 2006 (see the text to note 5), 'Wales' includes the sea adjacent to Wales out as far as the seaward boundary of the territorial sea: s 158(1). The Secretary of State

may by order determine, or make provision for determining, for the purposes of this definition of 'Wales' any boundary between the parts of the sea which are to be treated as adjacent to Wales, and those which are not: s 158(3). For the purposes of this definition the boundary between those parts of the sea within the Severn and Dee Estuaries which are to be treated as adjacent to Wales and those which are not is, in each case, a line drawn between the co-ordinates set out in the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 3: art 6; Government of Wales Act 2006 Sch 11 para 26. An Order in Council transferring ministerial functions under the Government of Wales Act 2006 s 58 (see the text to note 6) may include any provision that may be included in an order under s 158(3): s 158(4). No order is to be made under s 158(3) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament: s 158(5). As to territorial waters see PARA 31. As to the Secretary of State see PARA 15 note 1. As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

3 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the National Assembly for Wales see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 5, Sch 2 (amended for these purposes by the Water Act 2003 s 100(3)).

5 See the Government of Wales Act 2006 s 162(1), Sch 11 para 30. 'Welsh Ministers' means the First Minister and the Welsh Ministers appointed under the Government of Wales Act 2006 s 48: see s 45(2). Where any function is transferred to the Welsh Ministers, or where the exercise of any function requires that they be consulted or their agreement, this is referred to in the specific paragraph or paragraphs dealing with that function in this title. As to the First Minister and the Welsh Ministers see the Government of Wales Act 2006 ss 46-48; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to devolved government in Wales generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the exercise of transferred functions and the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see Sch 11 paras 33-35 (in the case of functions transferred to the Assembly by Order in Council under the Government of Wales Act 1998 s 22) or the Government of Wales Act 2006 Sch 3 para 9 (in the case of functions transferred to the Welsh Ministers by Order in Council under s 58); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

6 See the Government of Wales Act 2006 s 58, Sch 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See also note 2.

7 'Relevant function' means: (1) a function conferred or imposed on any person by or under an Assembly Measure or Act of the Assembly; or (2) a function which is not so conferred or imposed but is exercisable by the Welsh Ministers, the First Minister or the Counsel General: Government of Wales Act 2006 s 152(3). 'Function' means power or duty: s 158(1). As to the meaning of 'person' see PARA 13 note 29. As to Assembly Measures and Acts of the Assembly see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 Government of Wales Act 2006 s 152(1)(a). As to the meaning of 'England' see PARA 19 note 8.

9 Government of Wales Act 2006 s 152(1)(b).

10 Government of Wales Act 2006 s 152(1)(c).

11 Government of Wales Act 2006 s 152(2)(a).

12 Government of Wales Act 2006 s 152(2)(b).

13 Government of Wales Act 2006 s 152(4). The notice: (1) must state the reason for the Secretary of State's intervention (s 152(5)(a)); (2) may make provision about the effect of any steps previously taken by the person or persons on whom the function is conferred or imposed (s 152(5)(b)); and (3) may extend the time for the taking of any steps by the Secretary of State or any other person (even if the time for taking them would otherwise have expired before the notice is given) (s 152(5)(c)).

14 Government of Wales Act 2006 s 152(6)(a).

15 As to the Environment Agency see PARA 17.

16 Government of Wales Act 2006 s 152(6)(b).

17 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

18 Government of Wales Act 2006 s 152(6)(c).

## UPDATE

### 15-18 Central Administration

The Marine and Coastal Access Act 2009 Pt 1 (ss 1-40) establishes an independent body, the Marine Management Organisation which is to discharge a number of marine functions on behalf of the UK Government. For provision as to marine management generally see PARAS 30A-30E. As to marine enforcement officers see PARA 30F. For provision as to common enforcement powers see PARA 30G; as to licensing enforcement powers see PARA 30H; and as to common enforcement provisions see PARA 30I.

## **16 Wales**

NOTE 2--Government of Wales Act 2006 s 158(3) substituted: Marine and Coastal Access Act 2009 s 43(3).

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## **17. The Environment Agency.**

The establishment, constitution and general powers, functions and duties of the Environment Agency are discussed in detail elsewhere in this work<sup>1</sup>. It is the duty of the Agency, in exercising any of its powers under any enactment<sup>2</sup>, to have particular regard to the duties imposed, by virtue of the provisions of Parts II to IV of the Water Industry Act 1991<sup>3</sup>, on any water undertaker or sewerage undertaker<sup>4</sup> which appears to the Agency to be or to be likely to be affected by the exercise of the power in question<sup>5</sup>.

The specific powers and duties of the Agency in relation to water are considered in detail as they arise in this title<sup>6</sup>.

1 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 68 et seq. In Wales, the Agency is known as Asiantaeth yr Amgylchedd Cymru: Environment Act 1995 s 1(1). Information as to the Agency and its work is available on the Environment Agency website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

2 As to the meaning of 'enactment' see PARA 14 note 31.

3 Ie by virtue of the Water Industry Act 1991 Pts II-IV (ss 6-141): see PARA 137 et seq; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 998 et seq.

4 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

5 Water Resources Act 1991 s 15(1) (amended by the Environment Act 1995 s 120, Sch 22 para 128).

6 See eg PARA 191 et seq.

## **UPDATE**

### **15-18 Central Administration**

The Marine and Coastal Access Act 2009 Pt 1 (ss 1-40) establishes an independent body, the Marine Management Organisation which is to discharge a number of marine functions on behalf of the UK Government. For provision as to marine management generally see PARAS 30A-30E. As to marine enforcement officers see PARA 30F. For provision as to common enforcement powers see PARA 30G; as to licensing enforcement powers see PARA 30H; and as to common enforcement provisions see PARA 30I.

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## **18. Regulatory arrangements for the water industry.**

The Water Services Regulation Authority<sup>1</sup>, known as 'Ofwat', is the regulatory authority for the purposes of the Water Industry Act 1991<sup>2</sup>. The Consumer Council for Water is established to represent the interests of consumers<sup>3</sup>. The Drinking Water Inspectorate has powers in relation to water quality and supply<sup>4</sup>.

The regulation of the water industry is discussed in detail below<sup>5</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 See the Water Industry Act 1991 s 1A; and PARA 109. Information as to the Authority and its work is available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

3 See PARA 115 et seq. Information as to the Council and its work is available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).

4 See PARA 126. Information as to the Inspectorate and its work is available on the Inspectorate's website at [www.dwi.gov.uk](http://www.dwi.gov.uk).

5 See PARA 109 et seq.

## **UPDATE**

### **15-18 Central Administration**

The Marine and Coastal Access Act 2009 Pt 1 (ss 1-40) establishes an independent body, the Marine Management Organisation which is to discharge a number of marine functions on behalf of the UK Government. For provision as to marine management generally see PARAS 30A-30E. As to marine enforcement officers see PARA 30F. For provision as to common enforcement powers see PARA 30G; as to licensing enforcement powers see PARA 30H; and as to common enforcement provisions see PARA 30I.

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#### **(iv) Other Relevant Provision**

##### **19. Powers to apply water legislation to the Isles of Scilly.**

Subject to the provisions of any order made by the Secretary of State<sup>1</sup>, the Water Industry Act 1991, the Water Resources Act 1991 and the Land Drainage Act 1991 do not apply in relation to the Isles of Scilly<sup>2</sup>. The Secretary of State may, after consultation with the Council of the Isles of Scilly<sup>3</sup>, by order<sup>4</sup> provide for the application of any provisions of those Acts to the Isles of Scilly; and any such order may provide for the application of those provisions to those Isles with such modifications as may be specified in the order<sup>5</sup>.

Subject to the provisions of any order made by the Secretary of State, nothing in the Water Act 1989 requires or authorises any function, duty or power to be carried out, performed or exercised in relation to the Isles of Scilly by the Environment Agency<sup>6</sup>, a water undertaker or sewerage undertaker<sup>7</sup>; and references in that Act to England and Wales<sup>8</sup> do not include references to those Isles<sup>9</sup>. The Secretary of State may, on the application of the Council of the Isles of Scilly, by order<sup>10</sup> make provision with respect to the carrying out in those Isles of functions falling under the Act to be carried out in relation to other parts of England and Wales by the Environment Agency, by a water undertaker or by a sewerage undertaker; and, without prejudice to the generality of that power, such an order may apply any provision of the Act in relation to the Isles of Scilly with or without modifications<sup>11</sup>.

Subject to certain exceptions<sup>12</sup>, nothing in the Environment Act 1995 requires or authorises any function, duty or power to be carried out, performed or exercised in relation to the Isles of Scilly by the Environment Agency unless an order so provides<sup>13</sup>. After consultation with the Council of the Isles of Scilly, the Secretary of State may make provision by order<sup>14</sup> with respect to the carrying out in the Isles of Scilly of functions<sup>15</sup> falling to be carried out in relation to other parts of England and Wales by the Agency<sup>16</sup>. Such an order may<sup>17</sup> apply any specified provision<sup>18</sup> in relation to the Isles of Scilly with or without modifications<sup>19</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Water Industry Act 1991 s 222(1); Water Resources Act 1991 s 224(1); Land Drainage Act 1991 s 75(1) (all substituted by the Environment Act 1995 s 118(4)-(6)). The Water Act 2003 ss 3, 4, 10 and 27 (see PARAS 216, 226, 263) have the same extent as they would have if they were contained in the Water Resources Act 1991, and the Water Resources Act 1991 s 224 (as so substituted) applies in relation to those provisions as it applies to the Water Resources Act 1991: Water Act 2003 s 105(12).

3 As to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

4 The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Water Industry Act 1991 s 222(4); Water Resources Act 1991 s 224(4); Land Drainage Act 1991 s 75(4) (all as substituted: see note 2). By virtue of the Water Consolidation (Consequential Provisions) Act 1991, the Isles of Scilly (Water and Sewerage) (Miscellaneous Provisions) Order 1990, SI 1990/524, has effect as if so made.

5 Water Industry Act 1991 s 222(2); Water Resources Act 1991 s 224(2); Land Drainage Act 1991 s 75(2) (all as substituted: see note 2). An order may also: (1) make different provision for different cases, including different provision in relation to different persons, circumstances or localities; and (2) contain such supplemental, consequential and transitional provision as the Secretary of State considers appropriate,

including provision saving provision repealed by or under any enactment: Water Industry Act 1991 s 222(3)(a), (b); Water Resources Act 1991 s 224(3)(a), (b); Land Drainage Act 1991 s 75(3)(a), (b) (all as so substituted). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'enactment' see PARA 14 note 31.

6 As to the Environment Agency see PARA 17.

7 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

8 'England' means, subject to any alteration of boundaries of local government areas, the area consisting of the counties established by the Local Government Act 1972 s 1 (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 5, 24), Greater London and the Isles of Scilly: Interpretation Act 1978 s 5, Sch 1. As to local government areas see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; and as to boundary changes see **LOCAL GOVERNMENT** vol 69 (2009) PARA 56 et seq. As to Greater London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 29. NB: references to 'England' in Acts passed before 1967 include references to Wales: see the Interpretation Act 1978 Sch 2 PARA 5(a). As to the meaning of 'Wales' see PARA 16 note 2.

9 Water Act 1989 s 193(1) (s 193(1), (2) amended by virtue of the Environment Act 1995 ss 2, 3).

10 The power of the Secretary of State to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Water Act 1989 s 193(3).

11 Water Act 1989 s 193(2) (as amended: see note 9). An order may also: (1) make different provision for different cases, including different provision in relation to different persons, circumstances or localities; and (2) contain such supplemental, consequential and transitional provision as the Secretary of State considers appropriate, including provision saving provision repealed by or under any enactment: Water Act 1989 s 193(3) (a), (b). The Isles of Scilly (Water and Sewerage) (Miscellaneous Provisions) Order 1990, SI 1990/524, has been made.

12 Ie subject to the Environment Act 1995 s 77 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526), ss 80 and 89 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 192) and the provisions of any order under s 117 (see the text and notes 13-19) or s 89: s 117(1).

13 Environment Act 1995 s 117(1). References in the other provisions of the Environment Act 1995, apart from Pt III (ss 61-79) (National Parks: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq) to England and Wales do not include reference to the Isles of Scilly: s 117(1).

14 The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Environment Act 1995 s 117(5).

15 Ie other than functions under or by virtue of the Environment Act 1995 Pt III (ss 61-79) or Pt IV (ss 80-91) (air quality: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 191 et seq): s 117(2).

16 Environment Act 1995 s 117(2). The Environment Act 1995 (Isles of Scilly) Order 1996, SI 1996/1030, and the Environmental Protection Act 1990 (Isles of Scilly) Order 2006, SI 2006/1381, have been made.

17 Ie without prejudice to the generality of the power conferred by the Environment Act 1995 s 117(2) (see the text to notes 14-16): s 117(3).

18 Ie any provision of the Environment Act 1995 except a provision contained in Pts III, IV: s 117(3).

19 Environment Act 1995 s 117(3). An order may: (1) make different provision for different cases, including different provision in relation to different persons, circumstances or localities; and (2) contain such supplemental, consequential and transitional provision as the Secretary of State considers appropriate, including provision saving provision repealed by or under any enactment: s 117(4).



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## **20. Application of water legislation to the Crown.**

The Water Industry Act 1991 and the Water Resources Act 1991<sup>1</sup>, with the exception of the flood defence provisions<sup>2</sup>, bind the Crown<sup>3</sup>, as does the Environment Act 1995<sup>4</sup>. No contravention<sup>5</sup> by the Crown of any provision made by or under those Acts makes the Crown criminally liable, but the High Court<sup>6</sup> may, on the application of the Environment Agency, declare unlawful any act or omission of the Crown which constitutes such a contravention<sup>7</sup>. Any provision made by or under those Acts, however, applies<sup>8</sup> to persons in the public service of the Crown as it applies to other persons<sup>9</sup>. If the Secretary of State<sup>10</sup> certifies or, in relation to Wales, the Welsh Ministers<sup>11</sup> certify that it appears to him or to them, as respects any Crown premises<sup>12</sup> and any powers of entry exercisable in relation to them specified in the certificate, that it is requisite or expedient that, in the interest of national security, the powers should not be exercisable in relation to those premises, those powers are not exercisable in relation to those premises<sup>13</sup>. Nothing in these provisions is to be taken as in any way affecting Her Majesty in her private capacity<sup>14</sup>.

Subject as otherwise expressly provided in the Land Drainage Act 1991, that Act and the flood defence provisions of the Water Resources Act 1991<sup>15</sup> apply to land belonging to Her Majesty in right of the Crown or the Duchy of Lancaster, to land belonging to the Duchy of Cornwall and to land belonging to a government department<sup>16</sup>. However, nothing in those provisions:

- 17 (1) authorises the compulsory acquisition of any land belonging to Her Majesty in right of the Crown or the Duchy of Lancaster, or of any land belonging to the Duchy of Cornwall or a government department<sup>17</sup>;
- 18 (2) operates as a grant (a) by or on behalf of Her Majesty as owner (whether in right of the Crown or of the Duchy of Lancaster) of any tidal lands<sup>18</sup>; or (b) by or on behalf of the Duchy of Cornwall as owner of any such lands<sup>19</sup>, of any estate or interest in or right over any of those lands or any part of them<sup>20</sup>;
- 19 (3) authorises any person to do any work on, over or under, or to use for any purpose, any tidal lands or any lands belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, to the Duchy of Cornwall, or to any government department, except with the consent of the owner of the land<sup>21</sup> or, in the case of tidal lands, of the owner of the land and of the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>22</sup>; and in accordance with the approved plans and sections and subject to the prescribed restrictions and conditions<sup>23</sup>; or
- 20 (4) confers any power of levying drainage rates in respect of tidal lands<sup>24</sup>.

Subject to the following provisions, the Reservoirs Act 1975 binds the Crown<sup>25</sup>. No contravention by the Crown of any provision made by or under the Act makes the Crown criminally liable; but the High Court may, on the application of the Environment Agency, declare unlawful any act or omission of the Crown which constitutes such a contravention<sup>26</sup>; and notwithstanding anything in the above provision, the provisions of the Act apply to persons in the public service of the Crown as they apply to other persons<sup>27</sup>. If the Secretary of State certifies or, in relation to Wales, the Welsh Ministers<sup>28</sup> certify that it appears to him or to them, as respects any Crown premises<sup>29</sup> and any power of entry exercisable in relation to them specified in the certificate, that it is requisite or expedient that, in the interests of national security, the powers should not be exercisable in relation to those premises, those powers are

not exercisable in relation to those premises<sup>30</sup>. Nothing in these provisions, however, is to be taken as in any way affecting Her Majesty in her private capacity<sup>31</sup>.

The provisions of the Coast Protection Act 1949 are binding on the Crown and apply in relation to any Crown land as they apply in relation to any other land<sup>32</sup>.

1 The Water Resources Act 1991 s 222 is substituted by the Environment Act 1995 Sch 21 para 2(1), (4), except for the purposes of the application of the substituted Water Resources Act 1991 s 222 to Pt II (ss 20-81) (see PARA 196 et seq) to which s 222 (as originally enacted; and amended by the Environment Act 1995 s 120(1), Sch 22 para 18) continues to apply until a day to be appointed: see the Environment Act 1995 (Commencement No 9 and Transitional Provisions) Order 1997, SI 1997/1626, art 2. At the date at which this volume states the law no such day had been appointed. For so long as the Water Resources Act 1991 s 222 (as substituted) does not apply to Pt II, s 222 as in force immediately before the substitution (see below) applies to (or in relation to) the Water Act 2003 ss 3, 4, and 10 (see PARAS 216, 226) as it applies to the Water Resources Act 1991 Pt II or, as the case may be, Pt II Ch 2 (ss 24-72): see the Water Act 2003 s 33.

In relation to the Water Resources Act 1991 Pt II (ss 20-81) the following provisions continue to apply: (1) the provisions of the Water Resources Act 1991 have effect in relation to land in which there is a Crown or Duchy interest as they have effect in relation to land in which there is no such interest: s 222(1) (as originally enacted). (2) Pt II Ch II (ss 24-72) (see PARA 214 et seq) and the related water resources provisions (as to the meaning of which see PARA 188 note 15) do not apply to anything done by or on behalf of the Crown, or to any land which is in the occupation of a government department or any other land in which there is a Crown or Duchy interest and which is occupied in right of that interest: s 222(2) (as originally enacted). (3) Nothing in the Act, as read with the other provisions of s 222 (as originally enacted), must be construed as conferring any power of levying drainage charges in respect of lands below the high-water mark of ordinary spring tides, or as authorising the Environment Agency to require the Crown to make any payment to the Agency in respect of any premises: s 222(3) (as originally enacted; and amended by the Environment Act 1995 s 120(1), Sch 22 para 18). (4) Subject to the Water Resources Act 1991 s 222(2), (3) above and to s 222(5) below, where a power is conferred in relation to land by or under any provision of the Act other than one of the flood defence provisions (as to the meaning of which see note 2) that power is exercisable in relation to any land in which there is a Crown or Duchy interest only with the consent of the appropriate authority, and a consent for these purposes may be given on such financial and other conditions as the appropriate authority giving the consent may consider appropriate (s 222(4) (as originally enacted)); but this provision does not require any consent to be given for the exercise of any power in relation to any land in which there is a Crown or Duchy interest to the extent that that power would be so exercisable apart from s 222(1) above, or for the purposes of any provision having effect by virtue of so much of s 168 and Sch 19 (see PARAS 455-459, 469, 686) as relates to the granting of authority for discharges of water (s 222(5) (as originally enacted)). (5) The Land Drainage Act 1991 s 74 (Crown application: see the text to notes 15-24), so far as it relates to land in which there is a Crown or Duchy interest, applies in relation to the flood defence provisions of the Water Resources Act 1991 as it applies in relation to that Act; but nothing in this provision affects any power conferred by the Water Resources Act 1991 for the purposes both of the Environment Agency's functions under those provisions and of other functions of the Agency: s 222(6) (as originally enacted; and amended by the Environment Act 1995 s 120(1), Sch 22 para 18). (6) The provisions of the Town and Country Planning Act 1990 s 293(3) (questions relating to Crown application: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 14) as to the determination of questions applies for the purposes of the Water Resources Act 1991 s 222: s 222(8) (as originally enacted). (7) Nothing in s 222 must be construed as requiring any provision of the Water Resources Act 1991 having effect otherwise than in relation to land to be construed as imposing any liability on the Crown to which the Crown would not be subject apart from that section: s 222(9) (as originally enacted).

As to the meaning of 'land' see PARA 14 note 21. As to the Environment Agency see PARA 17. 'Appropriate authority' has the same meaning as in the Town and Country Planning Act 1990 s 293 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 14); and 'Crown or Duchy interest' means an interest belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or belonging to a government department or held in trust for Her Majesty for the purposes of a government department: Water Resources Act 1991 s 222(7) (as originally enacted). As to the Crown see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 353; **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 1 et seq. As to Crown property see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 1 et seq. As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq. As to the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq.

2 The Land Drainage Act 1991 s 74 (Crown application: see the text to notes 15-24), so far as it relates to land in which there is a Crown or Duchy interest, applies in relation to the flood defence provisions of the Water Resources Act 1991 as it applies in relation to the Land Drainage Act 1991; but nothing in this provision affects any power conferred by the Water Resources Act 1991 for the purposes both of the Environment Agency's functions under those provisions and of other functions of the Agency: s 222(8) (as substituted: see note 1). Nothing in the Water Resources Act 1991, as read with the other provisions of s 222, must be construed as conferring any power of levying drainage charges in respect of lands below the high-water mark of ordinary

spring tides: s 222(7) (as so substituted). 'Crown or Duchy interest' means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or belonging to a government department or held in trust for Her Majesty for the purposes of a government department: s 222(9) (as so substituted); Water Industry Act 1991 s 221(7) (s 221 substituted by the Environment Act 1995 s 116, Sch 21 para 1).

'Flood defence provisions' means: (1) any of the provisions of the Water Resources Act 1991 Pt IV (ss 105-113); ss 133-141 (including Sch 15) (see PARAS 612-625); s 143 (see PARA 710); s 155 (see PARA 610); ss 165-167 (see PARAS 589-590, 596-597); s 180 (see PARA 604); ss 193, 194 (see PARA 574), Sch 25 para 5 (see PARA 605); (2) any of the provisions of Environment Act 1995 s 6(4) (general supervision of flood defence: see PARA 573), s 53 (inquiries and other hearings: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 89); and Sch 5 (membership and proceedings of regional and local flood defence committees: see PARA 561 et seq); and (3) any other provision of the Water Resources Act 1991 or the Environment Act 1995 so far as it relates to a provision falling within head (1) or head (2) above: Water Resources Act 1991 s 221(1) (definition substituted by the Environment Act 1995 Sch 22 para 177(8); amended by the Water Act 2003 ss 69(4), 101(2), Sch 9 Pt 3).

3 Water Industry Act 1991 s 221(1) (as substituted: see note 2); Water Resources Act 1991 s 222(1) (as substituted: see note 1). The Water Resources Act 1991 s 222 (as so substituted) applies in relation to the Water Act 2003 ss 3, 4, 10 (see PARAS 216, 226) as it applies in relation to the provisions of the Water Resources Act 1991: s 222(11) (s 222 as so substituted; s 222(11) added by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 13).

Until a day to be appointed the following provisions have effect: the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 214 et seq) and the related water resources provisions do not apply: (1) to anything done by a member of a visiting force in his capacity as a member of that force; or (2) to any land occupied by or for the purposes of a visiting force; and for these purposes, 'visiting force' means any such body, contingent or detachment of the forces of any country as is a visiting force for the purposes of any of the provisions of the Visiting Forces Act 1952 (see **ARMED FORCES** vol 2(2) (Reissue) PARA 140): Water Resources Act 1991 s 223(1), (2) (prospectively repealed by the Water Act 2003 ss 32, 101(2), Sch 9 Pt 1). At the date at which this volume states the law no such day had been appointed.

4 Environment Act 1995 s 115(1). Part III (ss 61-79) (National Parks: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq) and any amendments, repeals and revocations made by other provisions of the Environment Act 1995 (other than those made by Sch 21, which bind the Crown) bind the Crown to the extent that the enactments to which they relate bind the Crown: s 115(2).

5 'Contravention' includes a failure to comply, and cognate expressions must be construed accordingly: Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1). The term is not defined in the Environment Act 1995.

6 As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

7 Water Industry Act 1991 s 221(2) (as substituted: see note 2); Water Resources Act 1991 s 222(2) (as substituted: see note 1); Environment Act 1995 s 115(3). In relation to a contravention of provisions of the Water Industry Act 1991, such application may also be made by a water undertaker or a sewerage undertaker: s 221(2) (as so substituted). As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

8 Ie notwithstanding anything in the Water Industry Act 1991 s 221(2), the Water Resources Act 1991 s 222(2) or the Environment Act 1995 s 115(3): see the text to notes 5-7.

9 Water Industry Act 1991 s 221(3) (as substituted: see note 2); Water Resources Act 1991 s 222(3) (as substituted: see note 1); Environment Act 1995 s 115(4). As to the meaning of 'person' see PARA 13 note 29.

10 As to the Secretary of State see PARA 15 note 1.

11 Functions of the Secretary of State under the Water Industry Act 1991 s 221(4), the Water Resources Act 1991 s 222(4) and the Environment Act 1995 s 115(5), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales and are now exercisable by the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

12 In the Water Industry Act 1991 and the Water Resources Act 1991, 'Crown premises' means premises held by or on behalf of the Crown: s 222(9) (as substituted: see note 1); Water Industry Act 1991 s 221(7) (as substituted: see note 2). In the Environment Act 1995, 'Crown premises' means premises held or used by or on behalf of the Crown: see s 115(5).

13 Water Industry Act 1991 s 221(4) (as substituted: see note 2); Water Resources Act 1991 s 222(4) (as substituted: see note 1); Environment Act 1995 s 115(5). Subject to this, the powers conferred by the Water Industry Act 1991 ss 155, 159, 161(2), 167 (see PARA 453 et seq) and by the Water Resources Act 1991 ss 154, 156, 160, 162(3), 168 (see PARA 453 et seq) are exercisable in relation to land in which there is a Crown or Duchy interest only with the consent of the appropriate authority: Water Industry Act 1991 s 221(6); Water Resources Act 1991 s 222(5) (both as so substituted). 'Appropriate authority' has the same meaning as it has in the Town and Country Planning Act 1990 Pt XIII (ss 293-302) by virtue of s 293(2) (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 14); Water Industry Act 1991 s 221(7); Water Resources Act 1991 s 222(9) (both as so substituted). The provisions of the Town and Country Planning Act 1990 s 293(3) (questions relating to Crown application: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 14) as to the determination of questions apply for the purposes of the Water Industry Act 1991 s 221 and the Water Resources Act 1991 s 222: s 222(10), Water Industry Act 1991 s 221(8) (both as so substituted). As to powers of entry see further PARA 476 et seq.

14 See the Water Industry Act 1991 s 221(5) (as substituted: see note 2); Water Resources Act 1991 s 222(6) (as substituted: see note 1); Environment Act 1995 s 115(6). These provisions are to be construed as if the Crown Proceedings Act 1947 s 38(3) (interpretation of references to Her Majesty in her private capacity) were contained in the respective Acts: Water Industry Act 1991 s 221(5); Water Resources Act 1991 s 222(6) (both as so substituted); Environment Act 1995 s 115(6). Any reference to Her Majesty in her private capacity must be construed as including a reference to Her Majesty in right of her Duchy of Lancaster and to the Duke of Cornwall: Crown Proceedings Act 1947 s 38(3). As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq. As to the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq.

15 As to the application of the Land Drainage Act 1991 s 74 to the flood defence provisions of the Water Resources Act 1991 see note 2.

16 Land Drainage Act 1991 s 74(1). The Water Resources Act 1991 s 222 (see the text to notes 1-14) has effect in relation to the provisions of the Land Drainage Act 1991 so far as they confer powers on the Environment Agency as it applies in relation to the provisions of the Water Resources Act 1991: Land Drainage Act 1991 s 74(5) (amended by the Environment Act 1995 s 120, Sch 22 para 191).

17 Land Drainage Act 1991 s 74(3)(a). As to compulsory acquisition of land generally see **COMPULSORY ACQUISITION OF LAND**.

18 Land Drainage Act 1991 s 74(3)(b)(i). 'Tidal lands' means land below the high-water mark of ordinary spring tides, but for the purposes of head (3) in the text does not include any lands which are protected, by means of walls, embankments or otherwise, from the incursion of the tides: s 74(6).

19 Land Drainage Act 1991 s 74(3)(b)(ii).

20 Land Drainage Act 1991 s 74(3)(b).

21 For the purposes of the Land Drainage Act 1991 the following are deemed to be the owner of land to which s 74 applies by virtue of s 74, that is to say: (1) in the case of land belonging to Her Majesty in right of the Crown, the Crown Estate Commissioners or the Secretary of State or, in relation to Wales, the Welsh Ministers, according as the land is under the management of those Commissioners or the Secretary of State or the Welsh Ministers (s 74(2)(a)); (2) in the case of land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor of the Duchy (s 74(2)(b)); and (3) in the case of land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall or the possessor for the time being of the Duchy of Cornwall appoints (s 74(2)(c)). As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 280 et seq. The functions of the Secretary of State under s 74, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

22 Land Drainage Act 1991 s 74(3)(c)(i). See also note 18.

23 Land Drainage Act 1991 s 74(3)(c)(ii). 'Approved' and 'prescribed' mean, respectively, approved and prescribed by the Secretary of State or, in relation to Wales, the Welsh Ministers or, as the case may be, the owner of the lands, before the commencement of the work in question: s 74(6). Nothing in the Land Drainage Act 1991 s 74(3)(c) applies to work done in maintaining existing works on tidal lands, or on land not in occupation of Her Majesty, the Duke of Cornwall or a government department: s 74(4).

24 Land Drainage Act 1991 s 74(3)(d). As to drainage rates see PARA 627 et seq.

25 Reservoirs Act 1975 s 27A(1) (s 27A added by the Water Act 2003 s 80). The provisions of the Town and Country Planning Act 1990 s 293(3) (questions relating to Crown application: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 14) as to the determination of questions apply for the purposes of the Reservoirs Act 1975 s 27A: s 27A(8) (as so added).

26 Reservoirs Act 1975 s 27A(2) (as added: see note 25).

27 Reservoirs Act 1975 s 27A(3) (as added: see note 25).

28 Functions of the Secretary of State under the Reservoirs Act 1975, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales and are now exercisable by the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30.

29 'Crown premises' means premises held by or on behalf of the Crown: Reservoirs Act 1975 s 27A(7) (as added: see note 25).

30 Reservoirs Act 1975 s 27A(4) (as added: see note 25). Subject to s 27A(4), the power conferred by s 17 (see PARA 294) is exercisable in relation to land in which there is a Crown or Duchy interest only with the consent of the appropriate authority: s 27A(5) (as so added). 'Appropriate authority' has the same meaning as it has in the Town and Country Planning Act 1990 Pt XIII by virtue of s 293(2) (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 14); and 'Crown or Duchy interest' means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or belonging to a government department or held in trust for Her Majesty for the purposes of a government department: Reservoirs Act 1975 s 27A(7) (as so added).

31 Reservoirs Act 1975 s 27A(6) (as added: see note 25). Section 27A(6) is to be construed as if the Crown Proceedings Act 1947 s 38(3) (interpretation of references to Her Majesty in her private capacity: see note 14) were contained in the Reservoirs Act 1975: s 27A(6) (as so added).

32 See the Coast Protection Act 1949 s 32(1); and PARA 502.

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## **21. Exercise of power to make orders or regulations.**

The powers of the Secretary of State<sup>1</sup> or where applicable, in relation to Wales, of the Welsh Ministers<sup>2</sup>, to make regulations under the Water Industry Act 1991 and to make regulations under any provision of the Water Resources Act 1991, are exercisable by statutory instrument, subject in most instances<sup>3</sup>, in the case of those made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament<sup>4</sup>. The provisions of any regulations so made may include:

- 21 (1) provision for any duty or other requirement imposed by them on a water undertaker or sewerage undertaker<sup>5</sup> or on a licensed water supplier<sup>6</sup> to be enforceable<sup>7</sup> by the Secretary of State or, where applicable, the Welsh Ministers, by the Water Services Regulation Authority<sup>8</sup>, or by either of them<sup>9</sup>;
- 22 (2) provision, where such a duty or requirement is so enforceable by either of them, for enforcement by the Water Services Regulation Authority to be subject to such consent or authorisation as may be prescribed by the regulations<sup>10</sup>;
- 23 (3) provision in relation to the furnishing of any information or the making of any application under the regulations which makes corresponding provision to the statutory prohibitions<sup>11</sup> on the giving of false information<sup>12</sup>;
- 24 (4) provision for anything that may be prescribed by the regulations to be determined under them and for anything falling to be so determined to be determined by such persons<sup>13</sup>, in accordance with such procedure and by reference to such matters, and to the opinion of such persons, as may be so prescribed<sup>14</sup>;
- 25 (5) different provision for different cases, including different provision in relation to different persons, circumstances or localities<sup>15</sup>; and
- 26 (6) such supplemental, consequential and transitional provision as the Secretary of State considers or, where applicable, the Welsh Ministers consider appropriate<sup>16</sup>.

In addition, regulations made under the Water Industry Act 1991 may include provision:

- 27 (a) for the determination of questions of fact or of law which may arise in giving effect to them<sup>17</sup>;
- 28 (b) for regulating, otherwise than in relation to any court proceedings, any matters relating to the practice and procedure to be followed in connection with the determination of such questions<sup>18</sup>;
- 29 (c) as to the mode of proof of any matter<sup>19</sup>;
- 30 (d) as to the parties and their representation<sup>20</sup>; and
- 31 (e) for the right to appear before and be heard by the Secretary of State or, where applicable, the Welsh Ministers, the Water Services Regulation Authority and other authorities<sup>21</sup>,
- 32 (f) as to awarding costs or expenses of proceedings in any determination under them, including the amount of the costs or expenses and the enforcement of the awards<sup>22</sup>;

and any such regulations which prescribe a period within which things are to be done may provide for extending the period so prescribed<sup>23</sup>.

The powers to make regulations under the Land Drainage Act 1991 are discussed in a later part of this title<sup>24</sup>.

Any power under the Water Act 2003 to make any order or regulations is exercisable by statutory instrument<sup>25</sup>. A statutory instrument containing an order or regulations made by the Secretary of State<sup>26</sup> and which contains (or contain) provision amending or repealing any enactment<sup>27</sup>, may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament<sup>28</sup>. Otherwise, a statutory instrument containing any order or regulations made by the Secretary of State under the Act, other than a commencement order<sup>29</sup>, is subject to annulment in pursuance of a resolution of either House of Parliament<sup>30</sup>. Any power under the Water Act 2003 to make any order or regulations may be exercised:

- 33 (i) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case<sup>31</sup>;
- 34 (ii) so as to make, as respects the cases in relation to which it is exercised:
  - 1
    1. (A) the full provision to which the power extends or any less provision (whether by way of exception or otherwise)<sup>32</sup>;
    2. (B) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case or different provision as respects the same case or class of case for different purposes of the Act<sup>33</sup>;
    3. (C) any such provision either unconditionally or subject to any specified condition<sup>34</sup>.
  - 2

Where any such power is expressed to be exercisable for alternative purposes it may be exercised in relation to the same case for all or any of those purposes<sup>35</sup>. Any such power includes power to make such incidental, supplementary, consequential, saving or transitional provision, including provision amending, repealing or revoking enactments or provisions of subordinate legislation<sup>36</sup>, as the authority making the order or regulations considers to be expedient<sup>37</sup>, and to provide for a person to exercise a discretion in dealing with any matter<sup>38</sup>; and nothing in the Act is to be read as affecting the generality of this provision<sup>39</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 213 and the Water Resources Act 1991 s 219, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, so as to be exercisable, in the case of the Water Industry Act 1991 s 213, by the Assembly to the same extent as the powers, duties and other provisions to which that section applies were exercisable by the Assembly: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 ie except in the case of regulations:

5 (1) under the Water Industry Act 1991 s 8(1) or (2) (see PARA 139), s 17D(8) (see PARA 152) or s 105A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1004) (s 213(1) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 3 para 39(1), (3), Sch 8 paras 2, 49(1), (2));

6 (2) made by virtue of the Water Resources Act 1991 Sch 15 para 1(3) (see PARA 619) (s 219(1)).

On the occasion of the first exercise by the Secretary of State of the power to make regulations under each of the Water Industry Act 1991 ss 89 and 90 (see PARAS 411, 414), the instrument containing the regulations must not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 213(1A) (added by the Water Act 2003 s 58(1), (8)). As from a day to be appointed, the power of the Welsh Ministers to make regulations under the Water Industry Act 1991 s 89 is exercisable by statutory instrument: s 213(1B) (prospectively added by the Water Act 2003 s 58(1), (8)). At the date at which this volume states the law no such day had been appointed. As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 Water Industry Act 1991 s 213(1); Water Resources Act 1991 s 219(1). As to the power to make regulations under the flood defence provisions of the Water Resources Act 1991 see further PARA 583. As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516.

5 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

6 As to licensed water suppliers see PARA 152 et seq.

7 le under the Water Industry Act 1991 s 18: see PARA 163.

8 As to the Water Services Regulation Authority see PARA 109.

9 Water Industry Act 1991 s 213(2)(a) (s 213(2)(a), (b) amended by virtue of the Water Act 2003 s 36(2); Water Industry Act 1991 s 213(2)(a) further amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 49(1), (3)); Water Resources Act 1991 s 219(2)(a) (s 219(2) amended by the Environment Act 1995 s 120(1), (3), Sch 22 para 176, Sch 24; Water Resources Act 1991 s 219(2)(a), (b) further amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 28(1), (4)).

10 Water Industry Act 1991 s 213(2)(b); Water Resources Act 1991 s 219(2)(b) (both as amended: see note 9).

11 le corresponding to the Water Industry Act 1991 s 207 or the Water Resources Act 1991 s 206(1), (5): see PARA 184.

12 Water Industry Act 1991 s 213(2)(c); Water Resources Act 1991 s 219(2)(c) (as amended: see note 9).

13 As to the meaning of 'person' see PARA 13 note 29.

14 Water Industry Act 1991 s 213(2)(d); Water Resources Act 1991 s 219(2)(d) (as amended: see note 9).

15 Water Industry Act 1991 s 213(2)(e); Water Resources Act 1991 s 219(2)(e) (as amended: see note 9).

16 Water Industry Act 1991 s 213(2)(f); Water Resources Act 1991 s 219(2)(f) (as amended: see note 9). Except to the extent that they would do so apart from the Water Industry Act 1991 s 213, the power to make regulations under ss 113, 125, 126, 214 or Sch 8 (provisions relating to sewerage undertakers: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARAS 1050-1051) does not include the powers conferred by virtue of heads (1) to (4) in the text, and in the case of the power to make regulations under s 214, also does not include the powers conferred by virtue of heads (5) and (6) in the text: s 213(3).

17 Water Industry Act 1991 s 213(2A)(a) (s 213(2A), (2B) added by the Competition and Service (Utilities) Act 1992 s 52).

18 Water Industry Act 1991 s 213(2A)(b) (as added: see note 17).

19 Water Industry Act 1991 s 213(2A)(c) (as added: see note 17).

20 Water Industry Act 1991 s 213(2A)(d) (as added: see note 17).

21 Water Industry Act 1991 s 213(2A)(e) (as added: see note 17; and amended by virtue of the Water Act 2003 s 36(2)).

22 Water Industry Act 1991 s 213(2)(dd) (added by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 28).

23 Water Industry Act 1991 s 213(2B) (as added: see note 17).

24 See PARA 583.



25 Water Act 2003 s 104(1).

26 Ie under any provision of the Water Act 2003 except s 10 (see PARA 226) (but including s 105 (commencement etc)): see the Water Act 2003 s 104(2)(a). The functions of the Secretary of State under the Water Act 2003 are not transferred to the Welsh Ministers.

27 Water Act 2003 s 104(2)(b). As to the meaning of 'enactment' see PARA 14 note 31.

28 Water Act 2003 s 104(2).

29 Ie an order under the Water Act 2003 s 105.

30 Water Act 2003 s 104(3).

31 Water Act 2003 s 104(4)(a).

32 Water Act 2003 s 104(4)(b)(i).

33 Water Act 2003 s 104(4)(b)(ii).

34 Water Act 2003 s 104(4)(b)(iii).

35 Water Act 2003 s 104(5).

36 'Subordinate legislation' means Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act; and 'Act' includes a local and personal or private Act: Interpretation Act 1978 s 21(1), (2) applied by the Water Act 2003 s 104(7). This definition is also applied for the purposes of the Water Industry Act 1991 and the Water Resources Act 1991: see the Water Industry Act 1991 s 219(1), Water Resources Act 1991 221(1). As to subordinate legislation generally see **STATUTES** vol 44(1) (Reissue) PARAS 1499-1526. As to the classification of legislation see **PARLIAMENT** vol 34 (Reissue) PARA 728 et seq.

37 Water Act 2003 s 104(6)(a).

38 Water Act 2003 s 104(6)(b).

39 Water Act 2003 s 104(8).

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## **22. Service of documents and notices.**

Any document or notice<sup>1</sup> required or authorised by virtue of the Water Industry Act 1991, the Water Resources Act 1991, the Land Drainage Act 1991, the Statutory Water Companies Act 1991<sup>2</sup>, the Reservoirs Act 1975<sup>3</sup> or the Environment Act 1995 to be served<sup>4</sup> on any person may be served:

- 35 (1) by delivering it to him or by leaving it at his proper address<sup>5</sup> or by sending it by post to him at that address<sup>6</sup>; or
- 36 (2) if the person is a body corporate, by serving it in accordance with head (1) above on the secretary or clerk of that body<sup>7</sup>; or
- 37 (3) if the person is a partnership, by serving it in accordance with head (1) above on a partner or a person having the control or management of the partnership business<sup>8</sup>.

Where any document or notice is required to be served on the owner<sup>9</sup>, on a lessee or on the occupier of any premises<sup>10</sup> then if the name or address of that owner, lessee or occupier cannot after reasonable inquiry be ascertained, or, in the case of service on the occupier, if the premises appear to be, or are, unoccupied, that document or notice may be served either by leaving it in the hands of a person who is or appears to be resident or employed on the land or by leaving it conspicuously affixed to some building or object on the land<sup>11</sup>.

The above provisions do not apply to any document or notice in relation to the service of which provision is made by rules of court<sup>12</sup>.

Where, under any provision of the Water Resources Act 1991 relating to the abstraction and impounding of water<sup>13</sup>, a document is required to be served on an owner of land and the land is ecclesiastical property<sup>14</sup>, a copy of the document must be served on the Diocesan Board of Finance for the diocese in which the land is situated<sup>15</sup>.

Any notice or other document which is required or authorised by or under the Coast Protection Act 1949 to be served on any person may be served:

- 38 (a) by delivering it to that person, or leaving it or sending it in a prepaid letter to him at his usual or last-known address<sup>16</sup>; or
- 39 (b) in the case of the council of a county, county borough or district<sup>17</sup>, or an incorporated company or body, including the Environment Agency and an internal drainage board<sup>18</sup>, or a coast protection board<sup>19</sup>, local fisheries committee<sup>20</sup>, conservancy authority<sup>21</sup>, highway authority<sup>22</sup>, navigation authority<sup>23</sup>, harbour authority<sup>24</sup> or sea defence commissioners<sup>25</sup>, not being an incorporated body, by delivering it to its clerk or secretary at its registered or principal office, or by sending it in a prepaid letter addressed to him at that office<sup>26</sup>; or
- 40 (c) in the case of a notice or document to be served on any person as having any interest in land<sup>27</sup>, if it is not practicable after reasonable inquiry to ascertain his name and address, by addressing it to him by the description of the person having that interest in the land (naming it), and delivering it to some responsible person on the land or affixing it, or a copy of it, to some conspicuous object on the land<sup>28</sup>.

These provisions do not, however, apply to the service of certain notices<sup>29</sup> in connection with the acquisition of land<sup>30</sup>.

1 The provisions of the Environment Act 1995 s 123 apply to the service of 'notices' and of 'documents': see s 123(1), (7). The Water Industry Act 1991 s 216, the Water Resources Act 1991 s 220, the Land Drainage Act 1991 s 71, and the Statutory Water Companies Act 1991 s 15(4) are expressed to apply to the service of 'documents'. None of those Acts defines 'document'; but under those Acts and also under the Environment Act 1995, 'notice' means notice in writing: see the Water Industry Act 1991 s 219(1); the Water Resources Act 1991 s 221(1); the Land Drainage Act 1991 s 71(1); the Statutory Water Companies Act 1991 s 15(1); the Environment Act 1995 s 124(1). 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly: Interpretation Act 1978 s 5, Sch 1.

The Water Resources Act 1991 s 220 applies to documents required or authorised by virtue of any of the Water Act 2003 ss 3, 4, 10 (see PARAS 216, 226) to be served on any person as it applies to documents required or authorised to be served by virtue of the Water Resources Act 1991: Water Act 2003 s 33(4). As to the meaning of 'person' see PARA 13 note 29.

2 The Water Industry Act 1991 s 216 applies in relation to the service of any document by virtue of the Statutory Water Companies Act 1991 as it applies in relation to the service of any document by virtue of the Water Industry Act 1991: Statutory Water Companies Act 1991 s 15(4).

3 The Environment Act 1995 s 123 applies to any document authorised or required by virtue of any provision of the Reservoirs Act 1975 to be served or given by the Environment Agency as if it were authorised or required to be served or given by or under the Environment Act 1995: Reservoirs Act 1975 s 22A (added by the Water Act 2003 s 76(2)). As to the Environment Agency see PARA 17.

4 In the Environment Act 1995 s 123 'serve' must be construed as such whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used: s 123(1), (8).

5 For these purposes, and the purposes of the Interpretation Act 1978 s 7 (service of documents by post: see below) in its application to these provisions, the proper address of any person on whom any such document or notice is to be served is his last-known address, except that: (1) in the case of a body corporate or its secretary or clerk, it is the address of the registered or principal office of that body; (2) in the case of a partnership or person having the control or the management of the partnership business, it is the address of the principal office of the partnership; and for these purposes the principal office of a company registered outside the United Kingdom or of a partnership carrying business outside the United Kingdom is its principal office within the United Kingdom: Water Industry Act 1991 s 216(2); Water Resources Act 1991 s 220(2); Land Drainage Act 1991 s 71(3); Environment Act 1995 s 123(3). If a person to be served with any document or notice by another has specified to that other an address within the United Kingdom other than his proper address as so determined as the one at which he or someone on his behalf will accept documents or notices of the same description as that document or notice, that address is also to be treated as his proper address for these purposes and for the purposes of the Interpretation Act 1978 s 7 in its application thereto: Water Industry Act 1991 s 216(3); Water Resources Act 1991 s 220(3); Land Drainage Act 1991 s 71(4); Environment Act 1995 s 123(4). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Isle of Man nor the Channel Islands are within the United Kingdom. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the registered office of a company see **COMPANIES** vol 14 (2009) PARA 129.

Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: Interpretation Act 1978 s 7. See further **STATUTES** vol 44(1) (Reissue) PARA 1388. As to the meaning of 'Act' see PARA 21 note 36. A requirement to send a document by post is not confined to sending it by the Post Office postal system: see the Postal Services Act 2000 s 127(4), Sch 8 Pt 1; and **POST OFFICE**.

6 Water Industry Act 1991 s 216(1)(a); Water Resources Act 1991 s 220(1)(a); Land Drainage Act 1991 s 71(2)(a); Environment Act 1995 s 123(1).

7 Water Industry Act 1991 s 216(1)(b); Water Resources Act 1991 s 220(1)(b); Land Drainage Act 1991 s 71(2)(b); and see the Environment Act 1995 s 123(2)(a).

8 Water Industry Act 1991 s 216(1)(c); Water Resources Act 1991 s 220(1)(c); Land Drainage Act 1991 s 71(2)(c); and see the Environment Act 1995 s 123(2)(b).

9 For the purposes of the Water Industry Act 1991 and the Water Resources Act 1991, 'owner', in relation to any premises, means the person who: (1) is for the time being receiving the rack rent of the premises, whether on his own account or as agent or as trustee for another person; or (2) would receive the rack rent if the premises were let at a rack rent, and cognate expressions are to be construed accordingly: Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1).

10 For the purposes of the Environment Act 1995 s 123, 'premises' includes any land, vehicle, vessel or mobile plant: s 123(8). As to the meaning of 'land' see PARA 14 note 21.

11 Water Industry Act 1991 s 216(4); Water Resources Act 1991 s 220(4); Land Drainage Act 1991 s 71(5); and see the Environment Act 1995 s 123(5) (which refers to a person resident or employed, and a building or object, on the premises). To prove good service in this case it is necessary to adduce evidence of reasonable inquiry: *R v Mead* [1898] 1 QB 110, DC.

12 Water Industry Act 1991 s 216(5); Water Resources Act 1991 s 220(5); Land Drainage Act 1991 s 71(6); Environment Act 1995 s 123(6).

13 In the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq.

14 For these purposes, 'ecclesiastical property' means land which: (1) belongs to an ecclesiastical benefice of the Church of England; (2) is or forms part of a church subject to the jurisdiction of the bishop of any diocese of the Church of England or the site of a church so subject; or (3) is or forms part of a burial ground so subject: Water Resources Act 1991 s 67(8). As to the Church of England see **ECCLESIASTICAL LAW** vol 14 PARA 345 et seq.

15 Water Resources Act 1991 s 67(7) (amended by the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30(a)). As to Diocesan Boards of Finance see **ECCLESIASTICAL LAW** vol 14 PARA 517 et seq.

16 Coast Protection Act 1949 s 45(1)(a).

17 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

18 As to internal drainage boards see PARA 569 et seq.

19 As to coast protection boards see PARA 508 et seq.

20 As to the meaning of 'local fisheries committee' see PARA 505 note 9.

21 As to the meaning of 'conservancy authority' see PARA 505 note 9.

22 As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

23 As to the meaning of 'navigation authority' see PARA 505 note 9.

24 As to the meaning of 'harbour authority' see PARA 505 note 9.

25 As to the meaning of 'sea defence commissioners' see PARA 505 note 9.

26 Coast Protection Act 1949 s 45(1)(b) (amended by the Local Government Act 1972 s 272(1), Sch 30; the Water Act 1989 s 190(1), Sch 25 para 11(6); the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(5); and SI 1996/593).

27 As to the meaning of 'land' for these purposes see PARA 502 note 3.

28 Coast Protection Act 1949 s 45(1)(c).

29 In any notice required or authorised to be served under the Acquisition of Land Act 1981 as applied by or under the Coast Protection Act 1949 to the compulsory purchase of land by a coast protection authority or to the creation of such rights as are mentioned in s 27 (see PARA 520): s 45(2); Interpretation Act 1978 s 17(2)(a).

30 Coast Protection Act 1949 s 45(2).

## UPDATE

## 22 Service of documents and notices

NOTE 1--Statutory Water Companies Act 1991 s 15(1) amended: SI 2009/1941.

TEXT AND NOTE 26--Coast Protection Act 1949 s 45(1)(b) further amended: Marine and Coastal Access Act 2009 Sch 14 para 3 (not yet in force).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(iv) Other Relevant Provision/23. Procedures for awarding supply and works contracts relating to water.

### **23. Procedures for awarding supply and works contracts relating to water.**

Under European Community law, member states are required to coordinate the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>1</sup>, and to coordinate the laws, regulations and administrative provisions relating to the application of Community rules in respect thereof<sup>2</sup>. In England and Wales<sup>3</sup>, the Utilities Contracts Regulations 2006 have been made for the purpose of implementing these requirements<sup>4</sup>. The regulations specify the procedures to be followed in relation to the award of supply contracts, works contracts and services contracts<sup>5</sup> by utilities for the purpose of carrying out activities in, inter alia, the water sector, and provide remedies for breaches of the regulations<sup>6</sup>. The utilities affected include:

- 41 (1) a company holding an appointment as a water undertaker or a sewerage undertaker<sup>7</sup> under the Water Industry Act 1991 in relation to:
- 3
4. (a) the provision or operation of a fixed network which provides or will provide a service to the public in connection with the production, transport or distribution of drinking water;
5. (b) hydraulic engineering, irrigation or land drainage, but only if more than 20 per cent of the total volume of water made available by such activity is intended for the supply of drinking water;
6. (c) the disposal or treatment of sewage<sup>8</sup>;
- 4
- 42 (2) a relevant person not specified in head (3) below, in relation to the supply of drinking water to a network referred to in head (1)(a) above<sup>9</sup>;
- 43 (3) a relevant person other than a contracting authority who produces drinking water because its consumption is necessary for the purpose of carrying out an activity not specified in heads (1) or (2) above and who supplies only the excess to a network which is referred to in head (1)(a) above, in relation to the supply of drinking water to such a network but only if the drinking water supplied in the period of 36 months<sup>10</sup> ending at the relevant time has exceeded 30 per cent of the total produced by the utility in that period<sup>11</sup>.

A number of contracts are excluded or exempted from the application of the regulations<sup>12</sup>, and, in any event, the value of the contract must exceed the specified threshold for the type of contract in question<sup>13</sup>.

Detailed provision is made as to the laying down of technical specifications<sup>14</sup>, the procedures to be followed in letting a contract<sup>15</sup>, the qualification and selection of bidders<sup>16</sup>, and awarding a contract<sup>17</sup>. When the regulations apply, a utility must not treat a person<sup>18</sup> who is not a national of a relevant state<sup>19</sup> and established in a relevant state more favourably than one who is<sup>20</sup>, must treat economic operators<sup>21</sup> equally and in a non-discriminatory way, and act in a transparent way<sup>22</sup>.

The obligation on a utility to comply with the provisions of the regulations is a duty owed to an economic operator a breach of which is actionable in the High Court by any economic operator which, in consequence suffers, or risks suffering, loss or damage<sup>23</sup>.

1 See European Parliament and EC Council Directive 2004/17 (OJ L134, 30.4.2004, p 1) coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (amended by European Commission Regulation 1874/2004 (OJ L326, 29.10.2004, p 17); European Commission Directive 2005/51 (OJ L257, 1.10.2005, p 127); European Commission Regulation 2083/2005 (OJ L333, 20.12.2005, p 28); EC Council Directive 2006/97 (OJ L363, 20.12.2006, p 107); European Commission Regulation 1422/2007 (OJ L317, 5.12.2007, p 34); European Commission Regulation 213/2008 (OJ L74, 15.3.2008, p 1)).

2 See EC Council Directive 92/13 (OJ L76, 23.3.1992, p 14) coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (amended by the European Act concerning the conditions of accession of Norway, Austria, Finland and Sweden (OJ C241, 29.8.1994, p 228); the European Act concerning the conditions of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic (OJ L236, 23.9.2003, p 70); EC Council Directive 2006/97 (OJ L363, 20.12.2006, p 107); European Parliament and EC Council Directive 2007/66 (OJ L335, 20.12.2007, p 31)).

3 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

4 Ie the Utilities Contracts Regulations 2006, SI 2006/6.

5 As to the meanings of 'supply contract', 'works contract' and 'services contract' see the Utilities Contracts Regulations 2006, SI 2006/6, reg 2, Schs 2, 3.

6 As to water supply generally see PARA 317 et seq. As to public works contracts generally, and for cases relating to the letting of contracts subject to the European Community law relating to public procurement, see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 22 et seq.

7 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

8 Utilities Contracts Regulations 2006, SI 2006/6, reg 3, Sch 1 Pt A.

9 See the Utilities Contracts Regulations 2006, SI 2006/6, reg 3, Sch 1 Pt B.

10 'Month' means calendar month: Interpretation Act 1978 s 5, Sch 1.

11 See the Utilities Contracts Regulations 2006, SI 2006/6, reg 3, Sch 1 Pt C.

12 See the Utilities Contracts Regulations 2006, SI 2006/6, regs 5-10.

13 See the Utilities Contracts Regulations 2006, SI 2006/6, reg 11.

14 See the Utilities Contracts Regulations 2006, SI 2006/6, reg 12.

15 See the Utilities Contracts Regulations 2006, SI 2006/6, regs 13-22.

16 See the Utilities Contracts Regulations 2006, SI 2006/6, regs 23-29.

17 See the Utilities Contracts Regulations 2006, SI 2006/6, regs 30-33.

18 As to the meaning of 'person' see PARA 13 note 29.

19 A 'relevant state' is a member state and Iceland, Liechtenstein and Norway: see the Utilities Contracts Regulations 2006, SI 2006/6, reg 4(4), Sch 4 (amended by SI 2007/3542). As to the meaning of 'member state' see the Interpretation Act 1978 s 5, Sch 1; European Communities Act 1972 s 1(2), Sch 1 Pt II.

20 Utilities Contracts Regulations 2006, SI 2006/6, reg 4(2).

21 'Economic operator' means a contractor, a supplier or a services provider: Utilities Contracts Regulations 2006, SI 2006/6, reg 4(1).

22 Utilities Contracts Regulations 2006, SI 2006/6, reg 4(3).

23 See the Utilities Contracts Regulations 2006, SI 2006/6, reg 45. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

**UPDATE**

**23 Procedures for awarding supply and works contracts relating to water**

NOTE 8--Directive 2004/17 further amended: European Parliament and EC Council Directive 2009/81 (OJ L216, 20.8.2009, p 76).



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(iv) Other Relevant Provision/24. Nationally significant infrastructure projects.

## **24. Nationally significant infrastructure projects.**

As from a day to be appointed<sup>1</sup>, the Planning Act 2008 creates a new system of development consent for development which is or forms part of a nationally significant infrastructure project<sup>2</sup>. 'Nationally significant infrastructure project' means a project which consists of any of the statutory descriptions of relevant projects in the fields of energy, transport, water, waste water and waste<sup>3</sup>, and includes the construction<sup>4</sup> or alteration<sup>5</sup> of a dam or reservoir<sup>6</sup>, and development relating to the transfer of water resources<sup>7</sup>.

These provisions are covered in detail elsewhere in this work<sup>8</sup>.

1 As to the commencement of the Planning Act 2008 see s 241; and **TOWN AND COUNTRY PLANNING**. At the date at which this volume states the law no day had been appointed for the commencement of the provisions of the Act referred to below.

2 See the Planning Act 2008 Pts 4-7 (ss 31-159).

3 See the Planning Act 2008 s 14.

4 The construction of a dam or reservoir is within the Planning Act 2008 s 14(1)(m) only if the dam or reservoir (when constructed) will be in England, the construction will be carried out by one or more water undertakers, and the volume of water to be held back by the dam or stored in the reservoir is expected to exceed 10 million cubic metres: s 27(1). As to the meaning of 'England' see PARA 19 note 8. 'Water undertaker' means a company appointed as a water undertaker under the Water Industry Act 1991: Planning Act 2008 s 27(3). As to the appointment of water undertakers see PARA 137 et seq.

5 The alteration of a dam or reservoir is within the Planning Act 2008 s 14(1)(m) only if the dam or reservoir is in England, the alteration will be carried out by one or more water undertakers, and the additional volume of water to be held back by the dam or stored in the reservoir as a result of the alteration is expected to exceed 10 million cubic metres: s 27(2).

6 See the Planning Act 2008 s 14(1)(m). As to reservoirs generally see PARA 277 et seq.

7 See the Planning Act 2008 s 14(1)(n). Development relating to the transfer of water resources is within s 14(1)(n) only if: (1) the development will be carried out in England by one or more water undertakers; (2) the volume of water to be transferred as a result of the development is expected to exceed 100 million cubic metres per year; (3) the development will enable the transfer of water resources (a) between river basins in England; (b) between water undertakers' areas in England; or (c) between a river basin in England and a water undertaker's area in England; and (4) the development does not relate to the transfer of drinking water: s 28(1). 'River basin' means an area of land drained by a river and its tributaries; 'water undertaker' means a company appointed as a water undertaker under the Water Industry Act 1991; and 'water undertaker's area' means the area for which a water undertaker is appointed under that Act: Planning Act 2008 s 28(2). As to the management of water resources see PARA 187 et seq. As to water undertakers areas see PARA 318.

8 See **TOWN AND COUNTRY PLANNING**.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(v) Pollution of Water/A. EUROPEAN LEGISLATION/25. Control of pollution under European Community legislation.

## **(v) Pollution of Water**

### **A. EUROPEAN LEGISLATION**

#### **25. Control of pollution under European Community legislation.**

The control of pollution of water is covered in detail elsewhere in this work<sup>1</sup>.

European Community legislation is of increasing importance in relation to the control of pollution of water. Of particular relevance are the Aquatic Environment Directive dealing with the discharge of certain dangerous substances into the aquatic environment<sup>2</sup>, the Urban Waste Water Treatment Directive dealing with urban waste-water treatment<sup>3</sup>, the Freshwater Fish Life Directive dealing with the quality of fresh waters in order to support fish life<sup>4</sup>, the Shellfish Waters Directive dealing with the quality of shellfish waters<sup>5</sup>, the Groundwater Directives dealing with the protection of ground water against pollution<sup>6</sup>, the Bathing Water Directive dealing with the quality of bathing waters<sup>7</sup>, and the Nitrates Directive dealing with the protection of waters against pollution caused by nitrates from agricultural sources<sup>8</sup>.

The Secretary of State<sup>9</sup> has power to provide by regulations<sup>10</sup> that the water pollution provisions<sup>11</sup> of the Water Resources Act 1991 have effect with such modifications<sup>12</sup> as may be prescribed by the regulations for the purpose of enabling Her Majesty's government in the United Kingdom<sup>13</sup> to give effect to any Community obligations<sup>14</sup> or to any international agreement to which the United Kingdom is for the time being a party<sup>15</sup>.

1 As to the control of pollution of water see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23.

2 Ie European Parliament and EC Council Directive 2006/11 (OJ L064, 04.03.2006, p 52) on pollution caused by certain dangerous substances discharged into the aquatic environment: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 24. In addition to the control of pollution of waters by the virtue of the Aquatic Environment Directive, there are a number of Directives concerned with specific substances aimed at specific types of industry: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 25.

3 Ie Council Directive 91/271 (OJ L135, 30.5.1991, p 40) concerning urban waste-water treatment: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 30.

4 Ie European Parliament and EC Council Directive 2006/44 (OJ L264, 25.9.2006, p 20) on the quality of fresh waters needing protection or improvement in order to support fish life: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 26.

5 Ie European Parliament and EC Council Directive 2006/113 (OJ L376, 27.12.2006, p 14) on the quality required of shellfish waters: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 27.

6 Ie EC Council Directive 80/68 (OJ L20, 26.01.80, p 43) on the protection of ground water against pollution caused by certain dangerous substances; and European Parliament and EC Council Directive 2006/118 (OJ L372, 27.12.2006, p 19) on the protection of groundwater against pollution and deterioration: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 28.

7 Ie European Parliament and EC Council Directive 2006/7 (OJ L64, 4.3.2006, p 37) concerning the management of bathing water quality: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 29.

8 le EC Council Directive 91/676 (OJ L375, 31.12.91, p 01) concerning the protection of waters against pollution caused by nitrates from agricultural sources: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 31.

9 As to the Secretary of State see PARA 15 note 1.

10 As to the making of regulations see PARA 21.

11 As to the meaning of 'water pollution provisions' see PARA 479 note 16.

12 As to the meaning of 'modifications' see PARA 141 note 20.

13 As to the meaning of 'United Kingdom' see PARA 22 note 5.

14 As to the meaning of 'Community obligation' see the European Communities Act 1972 s 1, Sch 1 Pt II; Interpretation Act 1978 s 5, Sch 1.

15 Water Resources Act 1991 s 102. The following regulations have been made: the Surface Waters (Dangerous Substances) (Classification) Regulations 1992, SI 1992/337; the Surface Waters (Abstraction for Drinking Water) (Classification) Regulations 1996, SI 1996/3001; the Surface Waters (Fishlife) (Classification) Regulations 1997, SI 1997/1331; the Surface Waters (Shellfish) (Classification) Regulations 1997, SI 1997/1332; the Surface Waters (Dangerous Substances) (Classification) Regulations 1997, SI 1997/2560; the Surface Waters (Dangerous Substances) (Classification) Regulations 1998, SI 1998/389; the Bathing Waters (Classification) (England) Regulations 2003, SI 2003/1238. In addition, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), the Surface Waters (Dangerous Substances) (Classification) Regulations 1989, SI 1989/2286, have effect as if so made.

## **UPDATE**

### **25 Control of pollution under European Community legislation**

NOTE 15--SI 1997/1331, SI 1997/1332 amended: SI 2009/1264.

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## **B. DOMESTIC LEGISLATION**

### **(A) IN GENERAL**

#### **26. Legislation to prevent pollution.**

The control of pollution of water is covered in detail elsewhere in this work<sup>1</sup>.

The principal Act concerned with the control of pollution of the water environment is the Water Resources Act 1991<sup>2</sup>. Numerous other enactments contain provision prohibiting or controlling pollution. On a general level, the Pollution Prevention and Control Act 1999 makes provision for the implementation of a system of integrated pollution prevention and control, the regulation of activities which are capable of causing any environmental pollution, and the prevention or control of emissions capable of causing any such pollution<sup>3</sup>. Other legislation contains many provisions relating to pollution whether caused by particular things or materials or derived from particular sources, such as the unauthorised or harmful deposit of waste, agricultural chemicals, deposits at sea, the manufacture of gas, radioactive waste, discharges of oil from land, and escapes from pipelines, or affecting particular places, such as the countryside, fisheries and harbours, or affecting the public water supply<sup>4</sup>. Also of relevance is the legislation directed to the abatement of public nuisances<sup>5</sup>, that regulating contaminated land<sup>6</sup>, and that relating to public health<sup>7</sup>.

1 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23.

2 See the Water Resources Act 1991 Pt III (ss 82-104); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 289 et seq.

3 See the Pollution Prevention and Control Act 1999 s 1; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 186.

4 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 334 et seq.

5 As to statutory nuisances see the Environmental Protection Act 1990 ss 79-84; and **NUISANCE** vol 78 (2010) PARAS 115, 155-161.

6 See the Environmental Protection Act 1990 ss 78A-78YC; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 761 et seq.

7 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 58 et seq.

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## (B) THE

### 27. Quality objectives.

The Water Resources Act 1991 makes provision for the control of pollution of water resources<sup>1</sup>. The Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> may prescribe a system for the classification of the quality of controlled waters<sup>4</sup> by reference to one or more of the following criteria: (1) general requirements as to the purposes for which the waters to which the classification is applied are to be suitable; (2) specific requirements as to the substances that are to be present in or absent from the water and as to the concentrations of substances which are or are required to be present in the water; (3) specific requirements as to other characteristics of those waters<sup>5</sup>. For the purpose of maintaining and improving the quality of such waters the Secretary of State or, as the case may be, the Welsh Ministers may, by serving a notice on the Environment Agency<sup>6</sup>, establish the water quality objectives for any waters which are, or are included in, waters of a prescribed description<sup>7</sup>. Duties are imposed on the Secretary of State, the Welsh Ministers and the Agency to exercise powers conferred on them by the Act in relation to water pollution so as to achieve water quality objectives<sup>8</sup>.

1 See the Water Resources Act 1991 Pt III Ch 1 ss 82-84; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330 et seq.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 ss 82-84, so far as exercisable in relation to Wales (except in the case of s 82 so far as exercisable in relation to those parts of Wales which are within the catchment areas of the rivers Dee, Wye and Severn) were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to controlled waters see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 289.

5 See the Water Resources Act 1991 s 82; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330.

6 As to the Environment Agency see PARA 17.

7 See the Water Resources Act 1991 s 83; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 331.

8 See the Water Resources Act 1991 s 84; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 332.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1. INTRODUCTION/(2) LEGISLATION AND ADMINISTRATION/(v) Pollution of Water/B. DOMESTIC LEGISLATION/(B) The Water Resources Act 1991/28. Pollution offences.

## **28. Pollution offences.**

The Water Resources Act 1991 makes it an offence to pollute controlled waters, and to interfere with river beds or cut vegetation in inland waters, subject to certain defences<sup>1</sup>. Provision is made for the Environment Agency<sup>2</sup> to grant consents authorising discharges, deposits and other activities in the water environment, and to enforce conditions to such consents<sup>3</sup>.

1 See the Water Resources Act 1991 ss 85-90; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 291 et seq.

2 As to the Environment Agency see PARA 17.

3 See the Water Resources Act 1991 ss 88(2), 90(1), 90A, 90B, 91, Sch 10; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 299 et seq.

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## 29. Powers to prevent and control pollution.

The Water Resources Act 1991 contains powers to prevent and control pollution of water.

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may make regulations governing the storage of matter which would pollute waters if it entered them<sup>3</sup>. and may establish water protection zones within which specified activities capable of giving rise to pollution may be prohibited or restricted<sup>4</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may designate areas of land as nitrate sensitive areas for the purpose of preventing or controlling the entry of nitrate into controlled waters<sup>5</sup>; and also have powers to make provision as to nitrate vulnerable areas<sup>6</sup>. The Secretary of State and the Welsh Ministers may approve codes of good agricultural practice issued for the purpose of giving guidance in respect of potentially polluting activities with the aim of avoiding or minimising the pollution of any waters<sup>7</sup>.

The Environment Agency<sup>8</sup> has powers to carry out certain anti-pollution works and operations and to deal with foul water and pollution<sup>9</sup>. The Agency must maintain registers containing prescribed information regarding pollution control and has other powers and duties relating to the collection and giving of information<sup>10</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 ss 92-94, 97 and Schs 11, 12, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, save that functions under s 92 were transferred to the Assembly only in relation to those parts of Wales which are outside the catchment areas of the rivers Dee, Wye and Severn and in relation to those parts of Wales which are within those catchment areas it was directed that the functions under s 92 were to be exercisable by the Assembly concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 See the Water Resources Act 1991 s 92; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 313-315.

4 See the Water Resources Act 1991 s 93, Sch 11; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 316, 317.

5 See the Water Resources Act 1991 s 94, Sch 12.

6 See the Protection of Water Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996, SI 1996/888; the Nitrate Pollution Prevention Regulations 2008, SI 2008/2349; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 318, 319.

7 See the Water Resources Act 1991 s 97; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 320.

8 As to the Environment Agency see PARA 17.

9 See the Water Resources Act 1991 ss 161, 161A-161D, 162; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 321-329.

10 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 343-346.



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### **C. COMMON LAW**

#### **30. Pollution at common law.**

The common law relating to water pollution is covered in detail elsewhere in this work<sup>1</sup>.

The common law meaning of 'pollution' is the doing of something which changes the natural qualities or properties of water, whether chemically or in its temperature or otherwise<sup>2</sup>. Any interference with the natural quantity or quality of the water may be actionable at common law as an infringement of proprietary rights, such as riparian rights<sup>3</sup> or a right to take underground water or an easement to a flow of water<sup>4</sup>, or may be actionable under the common law relating to nuisance<sup>5</sup> or under the rule in *Rylands v Fletcher*<sup>6</sup>. Other common law claims may also be available such as a claim in trespass or in negligence<sup>7</sup>. There is in general no right to pollute a natural watercourse, although a right to pollute water, and thus a defence to a claim, may be acquired by statute, express grant, implication of law or prescription<sup>8</sup>.

1 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270 et seq.

2 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270.

3 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 271.

4 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 272.

5 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 274, 275.

6 See the rule in *Rylands v Fletcher* (1868) LR 3 HL 330: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 276.

7 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 277.

8 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 278 et seq.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1A. MARINE MANAGEMENT/30A. The Marine Management Organisation.

## **1A. MARINE MANAGEMENT**

### **30A. The Marine Management Organisation.**

The Marine and Coastal Access Act 2009 Pt 1 (ss 1-40) establishes an independent body, the Marine Management Organisation which is to discharge a number of marine functions on behalf of the UK Government.

#### **1. The Marine Management Organisation: establishment**

There is to be a body known as the Marine Management Organisation ('the MMO'): Marine and Coastal Access Act 2009 s 1(1). The MMO is to have the functions conferred on it by or under the Marine and Coastal Access Act 2009 or any other enactment: s 1(2). Further provision about the MMO is made: see Marine and Coastal Access Act 2009 s 1(3), Sch 1.

It is the duty of the MMO to secure that the MMO functions are so exercised that the carrying on of activities by persons in the MMO's area is managed, regulated or controlled (1) with the objective of making a contribution to the achievement of sustainable development (see Marine and Coastal Access Act 2009 s 2(2) and (4)-(11)), (2) taking account of all relevant facts and matters (see s 2(3)), and (3) in a manner which is consistent and co-ordinated (see s 2(12)): Marine and Coastal Access Act 2009 s 2(1). Any reference in the Marine and Coastal Access Act 2009 to the MMO's 'general objective' is a reference to the duty imposed on the MMO by s 2(1): s 2(1). In s 2 'MMO functions' means functions exercisable by or on behalf of the MMO; and 'the MMO's area' means those parts of the UK marine area (see PARA 30B.2), or of the United Kingdom, where MMO functions are exercisable: s 2(12). In pursuit of its general objective, the MMO may take any action which it considers necessary or expedient for the purpose of furthering any social, economic or environmental purposes: s 2(2). For the purposes of head (2), the facts and matters that may be taken into account include each of the following (a) scientific evidence, whether available to, or reasonably obtainable by, the MMO; (b) other evidence so available or obtainable relating to the social, economic or environmental elements of sustainable development; (c) such facts or matters not falling within head (a) or (b) as the MMO may consider appropriate: s 2(3). In s 2 'evidence' includes predictions and other opinions resulting from the consideration of evidence by any person: s 2(12). See also Marine and Coastal Access Act 2009 s 24 (powers of MMO in relation to research: see PARA 30A.4). The Secretary of State is to give the MMO guidance as to the manner in which the MMO is to seek to secure that the contribution to the achievement of sustainable development mentioned in head (1) is made (and see also the Marine and Coastal Access Act 2009 s 38 (guidance: see PARA 30A.6)). In preparing any such guidance the Secretary of State must take into consideration (i) the functions of the MMO, and (ii) the resources available, or likely to be available, to the MMO: s 2(5). For further provision with respect to guidance see s 2(6)-(11).

The MMO is to use its best endeavours to meet such objectives as the Secretary of State may from time to time set with regard to the quality and effectiveness of its performance: Marine and Coastal Access Act 2009 s 3(1). The Legislative and Regulatory Reform Act 2006 s 24(6) (consultation) does not apply in relation to an order under s 24(2) specifying regulatory functions of the MMO as functions to which the Legislative and Regulatory Reform Act 2006 ss 21 and 22 (principles and code of practice) apply: Marine and Coastal Access Act 2009 s 3(2). See further **COMPETITION**.

## **2. The Marine Management Organisation: transfer of functions**

The Marine and Coastal Access Act 2009 Pt 1 Ch 2 (ss 4-13) provides for the transfer of a number of existing functions to the Marine Management Organisation (see PARA 30A.1), including certain functions under the Sea Fish (Conservation) Act 1967, certain functions relating to nature conservation and certain functions relating to generating and renewable energy installations. See further **AGRICULTURE AND FISHERIES; FUEL AND ENERGY**.

## **3. Agreements involving the Marine Management Organisation for the exercise of functions**

The Secretary of State may enter into an agreement with the Marine Management Organisation ('the MMO': see PARA 30A.1) authorising the MMO to perform any marine function of the Secretary of State (1) either in relation to the UK marine area (see PARA 30B.2) or in relation to specified parts of that area; (2) subject to head (1), either generally or in specified cases: Marine and Coastal Access Act 2009 s 14(1). 'Specified' means specified in the agreement: s 14(1). For the purposes of the Marine and Coastal Access Act 2009 Pt 1 Ch 3 (ss 14-22), a 'marine function' is any function which relates to, or whose exercise is capable of affecting, the whole or any part of the UK marine area: s 14(2). For the purposes of Pt 1 Ch 3, any reference to a marine function of the Secretary of State includes a reference to a marine function exercisable by a person (a) authorised or appointed by the Secretary of State, or (b) employed in the civil service of the State (but see s 14(4)). An agreement under s 14 may be cancelled by the Secretary of State at any time, and does not prevent the Secretary of State from performing a function to which the agreement relates: s 14(5). Section 14 is subject to the Marine and Coastal Access Act 2009 ss 17 and 18 (non-delegable functions and maximum duration of agreement): s 14(6).

The MMO may, with the approval of the Secretary of State, enter into an agreement with an eligible body (see Marine and Coastal Access Act 2009 s 16) authorising the eligible body to perform any function of the MMO (i) either in relation to the UK marine area or in relation to specified parts of that area; (ii) subject to head (i), either generally or in specified cases: Marine and Coastal Access Act 2009 s 15(1). 'Specified' means specified in the agreement: s 15(1). For the purposes of the Marine and Coastal Access Act 2009 Pt 1 Ch 3 any reference to a function of the MMO includes a reference to a function exercisable by a person authorised, appointed or employed by the MMO: s 15(2). The Secretary of State's approval may be given (A) in relation to a particular agreement or in relation to a description of agreements; (B) unconditionally or subject to conditions specified in the approval: s 15(3). Subject to s 15(6), the Secretary of State must review an agreement under s 15 no later than the end of the period of five years beginning with the date on which the agreement was entered into or was last reviewed by the Secretary of State, and if it appears appropriate to do so in the light of the review, may cancel the agreement: s 15(4). Subject to s 15(6), an agreement under s 15 may not be varied except by agreement between the MMO and the eligible body, and with the approval of the Secretary of State: s 15(5). An approval given under s 15(1) may provide that s 15(4) or (5) does not apply (or that both of them do not apply): s 15(6). Section 15 is subject to ss 17 and 18 (non-delegable functions and maximum duration of agreement): s 15(7).

Supplementary provision is made, including provision relating to particular powers (see Marine and Coastal Access Act 2009 s 19); additional provision in relation to agreements with harbour authorities which are local authorities (see Marine and Coastal Access Act 2009 s 20); and supplementary provisions with respect to agreements (see Marine and Coastal Access Act 2009 s 21).

## **4. General powers and duties**

The Marine Management Organisation ('the MMO': see PARA 30A.1) may (whether alone or with other bodies or persons) undertake research into any matter relating to its functions or its general objective (see PARA 30A.1), or commission or support (by financial means or otherwise) research into any such matter: see Marine and Coastal Access Act 2009 s 24.

The MMO must provide the Secretary of State with such advice and assistance as the Secretary of State may request: Marine and Coastal Access Act 2009 s 25(1). The MMO must, at the request of any public body, provide advice to that body on any matter which (1) is within the knowledge or experience of the MMO, (2) relates to any of the functions of the MMO or to its general objective, and (3) affects the performance by the public body of its functions: s 25(2). For the meaning of 'public body' see Marine and Coastal Access Act 2009 s 322(1), (2). The MMO may provide advice to any person on any matter relating to any of its functions or its general objective (a) at the request of that person, or (b) if the MMO considers it appropriate to do so, on its own initiative: s 25(3). The MMO may provide any person with assistance, or the use of training facilities, as respects any matter of which the MMO has knowledge or experience: s 25(4).

The MMO may publish documents or provide information about any matter relating to any of its functions or its general objective, or assist in the publication of such documents or the provision of such information: see Marine and Coastal Access Act 2009 s 26.

The MMO may charge such fees in respect of the cost of providing its services as appear to it to be reasonable: see Marine and Coastal Access Act 2009 s 27.

The MMO must provide the Secretary of State with all such information as the Secretary of State may reasonably require with respect to any of the following matters (i) the carrying out, or proposed carrying out, of the MMO's functions; (ii) the MMO's responsibilities generally: see Marine and Coastal Access Act 2009 s 28.

Provision is also made with respect to the power to bring proceedings (see Marine and Coastal Access Act 2009 s 29); and the continuation of certain existing prosecutions (see Marine and Coastal Access Act 2009 s 30).

The MMO may do anything which appears to it to be incidental or conducive to the carrying out of its functions or the achievement of its general objective: see Marine and Coastal Access Act 2009 s 31.

## **5. Financial provisions**

The Secretary of State may make payments by way of grant to the Marine Management Organisation ('the MMO': see PARA 30A.1): Marine and Coastal Access Act 2009 s 32(1). Any payments under s 32(1) are to be (1) of such amounts, (2) at such times, and (3) subject to such conditions (if any), as the Secretary of State may determine: s 32(2).

The MMO may borrow money, but only in accordance with the following provisions of the Marine and Coastal Access Act 2009 s 33, and subject to the Marine and Coastal Access Act 2009 s 34 (limit on borrowing): s 33(1). The MMO may borrow such sums as it may require for meeting its obligations and carrying out its functions: s 33(2). The MMO may borrow any such sums (a) from the Secretary of State, by way of loan, or (b) from persons other than the Secretary of State, by way of overdraft or otherwise: s 33(3). The MMO may borrow by virtue of head (b) only if the Secretary of State consents: s 33(4). Any consent under s 33(4) may be given subject to conditions: s 33(5).

The aggregate amount outstanding in respect of the principal of sums borrowed by the MMO must not at any time exceed £20 million: Marine and Coastal Access Act 2009 s 34(1). The Secretary of State may by order amend s 34(1) so as to substitute for the sum for the time

being there specified such sum as may be specified in the order: s 34(2). The sum specified in an order under s 34(2) must be a sum greater than £20 million, but not greater than £80 million: s 34(3). A statutory instrument containing an order under s 34(2) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the House of Commons: s 34(4).

The Secretary of State may lend money to the MMO; such a loan may be made subject to such conditions as may be determined by, or in accordance with arrangements made by, the Secretary of State: see Marine and Coastal Access Act 2009 s 35.

The Secretary of State may guarantee (i) the repayment of the principal of any sum borrowed by the MMO from a person other than the Secretary of State; (ii) the payment of interest on any such sum; (iii) the discharge of any other financial obligation in connection with any such sum: see Marine and Coastal Access Act 2009 s 36.

## **6. Directions and guidance**

The Secretary of State may give the Marine Management Organisation ('the MMO': see PARA 30A.1) general or specific directions with respect to the exercise of any of the MMO's functions; the Secretary of State may also give the MMO such general or specific directions as the Secretary of State considers appropriate for the implementation of any obligations of the United Kingdom under (1) the EU Treaties, or (2) any international agreement to which the United Kingdom or the European Union is for the time being a party: see Marine and Coastal Access Act 2009 s 37.

The Secretary of State may give the MMO guidance with respect to the exercise of any of the MMO's functions: Marine and Coastal Access Act 2009 s 38(1). The MMO must have regard to any guidance given to it under the Marine and Coastal Access Act 2009 by the Secretary of State: s 38(2). Before giving any such guidance, the Secretary of State must consult (a) the MMO, and (b) such other bodies or persons as the Secretary of State considers appropriate: s 38(3).

## **7. Transfer schemes**

The Secretary of State may, in connection with the establishment of, or the transfer of any functions to, the Marine Management Organisation ('the MMO': see PARA 30A.1), make one or more schemes for the transfer to the MMO of designated property, rights or liabilities of any of the following (1) a Minister of the Crown, (2) a government department, (3) a statutory body: Marine and Coastal Access Act 2009 s 39(1). 'Designated', in relation to a scheme, means specified or described in, or determined in accordance with, the scheme; and 'statutory body' means any body or person established by or under any enactment: s 39(5). 'Minister of the Crown' has the same meaning as in the Ministers of the Crown Act 1975: Marine and Coastal Access Act 2009 s 322(1). The Secretary of State may make one or more schemes for the transfer of designated property, rights or liabilities of the MMO to any of the following (a) a Minister of the Crown, (b) a government department, (c) a statutory body: s 39(2). In connection with the efficient management for public purposes of any property, rights or liabilities, the Secretary of State may at any time make one or more schemes for the transfer of (i) designated property, rights or liabilities of the Secretary of State to the MMO, or (ii) designated property, rights or liabilities of the MMO to the Secretary of State: s 39(3). On the transfer date for any designated property, rights or liabilities, that property and those rights and liabilities are transferred and vest in accordance with the scheme: s 39(4). 'Transfer date', in relation to any property, rights or liabilities, means a date specified by a scheme as the date on which the scheme is to have effect in relation to that property or those rights or liabilities: s 39(5). The Marine and Coastal Access Act 2009 Sch 3 makes further provision relating to schemes under s 39: s 39(6).

The Secretary of State may by notice require any of the following (a) a Minister of the Crown, (b) a government department, (c) a statutory body, to provide to the MMO on a temporary basis such staff, premises or other facilities as may be specified in the notice: see Marine and Coastal Access Act 2009 s 40. 'Notice' means notice in writing: Marine and Coastal Access Act 2009 s 322(1).

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### **30B. Exclusive Economic Zone and UK Marine Area.**

The Marine and Coastal Access Act 2009 Pt 2 (ss 41-43) (partly in force: SI 2009/3345) allows an Exclusive Economic Zone to be designated and defines the UK marine area. The Exclusive Economic Zone will replace the existing zones, namely the areas within British fishery limits, the Renewable Energy Zone, the Pollution Zone, and the Gas Importation and Storage Zone, in order to simplify the management of the United Kingdom's offshore maritime areas. In addition Pt 2 creates the Welsh zone.

#### **1. Exclusive economic zone**

The following provisions are not yet in force.

The rights to which the Marine and Coastal Access Act 2009 s 41 applies have effect as rights belonging to Her Majesty by virtue of s 41: s 41(1). Section 41 applies to all rights under Part V of the Convention that are exercisable by the United Kingdom in areas outside the territorial sea: Marine and Coastal Access Act 2009 s 41(2). In s 41 'the Convention' means the United Nations Convention on the Law of the Sea (Cmnd 8941) and any modifications of that Convention agreed after the passing of the Marine and Coastal Access Act 2009 (ie 12 November 2009) that have entered into force in relation to the United Kingdom: s 41(7). For the meaning of 'territorial sea' and 'sea' see Marine and Coastal Access Act 2009 s 322(1). Her Majesty may by Order in Council designate an area as an area within which the rights to which s 41 applies are exercisable (an 'exclusive economic zone'): s 41(3). The Secretary of State may by order designate the whole or any part of the exclusive economic zone as an area in relation to which the Scottish Ministers, the Welsh Ministers or any Northern Ireland department are to have functions: s 41(4). In any enactment or instrument passed or made after the coming into force of an Order in Council made under s 41, any reference to the United Kingdom's exclusive economic zone is to be read as a reference to any area designated in the Order in Council: s 41(5). An Order in Council under s 41 may include incidental, consequential, supplementary or transitional provision or savings: s 41(6). The Marine and Coastal Access Act 2009 Sch 4 Pt 1 (which contains amendments consequential on s 41) has effect: s 41(8).

#### **2. UK marine area**

The following provisions are in force.

For the purposes of the Marine and Coastal Access Act 2009, the 'UK marine area' consists of the following (1) the area of sea within the seaward limits of the territorial sea adjacent to the United Kingdom, (2) any area of sea within the limits of the exclusive economic zone (see PARA 30B.1), (3) the area of sea within the limits of the UK sector of the continental shelf (so far as not falling within the area mentioned in head (2), and see also the Marine and Coastal Access Act 2009 s 42(2)), and includes the bed and subsoil of the sea within those areas: s 42(1). In s 42 'sea' includes (a) any area submerged at mean high water spring tide, and (b) the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide: s 42(3). For the meaning of 'territorial sea' see Marine and Coastal Access Act 2009 s 322(1). The area of sea mentioned in head (3) is to be treated as part of the UK marine area for any purpose only to the extent that such treatment for that purpose does not contravene any international obligation binding on the United Kingdom or Her Majesty's government: s 42(2). The area of

sea referred to in head (a) includes waters in any area (i) which is closed, whether permanently or intermittently, by a lock or other artificial means against the regular action of the tide, but (ii) into which seawater is caused or permitted to flow, whether continuously or from time to time, and (iii) from which seawater is caused or permitted to flow, whether continuously or from time to time: s 42(4). Until the coming into force of the first Order in Council made under the Marine and Coastal Access Act 2009 s 41 (the exclusive economic zone: see PARA 30B.1), the reference in head (2) to the exclusive economic zone is to be read as a reference to a renewable energy zone: s 42(5). 'Renewable energy zone' means any area for the time being designated by an Order in Council under the Energy Act 2004 s 84(4) (see **FUEL AND ENERGY**): Marine and Coastal Access Act 2009 s 322(1).



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### **30C. Marine Planning.**

The Marine and Coastal Access Act 2009 Pt 3 (ss 44-64) introduces a new system of marine planning.

Part 3 binds the Crown: Marine and Coastal Access Act 2009 s 64(3).

#### **1. Marine policy statement**

For the purposes of the Marine and Coastal Access Act 2009 a 'marine policy statement' (an 'MPS') is a document (1) in which the policy authorities that prepare and adopt it state general policies of theirs (however expressed) for contributing to the achievement of sustainable development in the UK marine area (see PARA 30B.2), (2) which has been prepared and adopted by those authorities in accordance with the Marine and Coastal Access Act 2009 Sch 5, and (3) which states that it has been prepared and adopted for the purposes of the Marine and Coastal Access Act 2009 s 44: s 44(1). In the Marine and Coastal Access Act 2009 Pt 3 (ss 44-64) 'policy authority' means any of the following (a) the Secretary of State; (b) the Scottish Ministers; (c) the Welsh Ministers; (d) the Department of the Environment in Northern Ireland: s 44(4). For the meaning of 'adopted' see Marine and Coastal Access Act 2009 s 64(1). Any reference in Pt 3 to an MPS being adopted by any policy authorities is a reference to the final text of the MPS being adopted by those authorities in accordance with Sch 5: s 44(5). An MPS may also include statements or information relating to policies contained in the MPS: s 44(2). If to any extent a policy stated in an MPS conflicts with any other statement or information in the MPS, that conflict must be resolved in favour of the policy: s 44(3).

Provision is made as to the preparation and coming into effect of an MPS (see Marine and Coastal Access Act 2009 s 45), the review of an MPS (see Marine and Coastal Access Act 2009 s 46), the amendment of an MPS (see Marine and Coastal Access Act 2009 s 47) and the withdrawal of, or from, an MPS (see Marine and Coastal Access Act 2009 s 48).

#### **2. Marine plans**

The UK marine area (see PARA 30B.2) comprises the following marine planning regions (1) the English inshore region; (2) the English offshore region; (3) the Scottish inshore region; (4) the Scottish offshore region; (5) the Welsh inshore region; (6) the Welsh offshore region; (7) the Northern Ireland inshore region; (8) the Northern Ireland offshore region: Marine and Coastal Access Act 2009 s 49(1). The definitions of those regions can be found in the Marine and Coastal Access Act 2009 s 322: s 49(2).

A marine plan authority (see Marine and Coastal Access Act 2009 s 50) may prepare a marine plan for an area (a 'marine plan area') consisting of the whole or any part of its marine planning region: Marine and Coastal Access Act 2009 s 51(1). Where a marine policy statement (an 'MPS': see PARA 30C.1) governs marine planning for a marine planning region, the marine plan authority for the region must seek to ensure that every part of the region is within an area for which a marine plan is in effect: s 52(2). A 'marine plan' is a document which (a) has been prepared and adopted (see Marine and Coastal Access Act 2009 s 64(1)) for a marine plan area by the appropriate marine plan authority in accordance with the Marine and Coastal Access Act 2009 Sch 6, (b) states the authority's policies (however expressed) for and in connection with

the sustainable development of the area, and (c) states that it is a marine plan prepared and adopted for the purposes of s 51: s 51(3). For the purposes of s 51 'the appropriate marine plan authority' in the case of any marine plan area is the marine plan authority in whose region the marine plan area lies: s 51(4). A marine plan must identify (by means of a map or otherwise) the marine plan area for which it is a marine plan: s 51(5). A marine plan must be in conformity with any MPS which governs marine planning for the marine plan area unless relevant considerations indicate otherwise: s 51(6). For the purposes of the Marine and Coastal Access Act 2009 Pt 3 (ss 44-64), an MPS 'governs marine planning' for an area if (i) it has been adopted by the policy authority (see PARA 30C.1) which is the marine plan authority whose region consists of or includes the area, (ii) it has been published in accordance with the Marine and Coastal Access Act 2009 Sch 5 para 12, (iii) it has not been replaced or withdrawn, and (iv) the policy authority mentioned in head (i) has not withdrawn from it: s 51(7). As respects heads (iii) and (iv), see also the Marine and Coastal Access Act 2009 s 48(8) (effect of withdrawal of, or from, an MPS: see PARA 30C.1): s 51(7). Unless prepared and adopted by the Secretary of State, a marine plan must state whether it includes provision relating to retained functions (see Marine and Coastal Access Act 2009 ss 59 and 60): s 51(8). A marine plan may also include statements or information relating to policies contained in the plan: s 51(9). If to any extent a policy stated in a marine plan conflicts with any other statement or information in the plan, that conflict must be resolved in favour of the policy: s 51(10). A marine plan comes into effect when it has been published by the marine plan authority that prepared and adopted it in accordance with Sch 6: s 51(11).

Provision is made as to the amendment of a marine plan (see Marine and Coastal Access Act 2009 s 52); the withdrawal of a marine plan (see Marine and Coastal Access Act 2009 s 53); and the duty to keep relevant matters under review (see Marine and Coastal Access Act 2009 s 54).

### **3. Delegation of functions relating to marine plans**

A marine plan authority (see PARA 30C.2) may give directions under the Marine and Coastal Access Act 2009 s 55: s 55(1). A direction under s 55 is a direction which (1) designates any of the delegable marine plan functions which would (apart from directions under s 55) be exercisable by or in relation to the authority, and (2) directs that those functions, instead of being so exercisable, are to be exercisable by or in relation to such public body, acting on behalf of the authority, as is designated in the direction: s 55(2). In s 55 'delegable marine plan functions' means (a) functions under the Marine and Coastal Access Act 2009 Pt 3 Ch 2 (marine plans: see PARA 30C.2), and (b) functions under the Marine and Coastal Access Act 2009 s 61 (monitoring etc of implementation: see PARA 30C.4), other than excepted functions (see s 55(6)): s 55(5). For the meaning of 'public body' see Marine and Coastal Access Act 2009 s 322(1), (2). An authority which gives a direction under s 55 may do so only with the consent of the public body: s 55(3). The public body (i) must comply with the direction, and (ii) is to be taken to have all the powers necessary to do so: s 55(4). No direction may be given under s 55 in respect of certain specified functions of the Secretary of State: see s 55(7).

Supplementary provision relating to directions under s 55 is made: see Marine and Coastal Access Act 2009 s 56.

A marine plan authority may give further directions to a public body to which it has delegated functions, setting out how those functions should be performed: see Marine and Coastal Access Act 2009 s 57.

### **4. Implementation and effect**

A public authority must take any authorisation or enforcement decision in accordance with the appropriate marine policy documents (see Marine and Coastal Access Act 2009 s 59), unless

relevant considerations indicate otherwise: Marine and Coastal Access Act 2009 s 58(1). For the meaning of 'public authority' see Marine and Coastal Access Act 2009 s 322(1). An 'authorisation or enforcement decision' is any of the following (1) the determination of any application (whenever made) for authorisation of the doing of any act which affects or might affect the whole or any part of the UK marine area (see PARA 30B.2), (2) any decision relating to any conditions of such an authorisation, (3) any decision about extension, replacement, variation, revocation or withdrawal of any such authorisation or any such conditions (whenever granted or imposed), (4) any decision relating to the enforcement of any such authorisation or any such conditions, (5) any decision relating to the enforcement of any prohibition or restriction (whenever imposed) on the doing of any act, or of any act of any description, falling within head (1), but does not include any decision on an application for an order granting development consent under the Planning Act 2008 (in relation to which the Marine and Coastal Access Act 2009 s 58(3) has effect accordingly): s 58(4). In s 58 'authorisation' means any approval, confirmation, consent, licence, permission or other authorisation (however described), whether special or general; and 'act' includes omission: s 58(6). If a public authority takes an authorisation or enforcement decision otherwise than in accordance with the appropriate marine policy documents, the public authority must state its reasons: s 58(2). A public authority must have regard to the appropriate marine policy documents in taking any decision (a) which relates to the exercise of any function capable of affecting the whole or any part of the UK marine area, but (b) which is not an authorisation or enforcement decision: s 58(3).

Provision is made in connection with the monitoring of, and periodical reporting on, implementation: see Marine and Coastal Access Act 2009 s 61.

## **5. Validity of marine policy statements and marine plans**

The Marine and Coastal Access Act 2009 s 62 applies to (1) any marine policy statement (an 'MPS': see PARA 30C.1), (2) any amendment of an MPS, (3) any marine plan (see PARA 30C.2), (4) any amendment of a marine plan: s 62(1). Anything falling within the heads of s 62(1) is referred to in s 62 as a 'relevant document': s 62(2). A relevant document must not be questioned in any legal proceedings, except in so far as is provided by the following provisions of s 62: s 62(3). A person aggrieved by a relevant document may make an application to the appropriate court on any of the following grounds (a) that the document is not within the appropriate powers; (b) that a procedural requirement (see s 62(6)) has not been complied with: s 62(4). In s 62 'the appropriate court' means (i) the High Court, if the relevant document is a marine plan, or an amendment of a marine plan, for an area within the English inshore region or the Welsh inshore region; (ii) in any other case, any superior court in the United Kingdom (ie the High Court): s 62(6). 'The appropriate powers' means (A) in the case of an MPS or an amendment of an MPS, the powers conferred by the Marine and Coastal Access Act 2009 Pt 3 Ch 1 (see PARA 30C.1); (B) in the case of a marine plan or an amendment of a marine plan, the powers conferred by Pt 3 Ch 2 (see PARA 30C.2), or the Marine and Coastal Access Act 2009 s 55 (delegation: see PARA 30C.3): s 62(6). Any such application must be made not later than six weeks after the publication of the relevant document: s 62(5). For the meaning of 'English inshore region' and 'Welsh inshore region' see Marine and Coastal Access Act 2009 s 322(1).

The powers of a court hearing a challenge to the validity of an MPS are set out: see Marine and Coastal Access Act 2009 s 63.

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### **30D. Marine Licensing.**

The following provisions are not yet in force.

The Marine and Coastal Access Act 2009 Pt 4 (ss 65-115) makes detailed provision with respect to marine licensing. For transitional provision relating to Pt 4 see Marine and Coastal Access Act 2009 Sch 9. As to the enforcement of the marine licensing regime see PARA 30F.2.

#### **1. Marine licences**

No person may (1) carry on a licensable marine activity (see Marine and Coastal Access Act 2009 s 66), or (2) cause or permit any other person to carry on such an activity, except in accordance with a marine licence granted by the appropriate licensing authority: Marine and Coastal Access Act 2009 s 65(1). As to the appropriate licensing authority see Marine and Coastal Access Act 2009 s 113. For the meaning of 'licensing authority' see Marine and Coastal Access Act 2009 s 115(1). Section 65(1) is subject to any provision made by or under the Marine and Coastal Access Act 2009 ss 74-77 (exemptions: see PARA 30D.2): s 65(2).

The appropriate licensing authority may require an application for a marine licence (a) to be made in such form as the authority may determine; (b) to be accompanied by a fee: see Marine and Coastal Access Act 2009 s 67.

Having received an application for a marine licence, the appropriate licensing authority must publish notice of the application, or require the applicant to publish notice of it: see Marine and Coastal Access Act 2009 s 68. 'Notice' means notice in writing: Marine and Coastal Access Act 2009 s 322(1).

In determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the appropriate licensing authority must have regard to (i) the need to protect the environment, (ii) the need to protect human health, (iii) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant: see Marine and Coastal Access Act 2009 s 69. As to references to the environment see Marine and Coastal Access Act 2009 s 115(2). For the meaning of 'sea' see Marine and Coastal Access Act 2009 s 322(1).

The appropriate licensing authority may cause an inquiry to be held in connection with the determination of an application for a marine licence: see Marine and Coastal Access Act 2009 s 70.

The appropriate licensing authority, having considered an application for a marine licence, must (A) grant the licence unconditionally, (B) grant the licence subject to such conditions as the authority thinks fit, or (C) refuse the application: see Marine and Coastal Access Act 2009 s 71.

Provision is made as to the variation, suspension, revocation and transfer of marine licences: see Marine and Coastal Access Act 2009 s 72.

The appropriate licensing authority must by regulations make provision for any person who applies for a marine licence to appeal against a decision under s 71: see Marine and Coastal Access Act 2009 s 73.

## 2. Exemptions and special cases

The appropriate licensing authority (see Marine and Coastal Access Act 2009 s 113) for an area may by order specify, as regards that area, activities (1) which are not to need a marine licence; (2) which are not to need a marine licence if conditions specified in the order are satisfied: Marine and Coastal Access Act 2009 s 74(1). For the meaning of 'licensing authority' see Marine and Coastal Access Act 2009 s 115(1). As to marine licences see PARA 30D.1. The conditions that may be specified in an order under s 74 include conditions enabling the authority to require a person to obtain the authority's approval before the person does anything for which a licence would be needed but for the order: s 74(2). Approval under s 74(2) may be (a) without conditions; (b) subject to such conditions as the authority considers appropriate: s 74(3). In deciding whether to make an order under s 74, the appropriate licensing authority must have regard to (i) the need to protect the environment, (ii) the need to protect human health, (iii) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant: s 74(4). As to references to the environment see Marine and Coastal Access Act 2009 s 115(2). For the meaning of 'sea' see Marine and Coastal Access Act 2009 s 322(1). A licensing authority must consult such persons as the authority considers appropriate as to any order the authority contemplates making under s 74: s 74(5).

A marine licence is not needed for a dredging or spoil disposal activity if specified conditions are met: see Marine and Coastal Access Act 2009 s 75.

Nothing in the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115) applies to anything done, in the exercise of specified functions, in relation to the extraction of minerals by dredging in the Scottish zone: see Marine and Coastal Access Act 2009 s 76. For the meaning of 'Scottish zone' see Marine and Coastal Access Act 2009 s 322(1).

Certain activities licensable under the Petroleum Act 1998 or the Energy Act 2008 are exempt from the need to obtain a marine licence: see Marine and Coastal Access Act 2009 s 77.

There is a special procedure for applications relating to harbour works (see Marine and Coastal Access Act 2009 s 78) and for applications relating to certain electricity works (see Marine and Coastal Access Act 2009 s 79).

A licensing authority must not grant a marine licence to carry on any activity which amounts to or involves the exercise of a right conferred by the Electronic Communications Code para 11 (ie the code set out in the Telecommunications Act 1984 Sch 2: see **TELECOMMUNICATIONS**) unless it is satisfied that adequate compensation arrangements have been made: see Marine and Coastal Access Act 2009 s 80.

Nothing in the Marine and Coastal Access Act 2009 Pt 4 applies to anything done in the course of laying or maintaining an offshore stretch of exempt submarine cable: see Marine and Coastal Access Act 2009 s 81.

If, in the case of any particular work, (A) a marine licence is needed for the carrying out of the work, (B) Admiralty consent for the carrying out of the work would also be required (apart from this provision) by virtue of any local legislation, and (C) the Secretary of State considers that, in view of the need for a marine licence, the requirement for Admiralty consent for the carrying out of the work may be dispensed with, and issues a notice to that effect, the requirement for Admiralty consent does not apply in relation to that work: see Marine and Coastal Access Act 2009 s 83.

## 3. Enforcement

A person who (1) contravenes the Marine and Coastal Access Act 2009 s 65(1) (see PARA 30D.1), or (2) fails to comply with any condition of a marine licence, commits an offence:

Marine and Coastal Access Act 2009 s 85(1). As to marine licences see PARA 30D.1. A person who is bound by a condition of a licence by virtue of the Marine and Coastal Access Act 2009 s 71(5) (see PARA 30D.1) is not to be taken as having failed to comply with the condition unless the requirements of s 85(3) are satisfied: s 85(2). The requirements are that (a) the appropriate licensing authority has served the person with a notice under this provision which specifies the condition together with a period (which must be a reasonable period, in all the circumstances of the case) within which the person must comply with the condition, and (b) the person has failed to comply with the condition within that period: s 85(3). As to the appropriate licensing authority see Marine and Coastal Access Act 2009 s 113. For the meaning of 'licensing authority' see Marine and Coastal Access Act 2009 s 115(1). A person guilty of an offence under s 85(1) is liable (i) on summary conviction, to a fine not exceeding £50,000; (ii) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both: s 85(4).

It is a defence for a person charged with an offence under s 85(1) in relation to any activity to prove that the activity was carried out for the purpose of securing the safety of a vessel, aircraft or marine structure, or for the purpose of saving life, and the person took steps within a reasonable time to inform the appropriate licensing authority of specified matters: see Marine and Coastal Access Act 2009 s 86. For the meaning of 'vessel' and 'marine structure' see Marine and Coastal Access Act 2009 s 115(1).

It is a defence for a person charged with an offence under s 85(1) in relation to any activity to prove that for the purposes of the Electronic Communications Code para 23 (undertaker's works) (ie the code set out in the Telecommunications Act 1984 Sch 2: see **TELECOMMUNICATIONS**), the person is the operator or a relevant undertaker, and the activity was carried out for the purpose of executing emergency works, within the meaning of that Code: Marine and Coastal Access Act 2009 s 87.

Provision is made for a further defence to the undertaking of certain activities without a licence, namely the depositing or incineration of any substance or object, or the scuttling of a vessel or floating container, from a British vessel, aircraft or marine structure, in non-UK waters: see Marine and Coastal Access Act 2009 s 88. For the meaning of 'British vessel', 'British aircraft' and 'British marine structure' see Marine and Coastal Access Act 2009 s 115(1).

It is an offence for a person who is applying for a new licence, or for the variation or transfer of an existing licence or who, in complying, or purporting to comply, with obligations imposed either by the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115) or a licence, knowingly or recklessly supplies false or misleading information, or intentionally fails to disclose any material particular: see Marine and Coastal Access Act 2009 s 89.

A person carrying on a licensed activity in a manner that breaches the conditions of the licence may be issued with a notice requiring compliance (a 'compliance notice'): see Marine and Coastal Access Act 2009 s 90. A person who has carried on or is in the process of carrying on a licensable activity either without a licence or with a licence but in a manner that breaches the conditions of the licence and who has caused, is causing or is likely to cause harm to the environment, harm to human health or interference with legitimate uses of the sea, may be issued with a remediation notice: see Marine and Coastal Access Act 2009 s 91. As to references to the environment see Marine and Coastal Access Act 2009 s 115(2). For the meaning of 'sea' see Marine and Coastal Access Act 2009 s 322(1). Further provision as to enforcement notices is made: see Marine and Coastal Access Act 2009 s 92.

The appropriate licensing authority for any area may by order make provision to confer on the appropriate enforcement authority for that area the power by notice to impose on a person in relation to an offence under the Marine and Coastal Access Act 2009 Pt 4 a fixed monetary penalty: see Marine and Coastal Access Act 2009 s 93. For the meaning of 'enforcement authority' see Marine and Coastal Access Act 2009 s 114. For the meaning of 'appropriate

enforcement authority' see Marine and Coastal Access Act 2009 s 115(1). See further Marine and Coastal Access Act 2009 s 94 (fixed monetary penalties: procedure).

The appropriate licensing authority for any area may by order make provision to confer on the appropriate enforcement authority for that area the power by notice to impose on a person in relation to an offence under the Marine and Coastal Access Act 2009 Pt 4 a variable monetary penalty: see Marine and Coastal Access Act 2009 s 95. See further Marine and Coastal Access Act 2009 s 96 (variable monetary penalties: procedure).

Further provision about civil sanctions is made: see Marine and Coastal Access Act 2009 s 97, Sch 7.

#### **4. Delegation**

The appropriate licensing authority (see Marine and Coastal Access Act 2009 s 113) for an area may make an order which (1) designates any of the delegable marine licensing functions which would (apart from any order under the Marine and Coastal Access Act 2009 s 98) be exercisable by or in relation to that authority or an enforcement authority for that area, and (2) provides that those functions, instead of being so exercisable, are to be exercisable by or in relation to such person, acting on behalf of the licensing authority or (as the case may be) the enforcement authority, as is designated in the order: Marine and Coastal Access Act 2009 s 98(1). For the meaning of 'licensing authority' see Marine and Coastal Access Act 2009 s 115(1). In s 98 'delegable marine licensing functions' means (a) functions of a licensing authority under the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115), other than excepted functions (see s 98(6)); (b) functions of an enforcement authority under Pt 4: s 98(5). For the meaning of 'enforcement authority' see Marine and Coastal Access Act 2009 s 114. The power to make an order under s 98 includes power to make provision in the order conferring on the person designated ('the delegate'), so far as acting on behalf of an enforcement authority, any power which the appropriate licensing authority may confer on an enforcement authority by an order under the Marine and Coastal Access Act 2009 s 93 or 95 (fixed or variable monetary penalties: see PARA 30D.3): s 98(2). An authority which makes an order under s 98 may do so only with the consent of the delegate: s 98(3). The delegate must comply with the order, and is to be taken to have all the powers necessary to do so: s 98(4).

Supplementary provision is made with respect to orders under s 98: see Marine and Coastal Access Act 2009 s 99.

Where any functions are exercisable by or in relation to a person by virtue of an order made under s 98 by a licensing authority, the authority may from time to time give directions to the person with respect to the performance of the functions: see Marine and Coastal Access Act 2009 s 100.

#### **5. Supplementary**

Each licensing authority must maintain, as respects activities in relation to which it is the appropriate licensing authority (see Marine and Coastal Access Act 2009 s 113) and licences for those activities, a register of licensing information: see Marine and Coastal Access Act 2009 s 101. For the meaning of 'licensing authority' see Marine and Coastal Access Act 2009 s 115(1).

An enforcement authority may issue a notice (a 'stop notice') to a person prohibiting the person from carrying on a licensable activity if that activity is causing or is likely to cause serious harm to the environment or to human health or is causing or is likely to cause serious interference with legitimate uses of the sea: see Marine and Coastal Access Act 2009 s 102. For the meaning of 'enforcement authority' see Marine and Coastal Access Act 2009 s 114. As to references to the environment see Marine and Coastal Access Act 2009 s 115(2). For the

meaning of 'sea' see Marine and Coastal Access Act 2009 s 322(1). Further provision as to stop notices is made: see Marine and Coastal Access Act 2009 s 103.

An enforcement authority may issue a notice (an 'emergency safety notice') to a person if it appears that serious interference with legitimate uses of the sea is occurring, or is likely to occur, as a result of licensable works: see Marine and Coastal Access Act 2009 s 104. Further provision as to emergency safety notices is made: see Marine and Coastal Access Act 2009 s 105.

If it appears to the appropriate licensing authority for an area that a licensable marine activity (see PARA 30D.1) has been carried on in its area otherwise than under a licence and in accordance with its conditions, the authority may carry out any works that appear to it to be necessary or expedient for any one or more of the following purposes (1) protecting the environment; (2) protecting human health; (3) preventing interference with legitimate uses of the sea; (4) preventing or minimising, or remedying or mitigating the effects of, any specified harm or interference; (5) restoring (whether in whole or in part) the condition of any place affected by any such harm or interference to the condition, or a condition reasonably similar to the condition, in which the place would have been had the harm or interference not occurred: see Marine and Coastal Access Act 2009 s 106.

A licensing authority may, at the request of any person, conduct tests for the purpose of ascertaining the probable effect on the marine environment of using any of the following substances (a) any marine chemical treatment substance; (b) any marine oil treatment substance; (c) any marine surface fouling cleaner: see Marine and Coastal Access Act 2009 s 107.

The appropriate licensing authority must by regulations make provision for any person to whom a notice is issued under the Marine and Coastal Access Act 2009 s 72, 90, 91, 102 or 104 (see PARAS 30D.1, 3, 5) to appeal against that notice: see Marine and Coastal Access Act 2009 s 108.

In any proceedings for an offence under the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115), it is a defence for the person charged ('the defendant') to prove that the defendant took all reasonable precautions and exercised all due diligence to avoid the commission of the offence: see Marine and Coastal Access Act 2009 s 109.

Proceedings for an offence under the Marine and Coastal Access Act 2009 Pt 4 may be taken, and the offence may for all incidental purposes be treated as having been committed, in any part of the United Kingdom: Marine and Coastal Access Act 2009 s 110.

Subject to specified provision, the provisions of the Marine and Coastal Access Act 2009 Pt 4 bind the Crown: see Marine and Coastal Access Act 2009 s 111.



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1A. MARINE MANAGEMENT/30E. Marine Conservation Zones.

### **30E. Marine Conservation Zones.**

The Marine and Coastal Access Act 2009 Pt 5 Ch 1 (ss 116-147) (in force in relation to England) provides a power, across most of UK waters, to designate new marine conservation zones in place of the power under the Wildlife and Countryside Act 1981 to designate marine nature reserves. For transitional provision see Marine and Coastal Access Act 2009 s 146(2), Sch 12.

#### **1. Designation of zones**

The appropriate authority (see Marine and Coastal Access Act 2009 s 116(5)) may by order designate any area falling within s 116(2) as a marine conservation zone (an 'MCZ'): Marine and Coastal Access Act 2009 s 116(1). The Marine and Coastal Access Act 2009 s 117 sets out the grounds on which such an order may be made: s 116(1). An area falls within s 116(2) if (1) it is an area of the sea within the seaward limits of the territorial sea adjacent to the United Kingdom; (2) it is an area of the sea within the limits of the exclusive economic zone (see PARA 30B.1); (3) it is an area of the sea bed or subsoil within the limits of the UK sector of the continental shelf (so far as not falling within an area mentioned in head (2)): s 116(2). For the meaning of 'sea' and 'territorial sea' see Marine and Coastal Access Act 2009 ss 147(1), (2), 322(1). For the meaning of 'UK sector of the continental shelf' see Marine and Coastal Access Act 2009 s 322(1). But an area does not fall within s 116(2) if it is in (a) the Scottish inshore region, or (b) the Northern Ireland inshore region: s 116(3). For the meaning of 'Scottish inshore region' and 'Northern Ireland inshore region' see Marine and Coastal Access Act 2009 s 322(1). Until the coming into force of the first Order in Council made under the Marine and Coastal Access Act 2009 s 41 (the exclusive economic zone: see PARA 30B.1), the reference in head (2) to the exclusive economic zone is to be read as a reference to a renewable energy zone: s 116(8). For the meaning of 'renewable energy zone' see PARA 30B.2. The Marine and Coastal Access Act 2009 s 118 makes further provision as to the areas that may be included in an MCZ: s 116(4).

The appropriate authority may make an order under s 116 if it thinks that it is desirable to do so for the purpose of conserving (i) marine flora or fauna; (ii) marine habitats or types of marine habitat; (iii) features of geological or geomorphological interest: see Marine and Coastal Access Act 2009 s 117.

The appropriate authority must carry out public consultation before designating an MCZ: see Marine and Coastal Access Act 2009 s 119. The appropriate authority must publish notice of the making of the order: see Marine and Coastal Access Act 2009 s 120. The appropriate authority may hold hearings before deciding whether to make an order under s 116 to designate an MCZ: see Marine and Coastal Access Act 2009 s 121. Provision is made as to the amendment, revocation and review of orders designating an MCZ: see Marine and Coastal Access Act 2009 s 122.

#### **2. Duties relating to network**

In order to contribute to the achievement of the objective in the Marine and Coastal Access Act 2009 s 123(2), the appropriate authority (see Marine and Coastal Access Act 2009 s 116(5)) must designate a marine conservation zone (an 'MCZ') under the Marine and Coastal Access Act 2009 s 116 (see PARA 30E.1): Marine and Coastal Access Act 2009 s 123(1). The objective is

that the MCZs designated by the appropriate authority, taken together with any other MCZs designated under s 116 and any relevant conservation sites (see s 123(4)) in the UK marine area (see PARA 30B.2), form a network which satisfies the conditions in s 123(3): s 123(2). The conditions are (1) that the network contributes to the conservation or improvement of the marine environment in the UK marine area; (2) that the features which are protected by the sites comprised in the network represent the range of features present in the UK marine area; (3) that the designation of sites comprised in the network reflects the fact that the conservation of a feature may require the designation of more than one site: s 123(3). When complying with the duty imposed by s 123(1), the appropriate authority must have regard to any obligations under EU or international law that relate to the conservation or improvement of the marine environment: s 123(5). Further provision is made under s 123 relating to the creation of a network of marine sites: see s 123(6)-(9).

The appropriate authority must report to the appropriate legislature (see s 123(9)) on progress in designating a network of MCZs: see Marine and Coastal Access Act 2009 s 124.

### **3. Duties of public authorities**

The Marine and Coastal Access Act 2009 s 125 applies to any public authority having any function the exercise of which is capable of affecting (other than insignificantly) (1) the protected features of a marine conservation zone (an 'MCZ'); (2) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent: Marine and Coastal Access Act 2009 s 125(1). For the meaning of 'public authority' see Marine and Coastal Access Act 2009 s 322(1). 'Public authority' does not include a Northern Ireland Minister or Northern Ireland department: s 125(13). 'Protected feature', in relation to an MCZ or proposed MCZ, means any flora, fauna, habitat or feature which is sought to be conserved by the making of the order designating the zone: Marine and Coastal Access Act 2009 s 147(1). Every public authority to which s 125 applies must (so far as is consistent with their proper exercise) (a) exercise its functions in the manner which the authority considers best furthers the conservation objectives stated for the MCZ; (b) where it is not possible to exercise its functions in a manner which furthers those objectives, exercise them in the manner which the authority considers least hinders the achievement of those objectives: s 125(2). If a public authority considers that any of its functions is such that the exercise of the function would or might significantly hinder the achievement of the conservation objectives for an MCZ, it must inform the appropriate statutory conservation body of that fact: s 125(3). For the meaning of 'the appropriate statutory conservation body' see the Marine and Coastal Access Act 2009 s 147(1). In carrying out its duties under s 125 a public authority must have regard to any advice or guidance given by the appropriate statutory conservation body under the Marine and Coastal Access Act 2009 s 127: s 125(12). Further provision is made under s 125 relating to the general duties of public authorities.

A public authority must inform the relevant statutory nature conservation body if it believes a proposed activity will hinder the achievement of the conservation objectives of an MCZ: see Marine and Coastal Access Act 2009 s 126.

The appropriate statutory conservation body may give advice and guidance as to (i) the matters which are capable of damaging or otherwise affecting any protected feature or features; (ii) the matters which are capable of affecting any ecological or geomorphological process on which the conservation of any protected feature or features is (wholly or in part) dependent; (iii) how any conservation objectives stated for an MCZ may be furthered, or how the achievement of any such objectives may be hindered; (iv) how the effect of any activity or activities on an MCZ or MCZs may be mitigated; (v) which activities are, or are not, of equivalent environmental benefit to any particular damage to the environment: see Marine and Coastal Access Act 2009 s 127.

Provision is made with the respect to the failure to comply with specified duties: see Marine and Coastal Access Act 2009 s 128.

#### **4. Byelaws for protection of MCZs etc: England**

The Marine Management Organisation ('the MMO': see PARA 30A.1) may make one or more byelaws for the purpose of furthering the conservation objectives stated for a marine conservation zone (an 'MCZ') in England: Marine and Coastal Access Act 2009 s 129(1). 'England' includes the English inshore region: Marine and Coastal Access Act 2009 s 147(1). For the meaning of 'English inshore region' see Marine and Coastal Access Act 2009 s 322(1). A byelaw under s 129 may be made so as to apply to any area in England: s 129(2). The provision that may be made by a byelaw under s 129 includes, in particular, provision (1) prohibiting or restricting entry into, or any movement or other activity within, the MCZ by persons or animals; (2) prohibiting or restricting entry into, or any movement or other activity within, the MCZ by vessels or (where appropriate) vehicles; (3) restricting the speed at which any vessel may move in the MCZ or in any specified area outside the MCZ where that movement might hinder the conservation objectives stated for the MCZ; (4) prohibiting or restricting the anchoring of any vessel within the MCZ; (5) prohibiting or restricting the killing, taking, destruction, molestation or disturbance of animals or plants of any description in the MCZ; (6) prohibiting or restricting the doing of anything in the MCZ which would interfere with the sea bed or damage or disturb any object in the MCZ: s 129(3). 'Animal' includes any egg, larva, pupa, or other immature stage of an animal: Marine and Coastal Access Act 2009 s 147(1). 'Vessels' includes hovercraft, aircraft capable of landing on water, and any other craft capable of travelling on, in or under water, whether or not capable or carrying any person: Marine and Coastal Access Act 2009 s 147(1). 'Vehicles' includes bicycles and other non-motorised forms of transport, and hovercraft: Marine and Coastal Access Act 2009 s 147(1). In s 129 'specified' means specified in the byelaw: s 129(9). The provision that may be made by a byelaw under s 129 also includes provision prohibiting or restricting entry into, or any movement or other activity on, any part of the seashore that adjoins the MCZ by persons, animals or vehicles: s 129(4). For the meaning of 'seashore' see Marine and Coastal Access Act 2009 s 147(1). A byelaw under s 129 may provide for the MMO to issue permits authorising anything which would, apart from such a permit, be unlawful under the byelaw: s 129(5). The MMO may attach to a permit under s 129(5) any condition which the MMO thinks appropriate to attach to that permit: s 129(6). A byelaw under s 129 may be made subject to specified exceptions: s 129(7). A byelaw under s 129 may make different provision for different cases, including (in particular) (a) different parts of the MCZ; (b) different times of the year; (c) different means or methods of carrying out any activity: s 129(8).

Provision is made as to procedure (see Marine and Coastal Access Act 2009 s 130), emergency byelaws (see Marine and Coastal Access Act 2009 s 131), interim byelaws (see Marine and Coastal Access Act 2009 s 132) and further provision (see Marine and Coastal Access Act 2009 s 133).

As to the enforcement of nature conservation legislation see Marine and Coastal Access Act 2009 s 237; and PARA 30F.3.

#### **5. Orders for protection of MCZs etc: Wales**

The Welsh Ministers may make one or more orders for the purpose of furthering the conservation objectives stated for a marine conservation zone (see PARA 30E.1) in Wales: see Marine and Coastal Access Act 2009 s 134. 'Wales' includes the Welsh inshore region: Marine and Coastal Access Act 2009 s 147(1). For the meaning of 'Welsh inshore region' see Marine and Coastal Access Act 2009 s 322(1). Provision is made as to consultation regarding orders under s 134 (see Marine and Coastal Access Act 2009 s 135), interim orders (see Marine and

Coastal Access Act 2009 s 136) and further provision (see Marine and Coastal Access Act 2009 s 137).

As to the enforcement of nature conservation legislation see Marine and Coastal Access Act 2009 s 237; and PARA 30F.3.

## **6. Hearings by Secretary of State or Welsh Ministers**

The Marine and Coastal Access Act 2009 s 138 applies where the Secretary of State has the function of (1) deciding (under the Marine and Coastal Access Act 2009 s 130) whether to confirm a byelaw made under the Marine and Coastal Access Act 2009s 129; (2) deciding (under the Marine and Coastal Access Act 2009 s 131) whether to revoke an emergency byelaw; (3) deciding (under the Marine and Coastal Access Act 2009 s 132) whether to revoke an interim byelaw: s 138(1). See further PARA 30E.4. Section 138 also applies where the Welsh Ministers have the function of (a) deciding whether to make an order under the Marine and Coastal Access Act 2009 s 134; (b) deciding whether to make an interim order under the Marine and Coastal Access Act 2009 s 136: s 138(2). See further PARA 30E.5. The Secretary of State or (as the case may be) the Welsh Ministers may, before making that decision, give to any person the opportunity of (i) appearing before and being heard by a person appointed for that purpose; (ii) providing written representations to such a person: s 138(3). The Secretary of State or (as the case may be) the Welsh Ministers may make regulations providing for the procedure to be followed (including decisions as to costs) at hearings held under s 138(3): s 138(4). A person appointed under s 138(3) must make a report to the Secretary of State or (as the case may be) the Welsh Ministers of any oral or written representations made under s 138(3): s 138(5).

## **7. Offences**

It is an offence for a person to contravene (1) any byelaw made under the Marine and Coastal Access Act 2009 s 129 or 132 (see PARA 30E.4); (2) any order made under the Marine and Coastal Access Act 2009 s 134 or 136 (see PARA 30E.5): Marine and Coastal Access Act 2009 s 139(1). In s 139 'contravene' includes fail to comply: s 139(3). A person who is guilty of an offence under s 139 is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 139(2). As to the standard scale see PARA 141. Proceedings for an offence under s 139 may be taken, and the offence may for all incidental purposes be treated as having been committed, in any part of England and Wales: s 139(4). For the meaning of 'England' and 'Wales' see Marine and Coastal Access Act 2009 s 147(1).

A person is guilty of an offence under the Marine and Coastal Access Act 2009 s 140 if (a) the person without lawful excuse does a prohibited act, (b) at the time of doing that act, the person knows, or ought to have known, that the feature to which the act relates is in, or forms part of, a marine conservation zone (an 'MCZ'), and (c) the act has significantly hindered, or may significantly hinder, the achievement of the conservation objectives stated for the MCZ: s 140(1). For the purposes of s 140(1), a person does a prohibited act if the person (i) intentionally or recklessly kills or injures any animal (see PARA 30E.4) in an MCZ which is a protected feature (see PARA 30E.3) of that MCZ, (ii) intentionally picks or collects, or intentionally or recklessly cuts, uproots or destroys, any plant in an MCZ which is a protected feature of that MCZ, (iii) intentionally or recklessly takes anything from an MCZ which is, or forms part of, a protected feature of that MCZ, or (iv) intentionally or recklessly destroys or damages any habitat or feature which is a protected feature of an MCZ: s 140(2). For the purposes of determining whether anything done by a person in relation to a protected feature is a prohibited act for the purposes of s 140(1), it is immaterial whether the person knew, or ought to have known, that the feature was a protected feature: s 140(3). A person who is guilty of an offence under s 140 is liable (A) on summary conviction, to a fine not exceeding £50,000;

(b) on conviction on indictment, to a fine: s 140(4). In determining the amount of any fine to be imposed on a person convicted of an offence under s 140, the court must in particular have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence: s 140(5). Proceedings for an offence under s 140 may be taken, and the offence may for all incidental purposes be treated as having been committed, in any part of the United Kingdom: s 140(6).

The circumstances in which a person will not be guilty of an offence under s 139 or 140 are set out: see Marine and Coastal Access Act 2009 s 141.

As to the enforcement of nature conservation legislation see Marine and Coastal Access Act 2009 s 237; and PARA 30F.3.

## **8. Fixed monetary penalties**

The appropriate authority (see Marine and Coastal Access Act 2009 s 116(5)) for any area may by order make provision to confer on any enforcement authority (see Marine and Coastal Access Act 2009 s 147(1)) for that area the power by notice to impose a fixed monetary penalty on a person in relation to an offence under the Marine and Coastal Access Act 2009 s 139 (see PARA 30E.7): Marine and Coastal Access Act 2009 s 142(1). For the purposes of the Marine and Coastal Access Act 2009 Pt 5 Ch 1 (ss 116-147) a 'fixed monetary penalty' is a requirement to pay to the enforcement authority a penalty of a prescribed amount: s 142(3). In s 142 'prescribed' means prescribed in an order made under s 142: s 142(5). Provision under s 142 may only confer such a power in relation to a case where the enforcement authority is satisfied beyond reasonable doubt that the person has committed the offence: s 142(2). The amount of the fixed monetary penalty that may be imposed in relation to an offence may not exceed level 1 on the standard scale: s 142(4). As to the standard scale see PARA 141.

Provision is made as to procedure: see Marine and Coastal Access Act 2009 s 143. Further provision about fixed monetary penalties is made: see Marine and Coastal Access Act 2009 s 144, Sch 10.

## **9. Application to the Crown**

The Marine and Coastal Access Act 2009 Pt 5 Ch 1 (ss 116-147) is binding on the Crown and applies in relation to any Crown land as it applies in relation to any other land: Marine and Coastal Access Act 2009 s 145(1). For the purposes of s 145 'Crown land' means land an interest in which (1) belongs to Her Majesty in right of the Crown or in right of Her private estates, (2) belongs to Her Majesty in right of the Duchy of Lancaster, (3) belongs to the Duchy of Cornwall, or (4) belongs to a government department or is held in trust for Her Majesty for the purposes of a government department: s 145(4). In s 145 references to Her Majesty's private estates are to be construed in accordance with the Crown Private Estates Act 1862 s 1: Marine and Coastal Access Act 2009 s 145(5). Section 145(1) is subject to s 145(2): s 145(1). No contravention by the Crown of any provision of Pt 5 Ch 1 is to make the Crown criminally liable; but the High Court may, on the application of the appropriate authority (see Marine and Coastal Access Act 2009 s 116(5)) or any other authority charged with enforcing that provision, declare unlawful any act or omission of the Crown which constitutes such a contravention: s 145(2). Despite s 145(2), the provisions of Pt 5 Ch 1 apply to persons in the public service of the Crown as they apply to other persons: s 145(3).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/1A. MARINE MANAGEMENT/30F. Marine enforcement officers.

### **30F. Marine enforcement officers.**

The Marine and Coastal Access Act 2009 Pt 8 Ch 1 (ss 235-244) (in force unless otherwise stated: SI 2009/3345) makes provision for marine enforcement officers.

For Crown application see Marine and Coastal Access Act 2009 s 295.

#### **1. Marine enforcement officers**

In the Marine and Coastal Access Act 2009 Pt 8 Ch 1 (ss 235-244) 'marine enforcement officer' means (1) any person appointed as such an officer by the Marine Management Organisation ('the MMO': see PARA 30A.1); (2) any person appointed as such an officer by the Welsh Ministers; (3) any person who is a commissioned officer of any of Her Majesty's ships; (4) any person in command or charge of any aircraft or hovercraft of the Royal Navy, the Army or the Royal Air Force: Marine and Coastal Access Act 2009 s 235(1). The carrying out of any functions of a marine enforcement officer by a person appointed under s 235 by the MMO or the Welsh Ministers (a 'civilian marine enforcement officer') is subject to any limitations specified by the MMO or (as the case may be) the Welsh Ministers in relation to that person: s 235(2). Until the coming into force of the Marine and Coastal Access Act 2009 s 1 (ie 12 January 2010: SI 2009/3345 (see PARA 30A.1)), any power conferred on the MMO by the Marine and Coastal Access Act 2009 s 235 is exercisable by the Secretary of State: s 235(3). Any reference in Pt 8 Ch 1 to a marine enforcement officer includes a reference to any person appointed by the Secretary of State as a marine enforcement officer by virtue of this provision: s 235(3).

#### **2. Enforcement of marine licensing regime**

The following provisions are not yet in force.

For the purposes of enforcing the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115: see PARA 30D), a marine enforcement officer (see PARA 30F.1) has the common enforcement powers conferred by the Marine and Coastal Access Act 2009 (see PARA 30G); and the power conferred by the Marine and Coastal Access Act 2009 s 263 (see PARA 30H): Marine and Coastal Access Act 2009 s 236(1). This is subject to s 236(2): s 236(1). A marine enforcement officer does not have the powers referred to in s 236(1) for the purposes of enforcing Pt 4 so far as relating to (1) any activity in Wales or the Welsh inshore region (see Marine and Coastal Access Act 2009 s 322(1)) concerning or arising from the exploration for, or production of, petroleum (see Marine and Coastal Access Act 2009 s 244(1)); (2) anything done in the course of taking installation abandonment measures in any other part of the relevant enforcement area: s 236(2). 'Installation abandonment measures' means any measures taken in connection with the abandonment of an offshore installation or submarine pipeline, within the meaning of the Petroleum Act 1998 Pt 4, or a carbon storage installation, within the meaning of the Energy Act 2008 s 30, whether or not the measures are taken in pursuance of an abandonment programme: Marine and Coastal Access Act 2009 s 236(9). For the meaning of 'abandonment programme' see s 236(9). 'The relevant enforcement area' means the area that consists of England and Wales and Northern Ireland, and the UK marine licensing area, excluding the Scottish offshore region (see Marine and Coastal Access Act 2009 s 322(1)): s 236(9). Subject to s 236(8), the powers which a marine enforcement officer has for the purposes of enforcing Pt 4 may be exercised (a) in the relevant enforcement area (and in relation to any vessel, aircraft

or marine structure in that area); (b) in relation to any vessel or marine structure outside the UK marine area (see Marine and Coastal Access Act 2009 s 322(1)) which was loaded within the relevant enforcement area; (c) in relation to any British vessel, British aircraft or British marine structure outside the UK marine area; (d) in Scotland or the Scottish inshore region (see Marine and Coastal Access Act 2009 s 322(1)), in relation to an offence which the officer reasonably believes has been committed (i) within the relevant enforcement area, or (ii) outside the UK marine area and in circumstances where a vessel, aircraft or marine structure referred to in head (b) or (c) was involved in the commission of the offence; (e) in relation to any vessel, aircraft or marine structure in the Scottish offshore region which has been pursued there in accordance with s 236(4): s 236(3). A vessel, aircraft or marine structure is pursued in accordance with s 236(4) if (A) immediately before the pursuit of the vessel, aircraft or structure commences, the vessel, aircraft or structure is in the relevant enforcement area, (B) before the pursuit of the vessel, aircraft or structure commences, a signal is given for it to stop, and (C) the pursuit of the vessel, aircraft or structure is not interrupted: s 236(4). As to references to 'vessel' see s 244(2). The signal referred to in head (B) must be given in such a way as to be audible or visible from the vessel, aircraft or structure in question: s 236(5). For the purposes of head (C), pursuit is not interrupted by reason only of the fact that the method of carrying out the pursuit, or the identity of the vessel or aircraft carrying out the pursuit, changes during the course of the pursuit: s 236(6). Nothing in s 236 affects any right of hot pursuit which a marine enforcement officer may have under international law: s 236(7). The powers which a civilian marine enforcement officer has for the purposes of enforcing Pt 4 may not be exercised in relation to any British warship: s 236(8). As to civilian marine enforcement officers see PARA 30F.1. 'British warship' means a ship belonging to Her Majesty and forming part of Her Majesty's armed forces: Marine and Coastal Access Act 2009 s 244(1).

Any term used in s 236 and in Pt 4 has the same meaning in s 236 as it has in Pt 4: s 236(10).

### **3. Enforcement of nature conservation legislation**

For the purposes of enforcing the nature conservation legislation, a marine enforcement officer (see para 30F.1) has the common enforcement powers conferred by the Marine and Coastal Access Act 2009 (see PARA 30G): Marine and Coastal Access Act 2009 s 237(1). For the meaning of 'the nature conservation legislation' see s 237(2). Subject to s 237(8) and (9), the powers which a marine enforcement officer has for the purposes of enforcing the nature conservation legislation may be exercised (1) in the relevant enforcement area (and in relation to any vessel, aircraft or marine installation in that area); (2) in relation to any British vessel or British marine installation outside the UK marine area (see Marine and Coastal Access Act 2009 s 322(1)); (3) in Scotland or Northern Ireland, or the Scottish or Northern Ireland inshore region (see Marine and Coastal Access Act 2009 s 322(1)), in relation to an offence which the officer reasonably believes has been committed (a) within the relevant enforcement area, or (b) outside the UK marine area and in circumstances where a British vessel or British marine installation was involved in the commission of the offence; (4) in relation to any vessel, aircraft or marine installation in the Scottish offshore region (see Marine and Coastal Access Act 2009 s 322(1)) which has been pursued there in accordance with s 237(4): s 237(3). 'The relevant enforcement area' means the area that consists of (i) England and Wales, and (ii) the UK marine area, excluding the Scottish inshore region, the Scottish offshore region, and the Northern Ireland inshore region: s 237(13). For the meaning of 'British vessel' see s 237(13). As to references to 'vessel' see s 244(2). 'British marine installation' means a marine installation owned by or leased to an individual residing in, or a body corporate incorporated under the law of, any part of the United Kingdom: Marine and Coastal Access Act 2009 s 244(1). 'Marine installation' means any artificial island, installation or structure (other than a vessel): s 244(1). A vessel, aircraft or marine installation is pursued in accordance with s 237(4) if (A) immediately before the pursuit of the vessel, aircraft or installation commences, the vessel, aircraft or installation is in the relevant enforcement area, (B) before the pursuit of the vessel,

aircraft or installation commences, a signal is given for it to stop, and (c) the pursuit of the vessel, aircraft or installation is not interrupted: s 237(4). The signal referred to in head (b) must be given in such a way as to be audible or visible from the vessel, aircraft or installation in question: s 237(5). For the purposes of head (c), pursuit is not interrupted by reason only of the fact that the method of carrying out the pursuit, or the identity of the vessel or aircraft carrying out the pursuit, changes during the course of the pursuit: s 237(6). Nothing in s 237 affects any right of hot pursuit which a marine enforcement officer may have under international law: s 237(7). The powers which a civilian marine enforcement officer has for the purposes of enforcing the nature conservation legislation may not be exercised in relation to any British warship: s 237(8). As to civilian marine enforcement officers see PARA 30F.1. For the meaning of 'British warship' see PARA 30F.2. The powers which a marine enforcement officer has for the purposes of enforcing the nature conservation legislation may not be exercised in relation to any vessel within s 237(10) unless (aa) in the case of a third country vessel, other than a vessel falling within head (bb) or (cc), the United Kingdom is entitled under international law to exercise those powers without the consent of the flag state, or (bb) the Commissioners have given authority to exercise those powers: s 237(9). 'Third country vessel' means a vessel which is flying the flag of, or is registered in, any State or territory (other than Gibraltar) which is not a member State, and is not registered in a member State: Marine and Coastal Access Act 2009 s 244(1). 'Flag state', in relation to a vessel, means the State whose flag the vessel is flying or is entitled to fly: s 244(1). 'The Commissioners' means the Commissioners for Her Majesty's Revenue and Customs: s 244(1). The vessels are (AA) a third country vessel; (BB) a warship that is being used by the government of a State other than the United Kingdom; (CC) any other vessel that is being used by such a government for any non-commercial purpose: s 237(10). The Commissioners may give authority under head (bb) only if the flag state has consented to the United Kingdom exercising those powers (whether generally or in relation to the vessel in question): s 237(11). In giving such authority, the Commissioners must impose such conditions or limitations on the exercise of the powers as are necessary to give effect to any conditions or limitations imposed by the flag state: s 237(12).

#### **4. Enforcement of fisheries legislation**

For the purposes of enforcing the fisheries legislation, a marine enforcement officer (see para 30F.1) has (1) the common enforcement powers conferred by Marine and Coastal Access Act 2009 (see PARA 30G); (2) the powers conferred by the Marine and Coastal Access Act 2009 ss 264, 268, 269, 279 and 284 (see AGRICULTURE AND FISHERIES); Marine and Coastal Access Act 2009 s 238(1). As to 'the fisheries legislation' see s 238(2), (3). Subject to s 238(9), the powers which a marine enforcement officer has for the purposes of enforcing the fisheries legislation may be exercised (a) in the relevant enforcement area (and in relation to any vessel, aircraft or marine installation in that area); (b) in relation to any vessel, vehicle, aircraft or marine installation in any other area within the United Kingdom or the UK marine area (see Marine and Coastal Access Act 2009 s 322(1)) which has been pursued there in accordance with s 238(5); (c) in relation to any relevant British fishing boat in the Scottish zone or the Northern Ireland zone (see Marine and Coastal Access Act 2009 s 322(1)); (d) in relation to any British vessel or British marine installation outside British fishery limits, other than a Scottish or Northern Ireland fishing boat: s 238(4). 'The relevant enforcement area' means the area that consists of England and Wales, and the sea within British fishery limits, excluding the Scottish zone and the Northern Ireland zone: s 238(10). For the meaning of 'sea' and 'British fishery limits' see Marine and Coastal Access Act 2009 s 322(1). As to references to 'vessel' see Marine and Coastal Access Act 2009 s 244(2). For the meaning of 'relevant British fishing boat' and 'British vessel' see s 238(10). For the meaning of 'British marine installation' and 'marine installation' see PARA 30F.3. For the meaning of 'fishing boat', 'Scottish fishing boat' and 'Northern Ireland fishing boat' see s 244(1). A vessel, vehicle, aircraft or marine installation is pursued in accordance with s 238(5) if (i) immediately before the pursuit of the vessel, vehicle, aircraft or installation commences the vessel, vehicle, aircraft or installation is in the relevant enforcement area, or in



the case of a vessel, aircraft or marine installation operating together with one or more other vessels, aircraft or marine installations to carry out a single activity, any of those vessels, aircraft or installations is in that area, (ii) before the pursuit of the vessel, vehicle, aircraft or installation commences, a signal is given for it to stop, and (iii) the pursuit of the vessel, vehicle, aircraft or installation is not interrupted: s 238(5). The signal referred to in head (ii) must be given in such a way as to be audible or visible from the vessel, vehicle, aircraft or installation in question: s 238(6). For the purposes of head (iii), pursuit is not interrupted by reason only of the fact that (A) the method of carrying out the pursuit, or (B) the identity of the vessel, vehicle or aircraft carrying out the pursuit, changes during the course of the pursuit: s 238(7). Nothing in s 238 affects any right of hot pursuit which a marine enforcement officer may have under international law: s 238(8). The powers which a civilian marine enforcement officer has for the purposes of enforcing the fisheries legislation may not be exercised in relation to any British warship: s 238(9). As to civilian marine enforcement officers see PARA 30F.1. For the meaning of 'British warship' see PARA 30F.2.

For fisheries enforcement powers see Marine and Coastal Access Act 2009 Pt 8 Ch 4 (ss 264-287); and AGRICULTURE AND FISHERIES.

## **5. Marine licensing: oil and gas and other reserved matters**

The following provisions are not yet in force.

The Secretary of State may appoint persons for the purposes of enforcing the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115: see PARA 30D), so far as relating to (1) any activity in the Scottish offshore region (see Marine and Coastal Access Act 2009 s 322(1)) falling within s 113(3) (activities relating to certain reserved matters); (2) any activity in Wales or the Welsh inshore region (see Marine and Coastal Access Act 2009 s 322(1)) concerning or arising from the exploration for, or production of, petroleum (see Marine and Coastal Access Act 2009 s 244(1)); (3) anything done in the course of taking installation abandonment measures in any other part of the relevant enforcement area: Marine and Coastal Access Act 2009 s 240(1). For the meaning of 'installation abandonment measures' see s 240(6). 'The relevant enforcement area' means the area that consists of England and Wales, and the UK marine licensing area, excluding the Northern Ireland inshore region (see Marine and Coastal Access Act 2009 s 322(1)): s 240(6). For the purposes referred to in s 240(1), a person appointed under s 240 has (a) the common enforcement powers conferred by the Marine and Coastal Access Act 2009 (see PARA 30G); (b) the power conferred by s 263 (see PARA 30H): s 240(2). Subject to s 240(4), the powers which a person appointed under s 240 has for the purposes referred to in s 240(1) may be exercised (i) in the relevant enforcement area (and in relation to any vessel, aircraft or marine structure in that area); (ii) in relation to any vessel or marine structure outside the UK marine area (see Marine and Coastal Access Act 2009 s 322(1)) which was loaded within the relevant enforcement area; (iii) in relation to any British vessel, British aircraft or British marine structure outside the UK marine area; (iv) in Scotland or Northern Ireland, or the Scottish or Northern Ireland inshore region, in relation to an offence which the person reasonably believes has been committed within the relevant enforcement area, or outside the UK marine area and in circumstances where a vessel, aircraft or marine structure referred to in head (ii) or (iii) was involved in the commission of the offence: s 240(3). As to references to 'vessel' see Marine and Coastal Access Act 2009 s 244(2). The powers which a person appointed under s 240 has for the purposes referred to in s 240(1) may not be exercised in relation to any British warship: s 240(4). For the meaning of 'British warship' see PARA 30F.2. Nothing in s 240 affects any right of hot pursuit which a person appointed under s 240 may have under international law: s 240(5).

Any term used in s 240 and in Pt 4 has the same meaning in s 240 as it has in Pt 4: s 240(7).

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### **30G. Common enforcement powers.**

The Marine and Coastal Access Act 2009 Pt 8 Ch 2 (ss 245-262) sets out the powers that may be exercised by a person who has the common enforcement powers conferred by the Marine and Coastal Access Act 2009: Marine and Coastal Access Act 2009 s 245(1). The powers conferred on an enforcement officer by any provision in Pt 8 Ch 2 are without prejudice to any powers exercisable by the officer apart from that provision: s 245(3).

For Crown application see Marine and Coastal Access Act 2009 s 295.

For fisheries enforcement powers see Marine and Coastal Access Act 2009 Pt 8 Ch 4 (ss 264-287); and AGRICULTURE AND FISHERIES.

#### **1. Entry, search and seizure**

For the purposes of carrying out any relevant functions, an enforcement officer may at any time board and inspect a vessel or marine installation: see Marine and Coastal Access Act 2009 s 246. 'Relevant function', in relation to an enforcement officer, means any function of that officer; and 'enforcement officer' means any person who has the common enforcement powers conferred by the Marine and Coastal Access Act 2009: Marine and Coastal Access Act 2009 s 245(2). 'Common enforcement power' means any power conferred by the Marine and Coastal Access Act 2009 ss 246-261: Marine and Coastal Access Act 2009 s 262(1). In the Marine and Coastal Access Act 2009 Pt 8 Ch 2 (ss 245-262) any reference to a vessel includes a reference to any ship or boat or any other description of vessel used in navigation, any hovercraft, submersible craft or other floating craft, and any aircraft, but does not include a reference to anything that permanently rests on, or is permanently attached to, the sea bed: s 262(2). 'Marine installation' means any artificial island, installation or structure (other than a vessel): s 262(1). Section 246 is subject to the Marine and Coastal Access Act 2009 s 249 (which provides that a warrant is necessary to enter a dwelling): s 246(1).

For the purposes of carrying out any relevant functions, an enforcement officer may enter and inspect any premises: see Marine and Coastal Access Act 2009 s 247. Section 247 is subject to the Marine and Coastal Access Act 2009 s 249: s 247(1).

For the purposes of carrying out any relevant functions, an enforcement officer may at any time (1) enter and inspect any vehicle; (2) stop and detain any vehicle for the purposes of entering and inspecting it: see Marine and Coastal Access Act 2009 s 248. Section 248 is subject to the Marine and Coastal Access Act 2009 s 249: s 248(1).

An enforcement officer may not by virtue of s 246, 247 or 248 enter any dwelling unless a justice has issued a warrant authorising the officer to enter the dwelling: see Marine and Coastal Access Act 2009 s 249. The Marine and Coastal Access Act 2009 Sch 17 contains further provision about warrants issued under s 249: s 249(4).

Where an enforcement officer is exercising a power of inspection conferred by s 246, 247 or 248, the officer may (a) search the relevant premises for any item; (b) examine anything that is in or on the relevant premises; the officer may also stop someone and detain them to perform a search of anything in their possession or control: see Marine and Coastal Access Act 2009 s 250. 'The relevant premises', in relation to an enforcement officer exercising a power of inspection conferred by s 246, 247 or 248, means the vessel, marine installation, premises or

vehicle in relation to which the power is being exercised: s 262(1). The officer may require any person in or on the relevant premises to produce any document or record that is in the person's possession or control: see Marine and Coastal Access Act 2009 s 251.

Provision is made as to powers of seizure (see Marine and Coastal Access Act 2009 ss 252, 253) and the retention of seized items (see Marine and Coastal Access Act 2009 s 254).

## **2. Miscellaneous and ancillary powers**

An enforcement officer may use any device for the purpose of taking visual images of anything which the officer believes is evidence of the commission of a relevant offence: see Marine and Coastal Access Act 2009 s 255. For the meaning of 'enforcement officer' see PARA 30G.1. 'Relevant offence', in relation to an enforcement officer, means any offence in respect of which the officer has functions: Marine and Coastal Access Act 2009 s 245(2).

Where an enforcement officer reasonably believes that a person has committed a relevant offence, the officer may require the person to provide the person's name and address: Marine and Coastal Access Act 2009 s 256.

Where an enforcement officer reasonably believes (1) that a person is or has been carrying on a relevant activity, and (2) that the person requires a licence or other authority to carry on that activity, the officer may require the person to produce that licence or other authority: Marine and Coastal Access Act 2009 s 257(1). 'Relevant activity', in relation to an enforcement officer, means any activity in respect of which the officer has functions: s 245(2). If the person is unable to produce the licence or other authority when required to do so, the person must produce it at such place, and within such period of time, as the officer may specify: s 257(2).

Where an enforcement officer has boarded a vessel or marine installation, or entered any premises, for the purposes of carrying out any relevant functions, the officer may require the attendance of (a) the person who is for the time being in charge of the vessel or marine installation; (b) any other person who is on board the vessel or marine installation; (c) the owner or occupier of the premises; (d) any person who is on the premises: Marine and Coastal Access Act 2009 s 258. For the meaning of 'marine installation' and 'relevant functions' see PARA 30G.1.

Enforcement officers have the power to direct a vessel or marine installation to the port they consider to be the nearest convenient port and detain it there: see Marine and Coastal Access Act 2009 s 259.

To assist in carrying out any relevant functions, an enforcement officer may bring (i) any other person; (ii) any equipment or materials: see Marine and Coastal Access Act 2009 s 260.

An enforcement officer may use reasonable force, if necessary, in the exercise of any power conferred by the Marine and Coastal Access Act 2009: Marine and Coastal Access Act 2009 s 261(1). A person assisting an enforcement officer under s 260 may use reasonable force, if necessary, in the exercise of any power conferred by the Marine and Coastal Access Act 2009: s 261(2).

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**30H. Licensing enforcement powers.**

The following provisions are not yet in force.

A person who has the power conferred by the Marine and Coastal Access Act 2009 s 263 may require any person (1) to give details of any substances or objects on board a vehicle, vessel, aircraft or marine structure; (2) to give information concerning any substances or objects lost from a vehicle, vessel, aircraft or marine structure: Marine and Coastal Access Act 2009 s 263(1). In s 263 'marine structure' and 'vessel' have the meaning given by the Marine and Coastal Access Act 2009 s 115: s 263(4). A statement made by a person in response to a requirement made under s 263 may not be used against the person in criminal proceedings in which the person is charged with an offence to which s 263(2) applies: s 263(2). Section 263(2) applies to any offence other than an offence under the Perjury Act 1911 s 5 (which concern false statements made otherwise than on oath): Marine and Coastal Access Act 2009 s 263(3). For Crown application see Marine and Coastal Access Act 2009 s 295.

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### **30I. Common enforcement provisions.**

The Marine and Coastal Access Act 2009 Pt 8 Ch 5 (ss 288-292) deals with common enforcement provisions.

For Crown application see Marine and Coastal Access Act 2009 s 295.

#### **1. Duties of enforcement officers**

Before exercising any power conferred by the Marine and Coastal Access Act 2009 Pt 8 (ss 235-295), an enforcement officer must, if requested to do so, produce evidence that the officer is authorised to exercise that power: Marine and Coastal Access Act 2009 s 289(1). In Pt 8 Ch 5 (ss 288-292) 'enforcement officer' means a person who has any powers conferred by Pt 8, other than a person who has such powers only by virtue of the Marine and Coastal Access Act 2009 s 260(2) (persons assisting enforcement officers: see PARA 30G.2): Marine and Coastal Access Act 2009 s 288. An enforcement officer may exercise a power conferred by Pt 8 only if the officer complies with the duty imposed by s 289(1): s 289(2). If, at the time the request is made, the officer does not consider it practicable to produce the evidence referred to in s 289(1), that provision does not apply until such time as the officer considers it practicable to comply with the request: s 289(3). Nothing in s 289 applies to a person falling within the Marine and Coastal Access Act 2009 s 235(1)(c) or (d) (see PARA 30F.1, heads (3) and (4): s 289(4).

Before exercising any power conferred by Pt 8, an enforcement officer must, if requested to do so, give the information in the Marine and Coastal Access Act 2009 s 290(3): s 290(1). Before exercising any power conferred by Pt 8, any person assisting an enforcement officer by virtue of the Marine and Coastal Access Act 2009 s 260 must, if requested to do so, give the information in heads (1) and (2): s 290(2). The information is (1) the person's name; (2) the power the person is proposing to exercise; (3) the grounds for proposing to do so: s 290(3). A person may exercise a power conferred by Pt 8 only if the person complies with the duty imposed by s 290(1) or the duty imposed by s 290(2) (as the case may be): s 290(4). If, at the time the request is made, the person does not consider it practicable to give the information referred to in s 290(1) or the information referred to in s 290 (2) (as the case may be), that provision does not apply until such time as the person considers it practicable to comply with the request: s 290(5).

#### **2. Liability of enforcement officers**

A person within the Marine and Coastal Access Act 2009 s 291(2) is not to be liable in any civil or criminal proceedings for anything done (or omitted to be done) in, or in connection with, the discharge or purported discharge of the person's functions under the Marine and Coastal Access Act 2009: s 291(1). The persons are (1) any enforcement officer; (2) any person assisting an enforcement officer by virtue of the Marine and Coastal Access Act 2009 s 260 (see PARA 30G.2): s 291(2). For the meaning of 'enforcement officer' see PARA 30I.1. Section 291(1) does not apply (a) if the act or omission is shown to have been in bad faith, (b) if there were no reasonable grounds for the act or omission, or (c) so as to prevent an award of damages in respect of the act or omission on the ground that it was unlawful as a result of the Human Rights Act 1998 s 6(1) (acts of public authorities incompatible with Convention rights: see JUDICIAL REVIEW vol 61 (2010) PARA 651): Marine and Coastal Access Act 2009 s 291(3).

### **3. Offences in relation to enforcement officers**

A person is guilty of an offence if (1) the person fails without reasonable excuse to comply with a requirement reasonably made, or a direction reasonably given, by an enforcement officer in the exercise of any power conferred by the Marine and Coastal Access Act 2009 Pt 8 (ss 235-295), or (2) the person prevents any other person from complying with any such requirement or direction: Marine and Coastal Access Act 2009 s 292(1). For the meaning of 'enforcement officer' see PARA 30I.1. In s 292 any reference to an enforcement officer includes a reference to a person assisting an enforcement officer by virtue of s 260 (see PARA 30G.2): s 292(11). A person is not guilty of an offence by reason of a failure to comply with a requirement made under the Marine and Coastal Access Act 2009 s 257(1) if the person complies with s 257(2) (see PARA 30G.2): s 292(2). A person who provides information in pursuance of a requirement reasonably made by an enforcement officer in the exercise of the power conferred by the Marine and Coastal Access Act 2009 s 263 (see PARA 30H) is guilty of an offence if (a) the information is false in a material particular, and the person knows that it is or is reckless as to whether it is, or (b) the person intentionally fails to disclose any material particular: s 292(3). A person who intentionally obstructs an enforcement officer in the performance of any of the officer's functions under the Marine and Coastal Access Act 2009 is guilty of an offence: s 292(4). A person who assaults an enforcement officer in the performance of any of the officer's functions under the Marine and Coastal Access Act 2009 is guilty of an offence: s 292(5). A person who, with intent to deceive, falsely pretends to be an enforcement officer is guilty of an offence: s 292(6). A person who is guilty of an offence under s 292(1), (3) or (6) is liable (i) on summary conviction, to a fine not exceeding the statutory maximum; (ii) on conviction on indictment, to a fine: s 292(7). As to the statutory maximum see PARA 169. A person who is guilty of an offence under s 292(4) is liable on summary conviction to a fine not exceeding £20,000: s 292(8). A person who is guilty of an offence under s 292(5) is liable on summary conviction to a fine not exceeding £50,000: s 292(9). Proceedings for an offence under s 292 may be taken, and the offence may for all incidental purposes be treated as having been committed, in any part of the United Kingdom: s 292(10).

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## 2. THE SEA AND SEASHORE

### (1) THE HIGH SEAS AND TERRITORIAL WATERS

#### 31. Meanings of 'high seas' and 'territorial waters'.

At common law, 'high seas' includes the whole of the sea below low-water mark<sup>1</sup> where great ships can go, except for such parts of the sea as are within the body of a county, for the realm of England only extends to the low-water mark, and all beyond is the high seas<sup>2</sup>. In international law 'high seas' means all parts of the sea not included in the territorial sea<sup>3</sup> and internal waters<sup>4</sup> of any state<sup>5</sup>.

The territorial sea for the United Kingdom now extends 12 nautical miles<sup>6</sup> measured from baselines established by Order in Council<sup>7</sup>, unless otherwise provided<sup>8</sup>. Its legal status is a belt of waters adjacent to the coast within which the coastal state enjoys sovereignty. The sovereignty must be exercised in a manner which respects certain rights for the benefit of other states, notably the right of innocent passage for vessels<sup>9</sup>.

In the absence of any treaty between states or of actual possession by any state, the soil under any part of the high seas which is more than 12 miles from the coast is the property of no person<sup>10</sup>.

1 If the low-water mark of ordinary tides is the boundary, then on many parts of the coast there are considerable tracts of land left bare by the sea on three days in every lunar week which are not part of the realm of England and not subject to the common law. In the time of Elizabeth I the land and the foreshore were considered to go to the low-water mark of spring tides: see Moore *History of the Foreshore and the Law Relating Thereto* (3rd Edn, 1888) p 236. For a view that, in relation to a right of fishery, the low-water mark of spring tides is to be preferred see *Loose v Castleton* (1978) 41 P & CR 19 at 33, CA, per Bridge LJ, considered further and concurred with in *Anderson v Alnwick District Council* [1993] 3 All ER 613, [1993] 1 WLR 1156, DC. See also the Public Health (Control of Disease) Act 1984, 'coastal waters' means waters within a distance of 3 nautical miles from any point on the coast measured from low-water mark of ordinary spring tides: s 74 (definition prospectively repealed). Cf, however, the Sea Fisheries Regulation Act 1966 s 20 ('sea' includes the coast up to high-water mark); and the Finance Act 1986 s 108 ('the shoreline of the United Kingdom means the high-water line along the coast'); and see also the definitions of 'sea' and 'seashore' in the Coast Protection Act s 49; PARA 505 note 9. As to the meaning of 'United Kingdom' see PARA 22 note 5.

2 *The Mecca* [1895] P 95 at 107, CA, per Lindley LJ (considering the jurisdiction of the Court of Admiralty), applied in *R v Liverpool Justices, ex p Molyneux* [1972] 2 QB 384, [1972] 2 All ER 471, DC. See also *R v Keyn* (1876) 2 Ex D 63, CCR, where the history of the jurisdiction is considered, and Sir R Phillimore stated (at 67) that the county extends to low-water mark, where the high seas begin, and that in earlier days the courts of oyer and terminer had jurisdiction between high and low-water mark when the tide was out, and the court of the Admiral had jurisdiction there when the tide was in. See also Coulson and Forbes *Law of Waters* (6th Edn, 1952) p 1. As to offences committed on the high seas see *R v Kelly* [1982] AC 665, [1981] 2 All ER 1098, HL.

3 In international law the territorial sea is a belt of sea adjacent to the coast of a state lying beyond its land territory and its internal waters: Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958; TS 3 (1965); Cmnd 2511) art 1 para 1. A state may establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles from its baselines: see the United Nations Convention on the Law of the Sea (New York, 10 December 1982; Misc 11 (1983); Cmnd 8941) art 3; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 123 et seq. Except with respect to states which are not parties to the latter Convention, the 1958 Convention is superseded by the 1982 Convention. The United Kingdom is a party to both Conventions.

4 In international law 'internal waters' means waters under the full sovereignty of a state which lie to the landward side of the baseline from which the territorial sea is measured: see the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958; TS 3 (1965); Cmnd 2511) art 5 para 1. Under the United Nations Convention on the Law of the Sea (New York, 10 December 1982; Misc 11 (1983); Cmnd 8941) they include inland waters, ports, anchorages and roadsteads, bays, gulfs and estuaries, sea separated by islands and all sea areas which are to the landward side of the baselines from which the territorial sea is delimited: see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 121. See also *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, CA.

5 Convention on the High Seas (Geneva, 29 April 1958; TS 5 (1963); Cmnd 1929) art 1. As to fishing rights in the high seas see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 800.

6 Territorial Sea Act 1987 s 1(1)(a). 'Nautical miles' means international nautical miles of 1,852 metres: s 1(7).

7 See the Territorial Sea Act 1987 s 1(1)(b). Orders in Council include existing orders made under the royal prerogative: s 1(4); and see PARA 32 note 1.

8 le for the purpose of implementing any international agreement or otherwise: see the Territorial Sea Act 1987 s 1(2). This includes reduction for geographical means, eg in the English Channel. The Territorial Sea (Limits) Order 1989, SI 1989/482, establishes the seaward limit of the territorial sea adjacent to the United Kingdom in the Straits of Dover and in the vicinity of the Isle of Man. The 12-mile limit accords with international practice. See also *The Fagernes* [1927] P 311 at 319, CA, where at the court's invitation, the Attorney General stated in open court that he was instructed by the Secretary of State for Home Affairs to say that a particular spot was not within the limits to which the Crown's territorial sovereignty extended. As to the binding effect of such a statement see *The Fagernes* at 323, 330. In *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at 756, [1967] 3 All ER 663 at 682, CA, Diplock LJ said that the Convention on the Territorial Sea and the Contiguous Zone constituted a declaration by the Crown as to the area over which it would claim to exercise territorial sovereignty.

9 See **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 133.

10 Cf Coulson and Forbes *Law of Waters* (6th Edn, 1952) p 1. As to the continental shelf, however, see PARA 32 note 2. As to the sea bed within the 12-mile limit see PARA 32.

## UPDATE

### 31 Meanings of 'high seas' and 'territorial waters'

NOTE 1--Sea Fisheries Regulation Act 1966 repealed: Marine and Coastal Access Act 2009 s 187, Sch 22 Pt 4 (in force in relation to Wales: SI 2010/630).



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/2. THE SEA AND SEASHORE/(1) THE HIGH SEAS AND TERRITORIAL WATERS/32. Rights of the Crown.

## 32. Rights of the Crown.

The soil of the sea between the low-water mark as shown on Admiralty charts<sup>1</sup> and extending for 12 miles is within the territorial sovereignty of the Crown<sup>2</sup>; and the soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up as the tide flows, is *prima facie* the property of the Crown<sup>3</sup>. The Crown also claims to be entitled to the mines and minerals under the soil of the seas within these limits except in respect of certain rights to coal<sup>4</sup>.

1 Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958; TS 3 (1965); Cmnd 2511) art 3; and see the Territorial Waters Order in Council 1964 (25 September 1964) (amended by SI 1998/2564) which establishes the baseline from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured. It is generally low-water line round the coast, including the coast of all islands: Territorial Waters Order in Council 1964 art 2(1). Special provision is made by art 3, Schedule (substituted by SI 1998/2564) to deal with the configuration of Scottish islands. Where there are well-defined bays, lines not exceeding 24 miles in length, drawn across the bays, are used: see art 4. For the wide meaning of 'bay' see art 5(1); and *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, CA. See also the Convention on the Territorial Sea and the Contiguous Zone art 13. As to Admiralty charts as evidence see *Post Office v Estuary Radio Ltd*. As to the extent of the territorial sea and its measurement see further **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 123 et seq. See also the National Heritage (Territorial Waters Adjacent to England) Order 2002, SI 2002/2427; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 804.

2 See PARA 31. Some states also claim exclusive sovereign rights over the 'continental shelf', ie the sea bed and subsoil of submarine areas adjacent to the coast but outside territorial waters to a specified depth, in order to exploit the natural resources of those areas. In relation to such matters see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 163 et seq. In general, British fishery limits extend to 200 miles from the baselines from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured (Fishery Limits Act 1976 s 1(1)); though they may be varied by Order in Council (s 1(2)) and are subject to median lines with other states (s 1(3)). See further the Fishery Limits Order 1999, SI 1999/1741; and **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 961. As to the meaning of 'United Kingdom' see PARA 22 note 5.

3 According to *R v Keyn* (1876) 2 Ex D 63 at 199 et seq, CCR, per Cockburn LCJ, the soil of the sea outside the body of a county and within the then 3-mile limit was not *prima facie* vested in the Crown, as was the case of the bed and foreshore within the county, and has never been so vested, except in the case of the bed of the sea off the coast of Cornwall by the Cornwall Submarine Mines Act 1858 (see s 2 (repealed)). On the other hand, there are dicta of judges to the contrary in *A-G v Chambers* (1854) 4 De GM & G 206 at 213; *Gammell v Woods and Forests Comrs* (1859) 3 Macq 419, HL; *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192; *Lord Advocate v Wemyss* [1900] AC 48 at 66, HL; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 166; and *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171, CA. In *A-G for British Columbia v A-G for Canada* [1914] AC 153, PC, the Privy Council refused to consider the question whether the shore below low-water mark to within 3 miles of the coast belonged to the Crown on the ground that it was not a question belonging to municipal law alone, and that it was not desirable that any municipal tribunal should pronounce upon it. As to the law relating to bays see note 1. As to the Crown's right to remove an obstruction in territorial waters see *The Putbus* [1969] P 136 at 155, [1969] 2 All ER 676 at 683, CA, per Phillimore LJ. For certain purposes such as police, customs, public health and fisheries, a state may exercise jurisdiction beyond its generally accepted limits of territorial waters: see *Croft v Dunphy* [1933] AC 156 at 162, PC. As to the right of the Crown to the foreshore see PARA 38. For the history of the *prima facie* title of the Crown to the bed of the sea and foreshore see Moore *History of the Foreshore and the Law Relating Thereto* (3rd Edn, 1888) p 1 et seq.

4 See **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 25. See also the Continental Shelf Act 1964 s 1(1); and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 172; **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 26.

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### 33. Grants to subjects.

The Crown can grant, and in many cases has granted, the soil below the ordinary low-water mark to subjects, but without prejudice to the public right of navigation and fishing and rights ancillary thereto<sup>1</sup>.

A subject may, by usage and prescription, acquire a title to so much of the soil below low-water mark as he may reasonably possess<sup>2</sup>.

1 *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192; *A-G v Wright* [1897] 2 QB 318, CA; *Lord Advocate v Wemyss* [1900] AC 48 at 66, HL. By grants made before Magna Carta the public right of fishing may have been annulled: see *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; *A-G for British Columbia v A-G for Canada* [1914] AC 153 at 170-171, PC; and **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 797 et seq. It is not improbable that in former times the foreshore was considered to extend to the low-water mark of spring tides, for in manors to which a several fishery by fixed engines was parcel the fishing engines were not infrequently placed below the low-water mark of ordinary tides: see Hale's *De Jure Maris* c 5 (Hargrave's Law Tracts 21-22), quoting Magna Carta and various statutes for the removal of weirs as showing that it was possible for a subject to own the soil below low-water mark even on the sea coast. Land below low-water mark is not part of the United Kingdom for the purpose of determining the seaward limit of fishing: *Stephens v Snell* (1954) Times, 5 June.

2 I.e. a place in the sea between certain points, or a particular part contiguous to the shore, or a port or creek or arm of the sea, known as a 'districtus maris': see Hale's *De Jure Maris* c 6 (Hargrave's Law Tracts 31-33). For instances see *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192; *Foreman v Free Fishers and Dredgers of Whitstable* (1869) LR 4 HL 266; and the cases cited in Hale's *De Jure Maris* c 5 (Hargrave's Law Tracts 21-22).

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## (2) THE SEASHORE

### (i) In general

#### 34. Extent of the seashore.

The seashore<sup>1</sup>, foreshore<sup>2</sup> or sea beach (these are generally synonymous terms<sup>3</sup>) is that portion of the realm of England which lies between the high-water mark of medium high tides and low-water mark<sup>4</sup>, but it has been said that all that lies to the landward of high-water mark and is in apparent continuity with the beach at high-water mark will normally form part of the beach<sup>5</sup>. It has also been held that 'foreshore' means the whole of the shore that is from time to time exposed by the receding tide<sup>6</sup>. For oil taxation purposes the shoreline is the high-water mark<sup>7</sup>.

1 As to the meaning of 'seashore' in the Coast Protection Act 1949 see PARA 505 note 9. In the Sea Fisheries (Shellfish) Act 1967 'seashore' means any portion of the shore and bed of the sea, or of an estuary or tidal river, above or below, or partly above and partly below, low-water mark and waters adjacent to England and Wales to, or that part of the Scottish zone within, a distance of 6 nautical miles measured from the baselines from which the breadth of the territorial sea is measured: s 1(1), (1A) (s 1 amended by the Fishery Limits Act 1976 s 9(1), Sch 2 para 15; the Sea Fisheries (Shellfish) Act 1967 s 1(1) amended, and s 1(1A) added, by SI 1999/1820).

2 In the Limitation Act 1980 and in the Land Registration Act 2002, 'foreshore' means the shore and bed of the sea and any tidal water, below the line of the medium high tide between the spring tides and the neap tides (Limitation Act 1980 Sch 1 para 11(3); Land Registration Act 2002 Sch 6 para 13(3)); and in the Salmon and Freshwater Fisheries Act 1975 'foreshore' includes the shore and bed of the sea and of every channel, creek, bay and estuary, and of every navigable river as far up it as the tide flows (s 41(1)).

3 *Mellor v Walmesley* [1905] 2 Ch 164, CA; *Government of the State of Penang v Beng Hong Oon* [1972] AC 425 at 437-439, [1971] 3 All ER 1163 at 1172-1173, PC, per Lord Cross of Chelsea. See, however, the Public Health Acts Amendment Act 1907 s 82 in which 'the seashore' appears to include the foreshore and seashore above high-water mark; and PARA 51. There is no definition of 'seashore' in the Public Health Acts Amendment Act 1907, but s 82 appears to be a public enactment of a clause which has constantly been inserted in local Acts for town improvements, in which Acts the seashore was defined according to the desire of the promoters: see eg the Clacton Improvement Act 1905 s 3 (repealed); and the Formby Urban District Council Act 1905 s 20 (repealed).

4 As to the meanings of 'high-water mark' and 'low-water mark' see PARA 35; and see *Blundell v Catterall* (1821) 5 B & Ald 268; *Scrutton v Brown* (1825) 4 B & C 485 at 495; *A-G v Chambers* (1854) 4 De GM & G 206 at 216.

5 *Tito v Waddell (No 2)*, *Tito v A-G* [1977] Ch 106 at 267, [1977] 3 All ER 129 at 263 per Megarry V-C. For discussion of these issues see also *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, [1971] 3 All ER 1163, PC, and *Musselburgh Magistrates v Musselburgh Real Estate Co Ltd* (1904) 7 F 308.

6 *Loose v Castleton* (1978) 41 P & CR 19 at 34, CA, per Bridge LJ. For a discussion of this point see *Anderson v Alnwick District Council* [1993] 3 All ER 613, [1993] 1 WLR 1156, DC. That it may be difficult to describe the foreshore with certainty was recognised in *R v Dyfed County Council, ex p Manson* (18 February 1994, unreported) approving the approach in *Anderson v Alnwick District Council* (above).

7 See the Finance Act 1986 s 108(3); and **OIL AND GAS TAXATION** vol 78 (2010) PARA 301. This is subject to special provisions relating to bays: see s 108(4). Where it is necessary to establish the high-water line at any place, it is taken to be the line which, on the current Admiralty chart showing that place, is depicted as 'the coastline': s 108(5).

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### 35. Landward and seaward limits.

The landward limit of the foreshore is the high-water mark of ordinary tides, which is the line of the medium tide between the spring and the neap tides throughout the year<sup>1</sup>, that is, the point on the shore which is, about four days in every week, reached and covered with the tides<sup>2</sup>, although it has been held that it does not matter if from time to time certain areas dry out<sup>3</sup>.

The seaward limit of the foreshore is usually taken to be the low-water mark of such tides<sup>4</sup>.

<sup>1</sup> *Government of the State of Penang v Beng Hong Oon* [1972] AC 425 at 435-436, [1971] 3 All ER 1163 at 1170-1171, PC, per Lord Cross of Chelsea.

<sup>2</sup> *A-G v Chambers* (1854) 4 De GM & G 206 at 215 per Alderson B, delivering the opinion of the judges, and at 218 per Lord Cranworth LC. Cf *Tracey Elliot v Earl of Morley* (1907) 51 Sol Jo 625. See further **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 922.

<sup>3</sup> *Post Office v Estuary Radio Ltd* [1967] 3 All ER 663 at 677, [1967] 1 WLR 847 at 868 per O'Connor J (affd [1968] 2 QB 740, [1967] 3 All ER 663, CA), where the court was concerned with the baseline for measuring the then 3-mile limit of territorial waters for the purpose of the Wireless Telegraphy Act 1949 s 1 (repealed), and the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958; TS 3 (1965); Cmnd 2511) arts 3, 7.

<sup>4</sup> *Blundell v Catterall* (1821) 5 B & Ald 268. The delimitation of the low-water boundary of the foreshore has not been brought directly into issue by the Crown, as was the case with the landward boundary in *A-G v Chambers* (1854) 4 De GM & G 206, but the question was considered in *Loose v Castleton* (1978) 41 P & CR 19 at 31, CA, per Bridge LJ, in connection with the seaward limit of a shell fishery.

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### **36. Courts having jurisdiction in relation to the foreshore.**

Foreshore on the sea coast when uncovered by the tide and foreshore on an arm of the sea which is within the body of a county<sup>1</sup> has always been within the jurisdiction of the criminal courts<sup>2</sup>. Foreshore on the sea coast, when covered with water, was formerly within the jurisdiction of the Admiralty<sup>3</sup>, but power to try crimes which were subject to that jurisdiction has now been conferred on the Crown Court<sup>4</sup>.

It appears that low-water mark is the limit of a coroner's jurisdiction<sup>5</sup>.

1 The test whether an arm of the sea is within the body of a county is said to be whether a man on one shore can see what is done on the other: 4 Co Inst 140-141; Hale's De Jure Maris c 4 (Hargrave's Law Tracts 10); 2 Hawk PC c 9 s 14; 2 East PC 804; *Leigh v Burley* (1609) Owen 122; *The Public Opinion* (1832) 2 Hag Adm 398; *R v Forty-nine Casks of Brandy* (1836) 3 Hag Adm 257; *R v Cunningham* (1859) 28 LJMC 66. See also *Violet v Blaque* (1618) Cro Jac 514; *R v Keyn* (1876) 2 Ex D 63 at 164, 168, CCR; *The Fagernes* [1927] P 311, CA.

2 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1055.

3 *R v Keyn* (1876) 2 Ex D 63 at 168, CCR. See also *Sir Henry Constable's Case* (1601) 5 Co Rep 106a; *R v Two Casks of Tallow* (1837) 3 Hag Adm 294; *The Pauline* (1845) 2 Wm Rob 358. In *Embleton v Brown* (1860) 3 E & E 234 the justices were held to have jurisdiction to the exclusion of the Admiralty.

4 See the Supreme Court Act 1981 s 46(2) (replacing the Courts Act 1971 s 6(2) (repealed)); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1056.

5 See **CORONERS** vol 9(2) (2006 Reissue) PARA 916. As to the jurisdiction of civil courts see **COURTS** vol 10 (Reissue) PARA 314 et seq.

## **UPDATE**

### **36 Courts having jurisdiction in relation to the foreshore**

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 37. Local government boundaries and the foreshore.

At common law, because foreshore, whether on the sea coast or on a tidal river, *prima facie* belongs to the Crown<sup>1</sup> it is *prima facie* extra-parochial<sup>2</sup>, but it may be shown to be within a parish, although the burden of proving this lies on whoever asserts it<sup>3</sup>.

By statute, however, accretion from the sea, whether natural or artificial, and any part of the seashore to the low-water mark, which was not immediately before 26 October 1972 part of a parish, is in England<sup>4</sup> annexed to and incorporated with the parish or parishes adjoining the relevant accretion or part of the seashore<sup>5</sup>. In turn, every accretion from the sea or part of the seashore which is thus annexed to and incorporated with a parish is annexed to and incorporated with the district and county in which that parish is situated<sup>6</sup>. Likewise, in Wales<sup>7</sup> every such accretion from the sea is annexed to and incorporated with the community or communities which the accretion or part of the sea-shore adjoins<sup>8</sup>; and every accretion so annexed or incorporated is annexed to and incorporated with the principal area and the preserved county in which that community is situated<sup>9</sup>.

1 As to Crown ownership of the foreshore see PARA 38.

2 *R v Musson* (1858) 8 E & B 900 (seashore at Yarmouth); *Bridgwater Trustees v Bootle-cum-Linacre* (1866) LR 2 QB 4 (foreshore of River Mersey). See, however, *R v Landulph Inhabitants* (1834) 1 Mood & R 393; *MacCannon v Sinclair* (1859) 2 E & E 53 (where land above the high-water mark of medium tides was held to be within the parish); *R v Gee* (1860) 1 E & E 1068.

3 *Perrott v Bryant* (1836) 2 Y & C Ex 61 (oyster layings on which tithes had been paid); *R v Musson* (1858) 8 E & B 900; *Ipswich Dock Comrs v St Peter, Ipswich, Overseers* (1866) 7 B & S 310 (where it was held that evidence of the rating of land reclaimed from the foreshore was of much more weight than evidence of a parish perambulation); *Bridgwater Trustees v Bootle-cum-Linacre* (1866) LR 2 QB 4.

4 As to the meaning of 'England' see PARA 19 note 8.

5 See the Local Government Act 1972 s 72(1)(a). This does not apply to structures below low-water mark, which are outside the realm (*Blackpool Pier Co and South Blackpool Jetty v Fylde Union Assessment Committee and Layton with Warbreck Township Overseers* (1877) 46 LJMC 189), but does apply to reclaimed land (*Barwick v South Eastern and Chatham Rly Cos* [1921] 1 KB 187, CA). In England, in so far as the whole or part of any such accretion from the sea or part of the seashore as is mentioned in the text does not adjoin a parish, it is to be annexed to and incorporated with the district which it adjoins or, if it adjoins more than one district, with those districts in proportion to the extent of the common boundary, and every such accretion or part of the seashore which is so annexed to and incorporated with a district is annexed to and incorporated with the county in which that district is situated: Local Government Act 1972 s 72(3). As to local government boundaries on rivers see PARA 76. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

6 Local Government Act 1972 s 72(2) (amended by the Local Government (Wales) Act 1994 s 66(5), Sch 15 para 18).

7 As to the meaning of 'Wales' see PARA 16 note 2.

8 See the Local Government Act 1972 s 72(1)(b).

9 See the Local Government Act 1972 s 72(2A) (added by the Local Government (Wales) Act 1994 Sch 15 para 18).

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### 38. Ownership of the foreshore.

Ownership of the foreshore, the establishment of title and the extent of the grant are all discussed in detail elsewhere in this work<sup>1</sup>. Where land is granted with a water boundary, the grantee's title extends to that land as added to or detracted from by accretion or diluvion<sup>2</sup>.

The management of Crown foreshore is vested in the Crown Estate Commissioners<sup>3</sup>. Other bodies may, however, exercise authority over it<sup>4</sup>.

Easements of all kinds may be acquired over the foreshore in exactly the same way as they may be acquired over any other land, provided that they do not interfere with public rights over the foreshore<sup>5</sup>. When the act relied on is an interference with the soil, such as the erecting of groynes to protect the adjoining land, it is questionable whether such interference amounts only to an easement, or to an act of possession and ownership of the soil<sup>6</sup>.

The Land Registration Act 2002 introduced a new procedure for the registration of title to demesne land<sup>7</sup>, anticipated to be of particular significance in relation to registration of the Crown's title to the foreshore<sup>8</sup>. This procedure is discussed elsewhere in this work<sup>9</sup>.

1 See **CROWN PROPERTY** vol 12(1) (Reissue) PARA 252 et seq.

2 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 716, [1982] 1 All ER 283 at 287-288, PC, per Lord Wilberforce, who added that this is so whether or not the grant is accompanied by a boundary map or contains a description stating the area of the land, and whether or not the boundary can be identified. See further **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 922 et seq. As to the meaning of 'accretion' see PARA 39.

3 See the Crown Estate Act 1961 s 1; and **CROWN PROPERTY** vol 12(1) (Reissue) PARA 242.

4 See *R v Dyfed County Council, ex p Manson* (18 February 1994, unreported) per Harrison J, concerning powers to make byelaws.

5 See eg *Mercer v Denne* [1904] 2 Ch 534 (affd [1905] 2 Ch 538, CA), where a custom for fishermen to dry their nets on waste land was upheld. As to the nature, characteristics and creation of easements see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 1 et seq.

6 *Philpot v Bath* (1905) 21 TLR 634, CA. If the act is done without any intention to take possession, only an easement is acquired: *Philpot v Bath* (above). As to the value to be attached to erections on the shore, and their change of position, on the question of ownership see *Le Strange v Rowe* (1866) 4 F & F 1048 (taking shingle, seaweed and shellfish); *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602 (maintaining or erecting wharves or landing stages); *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 617, PC (erecting stores and jetties on reclaimed land).

7 See the Land Registration Act 2002 s 79; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 883.

8 See *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) para 11.10.

9 See **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 883.

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## **(ii) Accretion, Alluvion and Dereliction**

### **39. Meanings of 'accretion', 'alluvion' and 'dereliction'.**

The doctrine which is conveniently called 'the doctrine of accretion' recognises the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water<sup>1</sup>.

'Accretion' means the gradual and imperceptible<sup>2</sup> receding of the sea or inland water, and 'alluvion' means the gradual and imperceptible deposit of matter on the foreshore. Both lead to an addition to the land or foreshore.

'Dereliction' means the gradual and imperceptible encroachment of water onto land causing a reduction in the surface area of the foreshore<sup>3</sup>.

1 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC.

2 'Imperceptible' means imperceptible in its progress, not imperceptible after a length of time; it means that the increase in the area of dry land cannot be seen as it occurs, not that it could not be later observed to have in fact occurred: *R v Lord Yarborough* (1824) 3 B & C 91 at 107 (affd sub nom *Gifford v Lord Yarborough* (1828) 5 Bing 163, HL); *Ford v Lacy* (1861) 7 H & N 151; *Foster v Wright* (1878) 4 CPD 438; *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, [1971] 3 All ER 1163, PC.

3 *Re Hull and Selby Rly Co* (1839) 5 M & W 327. As to coast protection see PARA 499 et seq.



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#### **40. Effect of accretion, alluvion and dereliction.**

The presumption of law is that where land or foreshore is subject to accretion or alluvion and the added land is above high-water mark, the addition belongs to the owner of the dry land to which it is added, and if the added land is above the low-water mark it belongs to the owner of the foreshore<sup>1</sup>. Evidence can be adduced to rebut this presumption, but that evidence must be strong<sup>2</sup>.

Where the opposite process, dereliction, takes place and the tidal water gradually and imperceptibly<sup>3</sup> encroaches upon land which was formerly situated above high-water mark, that land becomes the property of the owner of the foreshore and the ownership of land which was formerly part of the foreshore passes to the owner of the bed of the tidal water<sup>4</sup>.

1 *Anon* (1573) 3 Dyer 326b; *R v Lord Yarborough* (1824) 3 B & C 91 (affd sub nom *Gifford v Lord Yarborough* (1828) 5 Bing 163, HL). In a dispute between a riparian owner and the Crown as to an accretion, the burden of proving the former position of the high-water mark is on the Crown if the riparian owner admits the Crown's title to the foreshore: *A-G v Chamberlaine* (1858) 4 K & J 292; *A-G v M'Carthy* [1911] 2 IR 260. The rule as to accretion applies to all riparian land, even if it has been scheduled or its measurements specified in title deeds: *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, PC.

2 *Mellor v Walmesley* [1905] 2 Ch 164, CA; *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620 (where the presumption was rebutted by a conveyance specifying 'pieces or parcels of land . . . more particularly delineated and described in the plan'). For application of the presumption cf *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, [1971] 3 All ER 1163, PC and *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC.

3 As to the meaning of 'imperceptible' see PARA 39 note 2.

4 *Re Hull and Selby Rly Co* (1839) 5 M & W 327.

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#### **41. Basis of the doctrine of accretion.**

The old basis of the doctrine of accretion was thought to be that from day to day, week to week and month to month a person cannot see where his old boundary was<sup>1</sup>, and that that which cannot be perceived in its progress is taken to be as if it had never existed<sup>2</sup>. A more realistic view is that the doctrine is required for the protection of property and recognises the fact that a riparian owner may lose as well as gain from changes in the water boundary or level; but whatever is the true explanation of the doctrine, what is certain is that it requires a distinction to be made between such progression as may justly be considered to belong to the riparian owner and such large changes or avulsions as should more properly be allocated to his neighbour<sup>3</sup>.

1 *Hindson v Ashby* [1896] 2 Ch 1 at 28, CA.

2 *Re Hull and Selby Rly Co* (1839) 5 M & W 327 at 333 per Alderson B.

3 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 721, [1982] 1 All ER 283 at 291, PC, per Lord Wilberforce. For a detailed discussion of the doctrine, including relatively rapid and erratic accretion, see *Southern Centre of Theosophy Inc v State of South Australia* (above).

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## 42. Sudden changes.

Where the change of boundary between the land and the water is not slow and imperceptible<sup>1</sup> but sudden<sup>2</sup> or as a result of deliberate artificial reclamation<sup>3</sup>, the presumptions as to ownership<sup>4</sup> do not apply and the change causes no change in the ownership of the land<sup>5</sup>.

1 As to the meaning of 'imperceptible' see PARA 39 note 2.

2 *Mussumat Imam Bandi v Hurgovind Ghose* (1848) 4 Moo Ind App 403, PC; *Carlisle Corp'n v Graham* (1869) LR 4 Exch 361, where a new channel of a river formed suddenly. If land suddenly inundated becomes dry land again, it belongs to its former owner: *A-G v Reeve* (1885) 1 TLR 675, where 10 to 12 feet of shingle (approximately 4 metres) was added in a tide. Land acquired by a sudden retreat of the sea is not prescribable as part of a manor or as belonging to a subject: *R v Oldsworth* (1637) cited in Hale's De Jure Maris c 6 (Hargrave's Law Tracts 30). As to the effect on the ownership of fisheries of sudden changes in the course of a river see Moore *History and Law of Fisheries* (1903) p 124 et seq.

3 *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, PC. As to the position where works intended for other purposes result in accretion see PARA 43.

4 As to these presumptions see PARA 40.

5 See the cases cited in notes 2-3.

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#### 43. Extent of the doctrine of accretion.

The doctrine of accretion applies equally to the property of the Crown or a subject<sup>1</sup>. It applies whether the change is caused by natural means or artificial means lawfully employed<sup>2</sup>, provided the change is not the direct result of deliberate reclamation<sup>3</sup>. So long as the change is gradual and imperceptible<sup>4</sup>, the doctrine applies, even though the former boundaries of the land concerned were defined or ascertainable<sup>5</sup>.

1 *Gifford v Lord Yarborough* (1828) 5 Bing 163, HL; *Re Hull and Selby Rly Co* (1839) 5 M & W 327; *A-G v M'Carthy* [1911] 2 IR 260.

2 *A-G v Chambers, A-G v Rees* (1859) 4 De G & J 55; *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372, where the erection of groynes to prevent erosion resulted in accretion. See also *Doe d Seebkristo v East India Co* (1856) 10 Moo PCC 140 at 158. The doctrine will apply to property scheduled or with measurements specified in the title deeds but in fact abutting on the foreshore: *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, PC. See also **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 926.

3 See PARA 42.

4 As to the meaning of 'imperceptible' see PARA 39 note 2.

5 *Gifford v Lord Yarborough* (1828) 5 Bing 163, HL; *A-G v M'Carthy* [1911] 2 IR 260; *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372; *Secretary of State for India in Council v Foucar & Co Ltd* (1933) 50 TLR 241, PC. Formerly some doubt existed on this point (see *A-G v Chambers, A-G v Rees* (1859) 4 De G & J 55 at 70 et seq per Lord Chelmsford, and *Hindson v Ashby* [1896] 2 Ch 1, CA), but in *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372 at 393, Romer J pointed out that *Gifford v Lord Yarborough* (which had not been brought to the notice of Lord Chelmsford in *A-G v Chambers, A-G v Rees*) had decided that the doctrine of accretion applied to land left dry which abutted on land the former boundary of which (a sea wall) was well known and readily ascertained. In *Foster v Wright* (1878) 4 CPD 438 the fact that changes in the course of a river had been marked from time to time on a map was held not to be sufficient to prevent the application of the doctrine. See also *Lloyd v Ingram* (1868), cited in *Hindson v Ashby* (above) at 29; *Hayes v Hayes* (1897) 31 ILT Jo 392.

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#### **44. Effect of accretion on character of land.**

Where land accretes<sup>1</sup> to land it acquires the legal characteristics of the land to which it is added. Thus, if it accretes to freehold it becomes freehold, and if to land subject to customary rights, it is equally liable to them<sup>2</sup>. The same rule applies to the question of jurisdiction; thus, where a town is declared to be bounded by the high-water mark, the town will extend to that mark wherever it may happen to be from time to time<sup>3</sup>.

1 As to the meaning of 'accretion' see PARA 39.

2 *Mercer v Denne* [1904] 2 Ch 534 (affd [1905] 2 Ch 538, CA), where a custom to dry fishing nets on waste land was upheld; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC.

3 *Smart & Co v Suva Town Board* [1893] AC 301, PC.

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**45. Effect on public rights.**

The rights of the public over the foreshore<sup>1</sup>, of fishing and of navigation are affected by accretion, alluvion or dereliction to the extent that those rights follow the foreshore wherever it may be at any material time<sup>2</sup>.

<sup>1</sup> As to such rights see PARA 46 et seq.

<sup>2</sup> *Carlisle Corpn v Graham* (1869) LR 4 Exch 361; *Mercer v Denne* [1904] 2 Ch 534 (affd [1905] 2 Ch 538, CA).

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### (iii) Passage and Bathing

#### 46. Extent of the right of passage.

The public has no right of passing along or across the foreshore<sup>1</sup>, except in the exercise of the rights of navigation or fishery<sup>2</sup>, or in respect of a lawfully dedicated right of way from one place to another over the foreshore<sup>3</sup>; there is no right of stray or of recreation there, and no right to go across the foreshore for the purpose of getting to or from boats, except by such places only as usage or necessity has appropriated for that purpose<sup>4</sup>. A public right to wander about at will<sup>5</sup> is a right unknown to English common law<sup>6</sup>; but the statutory right for members of the public to enter and remain on any access land<sup>7</sup> for the purposes of open-air recreation<sup>8</sup> may be extended, by order made by the Secretary of State, as respects England<sup>9</sup>, or by the Welsh Ministers, as respects Wales<sup>10</sup>, so as to include such a right in relation to coastal land or to coastal land of any description<sup>11</sup>.

There is no general right of loading or unloading, landing or embarking at pleasure upon any part of the seashore or land adjoining it except in case of peril or necessity<sup>12</sup>.

1 As to the foreshore see PARA 34. The foreshore was not a street, highway or public place within the definition of 'street' contained in former legislation relating to gas: see *Maddock v Wallasey Local Board* (1886) 55 LJQB 267. See also *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 482, [1967] 1 All ER 833 at 851, CA, per Winn LJ.

2 For a discussion of ancillary rights see *Anderson v Alnwick District Council* [1993] 3 All ER 613, [1993] 1 WLR 1156, DC (right to take worms on the foreshore).

3 As to public rights of way see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 582 et seq.

4 *Blundell v Catterall* (1821) 5 B & Ald 268 at 301, approved in *Brinckman v Matley* [1904] 2 Ch 313 at 323, CA; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 and *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA. See also *Behrens v Richards* [1905] 2 Ch 614.

5 Ie 'jus spatiandi'.

6 *A-G v Antrobus* [1905] 2 Ch 188 at 198; *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 172. The dicta of Farwell J in those cases was disapproved in relation to private rights in *Re Ellenborough Park*, *Re Davies*, *Powell v Maddison* [1956] Ch 131, [1955] 3 All ER 667, CA, where it was held that a jus spatiandi might subsist as a private right, ie as an easement appurtenant to a defined hereditament, but was approved in relation to public rights in *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 479, [1967] 1 All ER 833 at 849, CA, per Winn LJ. As to public statutory rights of access to certain commons for air and exercise see the Law of Property Act 1925 s 193; and **COMMONS** vol 13 (2009) PARA 581; and see further the text to notes 7-11.

7 'Access land' means any land which: (1) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of the Countryside and Rights of Way Act 2000 Pt I (ss 1-46); (2) is shown on such a map as registered common land; (3) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued; (4) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued; or (5) is dedicated for the purposes of Pt I under s 16, but does not (in any of those cases) include excepted land or land which is treated by s 15(1) as being accessible to the public apart from the 2000 Act: see s 1(1); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580.

8 Ie the rights under the Countryside and Rights of Way Act 2000 s 2: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583.

9 As to the Secretary of State see PARA 15 note 1. As to the meaning of 'England' see PARA 19 note 8.

10 Functions under the Countryside and Rights of Way Act 2000 s 3 which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

11 See the Countryside and Rights of Way Act 2000 s 3; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 582. 'Coastal land' means (1) the foreshore; and (2) land adjacent to the foreshore (including in particular any cliff, bank, barrier, dune, beach or flat which is adjacent to the foreshore): s 3(3). As to the meaning of 'land' see PARA 14 note 21.

12 *Blundell v Catterall* (1821) 5 B & Ald 268; *Brinckman v Matley* [1904] 2 Ch 313, CA. As to the seashore see PARA 34. As to landing persons or goods as part of the right of navigation see PARA 691.



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#### 47. Rights of inhabitants.

By immemorial custom the inhabitants of a parish or the fishermen of a village may have acquired rights akin to easements<sup>1</sup> over the foreshore or land adjacent to it<sup>2</sup>. Although the public has no such right, the court is reluctant to assist by injunction the owner of the foreshore in restraining acts which in themselves cause no injury to him<sup>3</sup>.

1 It is perhaps best to describe such local customary rights as quasi-easements rather than as easements in the strict sense: see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 629; **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 41.

2 *Mercer v Denne* [1904] 2 Ch 534 (affd [1905] 2 Ch 538, CA), where a custom for local fishermen to dry nets on waste ground was allowed; *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL, where inhabitants were allowed to share in an oyster fishery (distinguished in *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA, where the custom of inhabitants to gather sea-coal on the foreshore was not upheld because, inter alia, the nature of any such right was a profit à prendre and not an easement, and a fluctuating body such as the inhabitants of a county could not acquire a right of that nature); *Ramsgate Corpn v Debling* (1906) 22 TLR 369, where the custom of inhabitants putting chairs on the foreshore was not allowed. Where fishermen have an immemorial right to beach boats on land adjoining a harbour, and a local Act authorises an annual payment for the privilege, the owner of the land must either permit the use or provide other land equally suitable for the purpose: *Aiton v Stephen* (1876) 1 App Cas 456, HL. As to the customary rights of tenants of a manor of ancient demesne to moor on the foreshore see *Earl of Iveagh v Martin* [1961] 1 QB 232 at 271, [1960] 2 All ER 668 at 682-683. As to ancient demesne see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 643. As to the meaning of 'mooring' and use of a public right of way cf, however, *Evans v Godber* [1974] 3 All ER 341, [1974] 1 WLR 1317, DC. As to the foreshore see PARA 34.

3 *Behrens v Richards* [1905] 2 Ch 614. Instead of granting an injunction the court may make a declaration of the owner's rights: *Blundell v Catterall* (1821) 5 B & Ald 268 at 316. See also *Llandudno UDC v Woods* [1899] 2 Ch 705, where an injunction against preaching on the foreshore was refused on the ground of the triviality of the act complained of; *Brinckman v Matley* [1904] 2 Ch 313 (affd at 317, CA), where an injunction against bathing from the foreshore was granted, with a declaration; *Brighton Corpn v Packham* (1908) 72 JP 318, where an injunction against preaching on the foreshore was granted, with a declaration; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA, where a declaration and injunction were granted.

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#### **48. Prevention of smuggling.**

The person in command or charge of any vessel<sup>1</sup> in the service of Her Majesty which is engaged in the prevention of smuggling: (1) may haul up and leave that vessel on part of the coast or of the shore or bank of any river or creek<sup>2</sup>; and (2) may moor that vessel at any place below high-water mark on any part of the coast or of any such shore or bank<sup>3</sup>. Any officer<sup>4</sup> and any person<sup>5</sup> acting in aid of an officer or otherwise duly engaged in preventing smuggling may for that purpose patrol upon and pass freely along and over any part of the coast or of the shore or bank of any river or creek<sup>6</sup>.

1 'Vessel' includes any boat or other vessel whatsoever, including any hovercraft: see the Customs and Excise Management Act 1979 ss 1(1), 2(1).

2 Customs and Excise Management Act 1979 s 82(1)(a).

3 Customs and Excise Management Act 1979 s 82(1)(b).

4 'Officer' means a person commissioned by the Commissioners for Revenue and Customs: Customs and Excise Management Act 1979 s 1(1) (definition amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50). As to persons, whether or not officers, engaged by the orders or with the concurrence of the commissioners see s 8(2); and **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 904.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Customs and Excise Management Act 1979 s 82(2). Nothing in s 82 authorises the use of, or entry into, any garden or pleasure ground: s 82(3).

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#### 49. Right to bathe.

There is no common law right for the public to use the foreshore<sup>1</sup> for the purpose of bathing; and as there is no such right to bathe in the sea, the public may not cross the foreshore for that purpose<sup>2</sup>, whether the foreshore is the property of the Crown or of a private person<sup>3</sup>. However, a right to use the foreshore for bathing may be gained by custom or prescription either by the permanent or temporary inhabitants of a village, parish or district<sup>4</sup>.

The quality of bathing water must conform to prescribed standards<sup>5</sup>.

1 As to the foreshore see PARA 34.

2 *Blundell v Catterall* (1821) 5 B & Ald 268 at 298-299 per Holroyd J (approved and followed in *Brinckman v Matley* [1904] 2 Ch 313, CA), where the court considered the development of related common law rights. It found ample authority for a public right of navigation, which is for the general benefit of all the kingdom, and for the right of fishing, which tends to the sustenance and beneficial employment of individuals, 'but it does not thence follow that they have also the right of bathing': *Blundell v Catterall* at 305 per Bayley J. A right to swim in the sea was not considered in those cases as distinct from the right to bathe from the foreshore. See also *Parker v Clegg* (1903) 2 LGR 608 at 616, DC.

3 *Blundell v Catterall* (1821) 5 B & Ald 268.

4 *Blundell v Catterall* (1821) 5 B & Ald 268 at 289, 306. See also *Llandudno UDC v Woods* [1899] 2 Ch 705 at 709, where Cozens-Hardy J held that the public is not entitled to cross the shore even for the purpose of bathing or amusement; *Brinckman v Matley* [1904] 2 Ch 313, CA, where the right to bathe from the foreshore was unsuccessfully claimed by prescription and by custom in respect of a particular tenement and also by common law right; and see *A-G v Hanmer* (1858) 31 LTOS 379; *Laird v Briggs* (1880) 16 ChD 440 (on appeal (1881) 19 ChD 22, CA).

5 See EC Council Directive 76/160 (OJ L31, 05.02.76, p 01) concerning the quality of bathing water, and European Parliament and Council Directive 2006/7 (OJ L64, 04.03.2006, p 37) concerning the management of bathing water quality, both of which apply to fresh and sea water habitually used for bathing; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 32. EC Council Directive 76/160 is repealed with effect from 31 December 2014: European Parliament and Council Directive 2006/7 (OJ L64, 04.03.2006, p 37) art 17.1. Member states must bring into force the laws, regulations and administrative provisions necessary to comply with European Parliament and of the Council Directive 2006/7 by 24 March 2008: art 18.1. See also the Bathing Water (Classification) Regulations 1991, SI 1991/1597 (revoked by SI 2008/1097 on 24 March 2015), the Bathing Water Regulations 2008, SI 2008/1097; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330. See also the Water Resources Act 1991 s 83; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 331. As to the extent of member states' obligations under the European Community rules see Case C-56/90 *EC Commission v United Kingdom* [1993] ECR I-4109, [1994] 1 CMLR 769, ECJ.

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## **50. Exercise of right to bathe.**

The right to bathe, if it exists<sup>1</sup>, must be exercised in conformity with the general law, which forbids indecency; and it is apparently an indictable common law offence to bathe uncovered at any place where persons cannot bathe without indecent exposure<sup>2</sup>. It is no defence that as long as living memory extends there has been a usage to bathe at that particular spot<sup>3</sup>.

1 As to the right to bathe see PARA 49.

2 *R v Crunden* (1809) 2 Camp 89, where, with no intention to outrage decency, a man undressed on the beach at Brighton within view of newly-erected houses on the cliff top; *R v Reed* (1871) 12 Cox CC 1, where bathers undressed and crossed a public path on their way to the sea near Chichester.

3 *R v Crunden* (1809) 2 Camp 89; *R v Reed* (1871) 12 Cox CC 1. As to outraging public decency see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 764. The object of the common law offence is to protect the public from feelings of outrage by the act complained of, and it must be questioned whether in modern times the offence upheld in *R v Crunden* (above) and *R v Reed* (above) would be sustainable.

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## 51. Byelaws made by local authorities.

A local authority<sup>1</sup> may make byelaws to regulate public bathing<sup>2</sup>. For preventing danger, obstruction or annoyance to persons bathing in the sea or using the seashore, a local authority<sup>3</sup> may also make byelaws<sup>4</sup> regulating the speed of pleasure boats<sup>5</sup>, regulating their use to prevent their navigation in a dangerous manner or without due care and attention or without reasonable consideration for other persons<sup>6</sup>, and requiring the use of effectual silencers on pleasure boats propelled by internal combustion engines<sup>7</sup>. Where any part of the area of a local authority having these byelaw-making powers<sup>8</sup> is bounded by or is to seaward of the low-water mark, the authority may exercise the powers as respects any area of the sea outside its area and within 1,000 metres to seaward of any place where that mark is within or on the boundary of the authority's area<sup>9</sup>.

For the prevention of danger, obstruction or annoyance to persons using the seashore a local authority may make and enforce byelaws<sup>10</sup> regulating:

- 44 (1) the erection of certain structures or the placing of certain vehicles on the seashore<sup>11</sup>, the playing of games there and generally the use of the seashore for purposes prescribed by the byelaws<sup>12</sup>;
- 45 (2) its use for riding and driving<sup>13</sup>; and
- 46 (3) the selling and hawking of any article, commodity or thing there<sup>14</sup>,

and providing for the preservation of good order and good conduct among persons using the seashore<sup>15</sup>. For the prevention of danger, obstruction or annoyance to persons using the esplanades or promenades within its district, a local authority may also make byelaws prescribing the nature of the traffic for which they may be used, regulating the selling and hawking of any article, commodity or thing there and for the preservation of order and good conduct among persons using them<sup>16</sup>.

The Environment Agency has similar powers to make byelaws in relation to non-tidal waters, which are discussed in a later part of this title<sup>17</sup>.

1 'Local authority' means: (1) in relation to England, the council of a district or London borough, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple and the Under Treasurer of the Middle Temple; and (2) in relation to Wales, the council of a county or county borough: Public Health Act 1936 s 1(2) (substituted by the Local Government Act 1972 s 180, Sch 14 para 1; and amended by the Local Government (Wales) Act 1994 s 22(3), Sch 9 para 3(2)(b)). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 32.

2 See the Public Health Act 1936 s 231 (amended by the Local Government (Miscellaneous Provisions) Act 1976 s 17(4)); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 985. A local authority may also provide bathing huts or other conveniences for bathing on land belonging to it or under its control: see the Public Health Act 1936 s 232; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 986. As to byelaws with respect to swimming baths see s 233; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 985. As to byelaws with regard to waterways in National Parks or areas of outstanding natural beauty see the National Parks and Access to the Countryside Act 1949 s 90; and **OPEN SPACES AND COUNTRYSIDE**

vol 78 (2010) PARA 648. As to byelaws with regard to artillery and rifle ranges see PARA 54. As to byelaws with regard to water-courses see PARA 605. As to waterway byelaws see PARAS 685, 720.

3 In the Public Health Act 1961, the expression 'local authority', except where the context otherwise requires, means the council of a borough or urban district, the Common Council, the Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple, and includes the Council of the Isles of Scilly: s 2(3) (amended by the London Government Act 1963 s 40, Sch 11 para 33; Local Government Act 1972 s 272(1), Sch 30).

4 The Secretary of State or, in relation to Wales, the Welsh Ministers is the confirming authority: Public Health Act 1961 s 76(2). Any such byelaw is of no effect if and in so far as it is inconsistent with any byelaw made by any dock undertakers or any person authorised by any enactment or statutory order to construct or operate a pier: s 76(4). As to the meaning of 'person' see PARA 13 note 29. As to the power of harbour authorities to make byelaws see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARAS 687, 688. The functions of the Secretary of State under the Public Health Act 1961 s 76, the Local Government (Miscellaneous Provisions) Act 1976 s 17 (see the text to notes 8-9), and the Public Health Acts Amendment Act 1907 ss 9, 82 (see note 10), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

5 Public Health Act 1961 s 76(1)(a). Further power to make byelaws with respect to pleasure boats is conferred by the Public Health Acts Amendment Act 1890 s 44; the Public Health Acts Amendment Act 1907 s 94; and the Local Government, Planning and Land Act 1980 s 185: see PARA 684; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 597.

6 Public Health Act 1961 s 76(1)(b).

7 Public Health Act 1961 s 76(1)(c).

8 The powers under the Public Health Act 1936 s 231; and the Public Health Act 1961 s 76: see the text to notes 1-7.

9 Local Government (Miscellaneous Provisions) Act 1976 s 17(1). Any offence against byelaws made by virtue of s 17(1) may be dealt with as if committed within the authority's area: s 17(3). Before confirming any such byelaws the Secretary of State or, in relation to Wales, the Welsh Ministers (see note 4) may amend them so as to reduce the area in which they have effect if it appears that they may have effect in an area for which another authority has made or may make byelaws by virtue of s 17: s 17(2).

10 The Secretary of State is or, in relation to Wales, the Welsh Ministers (see note 4) are the confirming authority (see the Public Health Acts Amendment Act 1907 s 9), although no such byelaws affecting the foreshore below high-water mark may come into operation until the consent of the Secretary of State for Business, Enterprise and Regulatory Reform or, in relation to Wales, the Welsh Ministers has been obtained (s 82 para (4) proviso; Secretary of State for Trade and Industry Order 1970, SI 1970/1537, art 2(1); Secretaries of State for Children, Schools and Families, for Innovation, Universities and Skills and for Business, Enterprise and Regulatory Reform Order 2007, SI 2007/3224, art 11). As from a day to be appointed this proviso is repealed by the Local Government and Public Involvement in Health Act 2007 ss 135, 241, Sch 6 para 1, Sch 18 Pt 7. At the date at which this volume states the law no such day had been appointed.

11 The regulating the erection or placing on the seashore or prescribed parts of it of booths, tents, sheds, stands and stalls, whether fixed or movable, or vehicles for the sale or exposure of any article or thing, or any shows, exhibitions, performances, swings, roundabouts or other erections, vans, photographic carts or other vehicles, whether drawn or propelled by animals, persons or any mechanical power: Public Health Acts Amendment Act 1907 s 82 para (1).

12 Public Health Acts Amendment Act 1907 s 82 para (1). See *Anderson v Alnwick District Council* [1993] 3 All ER 613, [1993] 1 WLR 1156, DC.

13 Public Health Acts Amendment Act 1907 s 82 para (2).

14 Public Health Acts Amendment Act 1907 s 82 para (3).

15 Public Health Acts Amendment Act 1907 s 82 para (4). These powers no longer apply to the regulation of bathing, now provided for by the Public Health Act 1936 Pt VIII (ss 221-234): see the text to notes 1-2.

16 Public Health Acts Amendment Act 1907 s 83.

17 See PARA 709. As to the Environment Agency see PARA 17.



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## (iv) Shooting

### 52. Nature of the right.

The right to shoot and take birds on the foreshore is a profit à prendre, and can only be acquired in the same way and by the same class of persons as other profits à prendre are acquired<sup>1</sup>.

As the public at large is incapable of acquiring a profit à prendre, there is no general right to shoot over the foreshore, either when the tide is in or when it is out<sup>2</sup>. The same rule applies to channels of tidal rivers and to the sea, for the public has no right to use the highway of tidal water for such a purpose<sup>3</sup>.

1 *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. As to profits à prendre generally see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 254 et seq. Any such right will be subject to the law relating to nature conservation and the protection of wild birds: see PARA 53.

2 *Blundell v Catterall* (1821) 5 B & Ald 268; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. See also *Harrison v Duke of Rutland* [1893] 1 QB 142, CA; *Hickman v Maisey* [1900] 1 QB 752, CA.

3 *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. As to the public right of navigation see PARA 689 et seq.



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### 53. Extent of the right.

Where the soil of the foreshore<sup>1</sup> is vested in the Crown and no mischief or injury is likely to arise from the exercise of a right to shoot by the public, an unnecessary and injurious restraint upon the practice would not, presumably, be enforced by the Crown as *parens patriae*<sup>2</sup>. Where the foreshore is vested in a private person, he is entitled to the right of shooting on it<sup>3</sup>.

Where the foreshore is parcel of a manor it forms part of the demesne land, for it is part of the waste of the manor<sup>4</sup>, and a grant of free warren<sup>5</sup> will therefore extend to and include the foreshore<sup>6</sup>.

Any right to shoot may be constrained by the operation of legislation intended to protect birds and/or their habitats<sup>7</sup>. In particular, areas classified<sup>8</sup> (or which meet the criteria for classification)<sup>9</sup> under European Community law as special protection areas must be protected from disturbances affecting the birds which may be significant having regard to the objectives of classifying such areas<sup>10</sup>. In the case of wild duck and wild geese in or over any area below high-water mark of ordinary spring tides which are not subject to special protection<sup>11</sup>, there is a close season which commences with 21 February in any year and ends with 31 August<sup>12</sup>.

1 As to the foreshore see PARA 34.

2 See *Blundell v Catterall* (1821) 5 B & Ald 268 at 300; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 168.

3 *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139.

4 *Foster v Warblington UDC* [1906] 1 KB 648 at 658, CA. As to the right of the lord of a manor to shoot on waste land of the manor see **ANIMALS** vol 2 (2008) PARA 778; **COMMONS** vol 13 (2009) PARA 560.

5 As to free warren see **COMMONS** vol 13 (2009) PARA 408.

6 Grants of free warren seem invariably to have been restricted to the grantee's demesne land. It is unknown when this restriction first originated, but it appears from a commission of 5 June 1280 (enrolled on the Patent Roll 8 Edw 1 m 15d) that by reason of an ancient ordinance (now lost) the king did not grant free warren except over the demesne land of the grantee. As to the restraining effect of Magna Carta on the royal right of fowling on the foreshore and on river banks see Moore *History and Law of Fisheries* (1903) pp 6-18.

7 See the Wildlife and Countryside Act 1981 Pt I (ss 1-27ZA); and **ANIMALS** vol 2 (2008) PARA 994 et seq. The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, made pursuant to EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) (on the conservation of natural habitats and of wild fauna and flora) may also apply in certain instances: see PARA 679; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728 et seq.

8 See Case C-57/89 *EC Commission v Germany* [1991] ECR I-883, ECJ (commonly known as *Re Leybucht Dykes*).

9 Ie under EC Council Directive 79/409 (OJ L103, 25.04.79, p 01) on the conservation of wild birds. See Case C-355/90 *EC Commission v Spain* [1993] ECR I-4221, ECJ (commonly known as *Re Santona Marshes*); Case C-44/95 *R v Secretary of State for the Environment, ex p Royal Society for the Protection of Birds* [1997] QB 206, [1996] ECR I-3805, ECJ (when designating and defining the boundaries of a special protection area, a member state is to be guided by ornithological criteria and may not take economic criteria into account).

10 See EC Council Directive 79/409 (OJ L103, 25.04.79, p 01) art 4(4) (amended by EC Council Directive 92/43 (OJ L206, 22.07.92, p 07)). This protection is strict: see Case C-57/89 *EC Commission v Germany* [1991] ECR I-883, ECJ. Even licences permitting taking of birds may not permit such disturbances; licensing provisions provided by EC Council Directive 79/409 (OJ L103, 25.04.79, p 01) art 9 do not permit derogation from art 4. See further **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728 et seq.

- 11    le such birds as are included in the Wildlife and Countryside Act 1981 Sch 2 Pt I.
- 12    See the Wildlife and Countryside Act 1981 s 2(4)(c); and **ANIMALS** vol 2 (2008) PARA 995.

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#### **54. Byelaws concerning sea or shore used for defence purposes.**

Where any land, the use of which can be regulated by byelaws under the military lands legislation<sup>1</sup>, abuts on any sea or tidal water, or where rifle or artillery practice is or can be carried on over any sea, tidal water or shore from any such land, byelaws may be made in relation to the sea, tidal water or shore as if it were part of the land<sup>2</sup>. Byelaws may also be made<sup>3</sup> in relation to any area of sea, tidal water or shore used or to be used for defence purposes, being an area lying wholly or partly within the limits of the territorial waters<sup>4</sup> of the United Kingdom<sup>5</sup>.

1 As to the power to make byelaws under this legislation see **ARMED FORCES** vol 2(2) (Reissue) PARA 124.

2 See the Military Lands Act 1900 s 2(2); and **ARMED FORCES** vol 2(2) (Reissue) PARA 124. As to compensation for persons injuriously affected and as to the necessary consent for byelaws affecting public rights of navigation, fishing, recreation etc or relating to Crown property see s 2(2) proviso; and **ARMED FORCES** vol 2(2) (Reissue) PARA 124. As to offences against the byelaws see the Military Lands Act 1892 s 17(2); and **ARMED FORCES** vol 2(2) (Reissue) PARA 124. Where the boundaries of an area of sea, tidal water or shore to which the byelaws apply cannot conveniently be marked by permanent marks, the boundaries must be described in the byelaws and the public sufficiently warned from entering the area while it is in use: see the Military Lands Act 1900 s 2(5).

3 ie under the Military Lands Act 1900 s 2 as extended by the Land Powers (Defence) Act 1958 s 7.

4 As to territorial waters see PARA 31.

5 See the Land Powers (Defence) Act 1958 s 7; and **ARMED FORCES** vol 2(2) (Reissue) PARA 124. As to the meaning of 'United Kingdom' see PARA 22 note 5.

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## **(v) Excavation and Removal of Materials**

### **55. Ownership of gravel, stones and sand.**

Gravel, stones and sand, even when washed up by the sea onto the foreshore<sup>1</sup>, are part of the freehold and therefore belong to the owner of the foreshore<sup>2</sup>, who may deal with them as he pleases and license others to do so<sup>3</sup>, provided that such acts do not amount to the removal of a natural barrier against the inroads of the sea, thereby increasing the risk of injury to the land abutting onto the foreshore<sup>4</sup>.

1 As to the foreshore see PARA 34. For a discussion of ownership of minerals on or under the sea bed below low-water mark see *Earl of Lonsdale v A-G* [1982] 3 All ER 579, [1981] 1 WLR 887.

2 *Blewett v Tregonning* (1835) 3 Ad & El 554, where it was held that sand blown by the wind onto land above the foreshore belongs to the owner of the land on which it falls. See also *Le Strange v Rowe* (1866) 4 F & F 1048 at 1056.

3 The constant and usual fetching of gravel, seaweed and sand is evidence of ownership of the foreshore: *Hale's De Jure Maris* c 6 (Hargrave's Law Tracts 27).

4 *Earl of Cowper v Baker* (1810) 17 Ves 128; *Chalk v Wyatt* (1810) 3 Mer 688; *A-G v Tomline* (1879) 12 ChD 214 (affd (1880) 14 ChD 58, CA); *Canvey Island Comrs v Preedy* [1922] 1 Ch 179, where an injunction was granted restraining a person claiming to be the freeholder of a strip of foreshore from removing drift sand and shingle so as to expose and weaken the plaintiff's sea wall, and determining that he was in fact a trespasser.

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## 56. Right to take gravel, stones and sand.

A right to take gravel, stones and sand from the foreshore is a profit à prendre, and can be successfully claimed only by the same class of persons as are able to sustain a claim to a profit à prendre from another person's land<sup>1</sup>. Consequently inhabitants of a parish or occupiers of land cannot, either by custom, prescription or grant, have a right to take sand, stones or gravel from the foreshore, whether vested in the Crown or in a subject, for the purpose of manuring their land<sup>2</sup> or repairing the highways in the parish<sup>3</sup>. At common law, highway authorities are in the same position<sup>4</sup>; however statute gives them extensive powers to take materials<sup>5</sup>.

1 *A-G v Hanmer* (1858) 31 LTOS 379 at 380; *Lord Chesterfield v Harris* [1908] 2 Ch 397, CA (affd [1911] AC 623, HL). A fluctuating body of people, such as the inhabitants of a county, cannot by custom acquire a prescriptive right in the nature of a profit à prendre to go beachcombing for seacoal washed up by the tide: *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA. As to profits à prendre generally see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 254 et seq. As to the foreshore see PARA 34.

2 Special provision is made with regard to Devon and Cornwall. All persons resident and dwelling in the counties of Devon and Cornwall may take sea sand below the full sea mark where the sand is or is cast by the sea for the bettering of their land and for the increase of corn and tillage: see 7 Jac 1 c 18 (Sea-Sand (Devon and Cornwall)) (1609) s 1. This Act (which was continued by 3 Car 1 c 5 (1627); and 16 Car 1 c 4 (1640) (both repealed)) is not declaratory of the common law (*Howe v Stawell* (1833) Alc & N 348 at 356; *Macnamara v Higgins* (1854) 4 ICLR 326), although the contrary is argued in Hall *Rights and Privileges of the Subject in the Seashores of the Realm* (2nd Edn, 1875) p 208. It does not in any way interfere with private rights (*Calmdy v Rowe* (1844) 6 CB 861 at 891 per Maule J), and is evidence that the foreshore may belong to a subject (Hale's *De Jure Maris* c 6 (Hargrave's Law Tracts 26)). The practice of taking sand by the residents of Devon and Cornwall recited in and legalised by this Act of 1609 has its origin in a grant by Richard, King of the Romans, allowing the inhabitants of Cornwall to take sea sand without payment, which was confirmed on 28 June 1261 by Henry III: Charter Roll 45 Hen 3 m 2 No 11, which shows that by that time the foreshore in Cornwall had ceased to belong to the Crown and had passed to the Duchy of Cornwall: see the charter of 17 March 1337 quoted in *The Prince's Case* (1606) 8 Co Rep 1a at 8a.

All bargemen, boatmen and all other carriers of sea sand of those counties may fetch or take sand there and land and cast it out of their boats at such places where sand is usually cast, and also carry it through the usual ways, paying the accustomed duties (ie those in force in 1609) or such reasonable compositions as by agreement with the owners of the soil may from time to time be made: see 7 Jac 1 c 18 (Sea-Sand (Devon and Cornwall)) (1609) s 2.

3 *Oxenden v Palmer* (1831) 2 B & Ad 236 (highway surveyor for a parish); *Macnamara v Higgins* (1854) 4 ICLR 326 (occupiers of land); *Constable v Nicholson* (1863) 14 CBNS 230 (inhabitants of a parish).

4 *Padwick v Knight* (1852) 7 Exch 854; *Pitts v Kingsbridge Highway Board* (1871) 25 LT 195, where the claim was made by the board as representing the inhabitants. In *Clowes v Beck* (1851) 13 Beav 347 an injunction was granted against the highway surveyor.

5 As to the statutory powers of highway authorities see PARA 57.

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## **57. Statutory right of highway authority to take roadmending materials.**

For the purpose of repairing highways maintainable by it at the public expense<sup>1</sup>, a highway authority<sup>2</sup> has statutory power:

- 47 (1) to search for, dig, get and carry away gravel, sand, stone and other materials in and from any waste or common land, including the bed of any river or brook flowing through that land<sup>3</sup>; or
- 48 (2) to gather and carry away stones lying upon any land in the non-metropolitan county, metropolitan district, London borough or the City of London within which the stones are to be used<sup>4</sup>.

In the exercise of these powers, however, the authority must not remove such quantity of stones or other materials from any sea beach as to cause damage by inundation or increased danger of encroachment by the sea<sup>5</sup>, or where removal is prohibited by order under the Coast Protection Act 1949<sup>6</sup>. There are also other limitations on the exercise of these powers<sup>7</sup>. The authority must pay compensation to persons interested in any land for any damage done to it by the carriage of the materials and, in certain cases, for the value of the materials<sup>8</sup>.

These powers may also be exercised by a person (other than the highway authority) liable to maintain a highway by reason of tenure, inclosure or prescription<sup>9</sup>.

1 As to the meaning of 'highway maintainable at the public expense' see the Highways Act 1980 s 329(1); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 248.

2 As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq. In relation to highways in respect of which the powers of maintenance of a district council under the Highways Act 1980 s 42 are exercisable, the district council ranks as a highway authority for these purposes: see s 45(12).

3 See the Highways Act 1980 s 45(1), (2); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 288.

4 See the Highways Act 1980 s 45(1), (4), (amended by the Local Government Act 1985 s 8(1), Sch 4 para 13); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 288.

5 See the Highways Act 1980 s 45(3)(b), (5)(c); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 288.

6 See under the Coast Protection Act s 18: see PARA 58.

7 See the Highways Act 1980 s 45(3)(a), (c), (5)(a), (b), which relate to diverting rivers, getting materials from rivers within 50 yards of a bridge, dam or weir, carrying away materials from certain commons (see the Commons Act 1876 s 20), and taking stone from inclosed grounds; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 288. As to the necessity for consent or, in some cases, a magistrates' court order see the Highways Act 1980 s 45(5)(b), (6); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 288.

8 See the Highways Act 1980 s 45(10); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 288.

9 See the Highways Act 1980 s 52(1), (2); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 259.

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## **58. Restriction on removal of materials from the seashore.**

A coast protection authority<sup>1</sup> may make an order<sup>2</sup> applying a statutory restriction<sup>3</sup> on the excavation or removal of materials (other than minerals<sup>4</sup> more than the specified distance below the surface<sup>5</sup>) on, under or forming such part of the seashore<sup>6</sup> within the authority's area or lying to seaward of its area but within 3 nautical miles<sup>7</sup> of the baselines from which the breadth of the territorial sea adjacent to Great Britain is measured as may be described in the order<sup>8</sup>. The purpose of this power is to enable the authority to take steps to prevent or mitigate the consequences to the land of the action of the sea in all its moods, and the authority must act in the light of the situation as it appears to it to be<sup>9</sup>.

The effect of such an order is to render it unlawful to excavate or remove any such materials on, under or forming part of that seashore<sup>10</sup>. However, as respects the whole or a specified part of that seashore, the order may except from the restriction the carrying out of specified classes of operations either conditionally or unconditionally<sup>11</sup>. Also, subject to such conditions as the authority determines, it may grant to any person a licence, as respects any part of the seashore described in the order, to do anything which would otherwise contravene the restriction<sup>12</sup>. Any person who, without such a licence, excavates or removes any materials in contravention of the restriction, or who fails to comply with any condition of the licence, is guilty of an offence<sup>13</sup>. It is the duty of a coast protection authority to enforce these provisions as respects any portion of the seashore to which they are applied by an order made by that authority<sup>14</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 For the procedure on the making of such an order see PARA 59.

3 I.e. the restriction imposed by the Coast Protection Act 1949 s 18(1): see the text to notes 9-10.

4 As to the meanings of 'materials' and 'minerals' see PARA 513 note 2.

5 The specified distance is 50 feet (15.24 metres): see the Coast Protection Act 1949 s 18(1). As to the meaning of 'surface' see PARA 535 note 9.

6 As to the meaning of 'seashore' see PARA 505 note 9.

7 'Nautical miles' means international nautical miles of 1,852 metres: Coast Protection Act 1949 s 49(1) (definition added by the Territorial Sea Act 1987 s 3(1), Sch 1 para 1(2)).

8 Coast Protection Act 1949 s 18(3) (amended by the Territorial Sea Act 1987 Sch 1 para 1(1)). As to the continuance in force of orders made under previous repealed legislation see the Coast Protection Act 1949 s 18(10). As to the baselines see the Territorial Sea Act 1987 s 1(1)(b); and PARA 31. As to the meaning of 'Great Britain' see PARA 22 note 5. An order under these provisions may require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.

9 *British Dredging (Services) Ltd v Secretary of State for Wales and Monmouthshire* [1975] 2 All ER 845, [1975] 1 WLR 687, where it was held that it is not a prerequisite to the making of an order that the coast would be protected by making the order, or that the continuance of the extraction of materials would require the coast to be protected; it is sufficient if changes are taking place along the seashore which might be due, among other things, to the extraction.

10 See the Coast Protection Act 1949 s 18(1). This does not, however, affect the excavation or removal of any material by the Secretary of State for Transport in the exercise of his powers under Pt II (ss 34-36A) relating

to the safety of navigation (see PARA 533 et seq), or the excavation or removal of materials by any other person in compliance with a notice served by that Secretary of State under Pt II: s 18(2). As to the meaning of 'person' see PARA 13 note 29. These functions of the Secretary of State for Transport are not transferred to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. The Coast Protection Act 1949 s 18(2) refers to the 'Minister of Transport'; as to the transfer of the functions of that minister to the Secretary of State for Transport see PARA 506 note 3. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

11 Coast Protection Act 1949 s 18(3) proviso.

12 Coast Protection Act 1949 s 18(5). Such a licence does not, however, render lawful anything which would have been unlawful if s 18(1) had not been enacted: s 18(5) proviso. If the order so provides, the coast protection authority must consult the drainage authority particularly concerned with a specified part of the area before granting a licence relating to land in that part of the area: s 18(6). 'Drainage authority' means the Environment Agency or an internal drainage board: s 49(1) (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 6 and by virtue of the Environment Act 1995 ss 2, 3). As to the meaning of 'land' see PARA 502 note 3. As to the Environment Agency see PARA 17. As to internal drainage boards see PARA 569. The granting of a licence under these provisions may require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.

13 Coast Protection Act 1949 s 18(7). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 43 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 141 note 18.

14 Coast Protection Act 1949 s 18(8).



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## **59. Order restricting excavation or removal of materials.**

Before making an order<sup>1</sup> restricting the excavation or removal of materials from the seashore, the coast protection authority<sup>2</sup> must prepare a draft order, publish notice<sup>3</sup> of its intention to make the order<sup>4</sup>; and serve<sup>5</sup> a like notice on the Environment Agency<sup>6</sup> and on any internal drainage board whose district<sup>7</sup>, and any conservancy authority, harbour authority or navigation authority<sup>8</sup> whose area, comprises land<sup>9</sup> to which the draft order relates<sup>10</sup>.

If no objection is duly made, or if all objections so made are withdrawn, and the Secretary of State or, in relation to Wales, the Welsh Ministers ('the minister')<sup>11</sup> is satisfied that the proper notices have been published, he may confirm the order with or without modifications<sup>12</sup>.

If an objection duly made is not withdrawn, the minister<sup>13</sup> must either cause a local inquiry<sup>14</sup> to be held, or afford to any person<sup>15</sup> by whom objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by him for the purpose<sup>16</sup>. Where objection is duly made by any person: (1) on the ground that the order would interfere with the exercise of his functions under any other enactment<sup>17</sup>; or (2) having an interest, right or privilege conferred on him by any local or private Act, on the ground that any such interest, right or privilege of his specified in the objection would be affected by the order<sup>18</sup>, and the objection is not withdrawn, the order, if made in relation to England, is subject to special parliamentary procedure<sup>19</sup>. In any other case the minister may confirm the order with or without modifications as he may think fit having regard to the determination of any objections and to the report of any person appointed to hold an inquiry or to hear objections<sup>20</sup>.

As soon as may be after the order has been confirmed, the coast protection authority must publish notice<sup>21</sup> of the confirmation and serve notice of it on the bodies on which notice of the intention to make the order was required to be served<sup>22</sup>.

Any person aggrieved<sup>23</sup> by the order who wishes to question its validity on the ground that it is not within the powers of the Coast Protection Act 1949, or that any requirement of that Act has not been complied with, may, within six weeks after the date on which notice of the confirmation of the order is published, apply to the High Court<sup>24</sup>; and, if satisfied that the order is not within those powers or that the applicant's interests have been substantially prejudiced by any requirement of the Act not having been complied with, the court may quash the order either generally or in so far as it affects any property of the applicant<sup>25</sup>. With this exception, the order may not be questioned at any time in any proceedings whatsoever<sup>26</sup>.

1    Ie under the Coast Protection Act 1949 s 18: see PARA 58.

2    As to the meaning of 'coast protection authority' see PARA 508.

3    The notice must state where copies of the draft order may be inspected at all reasonable hours and the time within which, and manner in which, objections to the draft order may be made; and must be published in two successive weeks in the London Gazette and in one or more local newspapers circulating in the locality: Coast Protection Act 1949 Sch 2 para 1.

4    Coast Protection Act 1949 Sch 2 para 1.

5    As to the service of documents see PARA 22.

6    As to the Environment Agency see PARA 17.

- 7 As to internal drainage boards and districts see PARA 569.
- 8 As to the meanings of 'conservancy authority', 'harbour authority' and 'navigation authority' see PARA 505 note 9.
- 9 As to the meaning of 'land' see PARA 502 note 3.
- 10 Coast Protection Act 1949 Sch 2 para 2 (amended by the Water Act 1989 s 190(1), Sch 25 para 11(9); and by virtue of the Environment Act 1995 ss 2, 3).
- 11 As to the meaning of 'the minister' see PARA 504 note 1. Functions conferred by the Coast Protection Act 1949 on 'the minister' (but not on any other Minister of the Crown) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.
- 12 Coast Protection Act 1949 Sch 2 para 4. Subject to the provisions as to interim orders (see PARA 60), the order does not have effect unless so confirmed: see s 18(4). If the order has effect without being so confirmed, it does not bind the Crown: s 32(4).
- 13 If the objector is any harbour authority or a conservancy or navigation authority, references to 'the minister' are to be construed as references to the minister and the Secretary of State for Transport: see the Coast Protection Act 1949 Sch 2 para 5(2)(b). The Coast Protection Act 1949 refers to the 'Minister of Transport'. As to the transfer of the functions of the Minister of Transport to the Secretary of State for Transport see PARA 506 note 3. The functions of the Secretary of State for Transport, in relation to Wales, are not transferred to the Welsh Ministers: see note 11. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.
- 14 As to local inquiries see PARA 506.
- 15 As to the meaning of 'person' see PARA 13 note 29.
- 16 Coast Protection Act 1949 Sch 2 para 5(1). If the objector avails himself of the opportunity of being heard, a similar opportunity must be afforded to the coast protection authority and, as expedient, to other persons: see Sch 2 para 6.
- 17 Coast Protection Act 1949 Sch 2 para 7(a). As to the meaning of 'enactment' see PARA 14 note 31.
- 18 Coast Protection Act 1949 Sch 2 para 7(b).
- 19 See the Coast Protection Act 1949 Sch 2 para 7. As to the meaning of 'England' see PARA 19 note 8. As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. As to the procedure in relation to an order made in relation to Wales by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 para 33; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 20 Coast Protection Act 1949 Sch 2 para 8. See eg *British Dredging (Services) Ltd v Secretary of State for Wales and Monmouthshire* [1975] 2 All ER 845, [1975] 1 WLR 687; and PARA 58 note 9.
- 21 The notice must state that the order has been confirmed and name a place where a copy may be inspected at all reasonable hours; and must be published in the London Gazette and in one or more local newspapers: see the Coast Protection Act 1949 Sch 2 para 9.
- 22 Coast Protection Act 1949 Sch 2 para 9.
- 23 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
- 24 As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.
- 25 Coast Protection Act 1949 Sch 2 para 10. However, this does not apply to an order confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARA 926); and has effect in relation to any other order which is subject to special parliamentary procedure by virtue of the Coast Protection Act 1949 Sch 2 para 7 (see the text to note 19), as if for the reference to the date of the publication of the notice there were substituted a reference to the date on which the order becomes operative: Sch 2 para 10 proviso.

26 Coast Protection Act 1949 Sch 2 para 10. As to judicial review of decisions thus expressed to be beyond challenge see **JUDICIAL REVIEW** vol 61 (2010) PARA 665. Note, however, that an order under these provisions may require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.

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## **60. Interim orders.**

Where it appears to a coast protection authority<sup>1</sup> that by reason of emergency it is urgently necessary for the protection<sup>2</sup> of any land<sup>3</sup> that an order should be made<sup>4</sup> restricting the excavation or removal of materials from any part of the seashore<sup>5</sup> in its area or lying to seaward from it, it may make an interim order accordingly<sup>6</sup>. As soon as may be after making the order the authority must publish notice of it<sup>7</sup>, and serve<sup>8</sup> notice of it on the Environment Agency<sup>9</sup>, and on any internal drainage board whose district<sup>10</sup>, and any conservancy authority, harbour authority or navigation authority<sup>11</sup> whose area, comprises land to which the order relates<sup>12</sup>.

Any person<sup>13</sup> who objects to the interim order may serve notice of objection on the Secretary of State or, in relation to Wales, the Welsh Ministers ('the minister')<sup>14</sup>, and on the authority by whom the order was made<sup>15</sup>. After holding a local inquiry<sup>16</sup>, or affording the objector and the authority and any other persons appearing to him to be concerned an opportunity of being heard by a person appointed by him for the purpose, the minister may, if he thinks fit, revoke the order<sup>17</sup>. Subject to this, an interim order remains in force until the expiration of a period of six months<sup>18</sup> after its making and no longer<sup>19</sup>; but if before the expiration of that period an order is made and confirmed<sup>20</sup> with respect to the portion of the seashore to which the interim order applies, the interim order ceases to have effect when that order comes into operation<sup>21</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'protection' see PARA 505 note 9.

3 As to the meaning of 'land' see PARA 502 note 3.

4 I.e. under the Coast Protection Act 1949 s 18: see PARA 58.

5 As to the meaning of 'seashore' see PARA 505 note 9.

6 Coast Protection Act 1949 Sch 2 para 11. An order under these provisions may require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.

7 The notice, which must be published in two successive weeks in the London Gazette and in one or more local newspapers, must state that the order has been made and must name a place where a copy of it may be inspected at all reasonable hours: Coast Protection Act 1949 Sch 2 para 12.

8 As to the service of documents see PARA 22.

9 As to the Environment Agency see PARA 17.

10 As to internal drainage boards and districts see PARA 569.

11 As to the meanings of 'conservancy authority', 'harbour authority' and 'navigation authority' see PARA 505 note 9.

12 Coast Protection Act 1949 Sch 2 para 12.

13 As to the meaning of 'person' see PARA 13 note 29.

14 As to the meaning of 'the minister' see PARA 504 note 1. Functions conferred by the Coast Protection Act 1949 on 'the minister' so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These

functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

15 Coast Protection Act 1949 Sch 2 para 13.

16 As to local inquiries see PARA 506.

17 Coast Protection Act 1949 Sch 2 para 13. The provisions of Sch 2 para 10 (excluding the proviso thereto) (see PARA 59) as to applications to the High Court to quash the order apply with the substitution of a reference to the date of first publication of the notice under Sch 2 para 12 (see the text to note 7) for the reference to the date of publication of notice of the confirmation of the order: Sch 2 para 15.

18 As to the meaning of 'month' see PARA 23 note 10.

19 Coast Protection Act 1949 Sch 2 para 14.

20 Ie in accordance with the Coast Protection Act 1949 Sch 2 paras 1-10: see PARA 59.

21 Coast Protection Act 1949 Sch 2 para 14 proviso.

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## 61. Seaweed.

There is no general common law right for the public to enter the foreshore for the purpose of taking seaweed<sup>1</sup>.

Seaweed cast above the high-water mark is the property of the owner of the land there<sup>2</sup>, and when cast on or growing on the foreshore it is the property of the owner of the foreshore, who can maintain a claim for wrongful interference with goods against anyone who takes it<sup>3</sup>. However, drifted and ungathered seaweed cannot be the subject of theft<sup>4</sup>. There may be an obligation to remove it if it causes a nuisance<sup>5</sup>.

The regular taking of seaweed by the owner of the foreshore or his licensees is evidence of his possession and ownership of the foreshore<sup>6</sup>. On the other hand, the taking of seaweed by the public does not displace a title to the foreshore founded on an ancient grant explained by the user of the grantee<sup>7</sup>.

Seaweed below the low-water mark belongs to the sovereign within whose territory it is situated, and the lord of a manor or a subject can only establish a title to it by a grant from the sovereign, or by such long and undisturbed enjoyment as to give him a title by prescription<sup>8</sup>.

A right to take seaweed from the foreshore may be acquired in the same way as the right to any other profit à prendre is acquired<sup>9</sup>. A grant of a right to take seaweed involves in it a grant of a way over any intervening land if it cannot be taken otherwise<sup>10</sup>.

1 *Howe v Stawell* (1833) Alc & N 348; *Mahoney v Neenan and Neenan* [1966] IR 559. As to the foreshore see PARA 34.

2 *Lowe v Govett* (1832) 3 B & Ad 863; *Hamilton v A-G* (1880) 5 LR Ir 555 at 575 (affd (1881) 9 LR Ir 271, Ir CA).

3 *Calmady v Rowe* (1844) 6 CB 861; *Mulholland v Killen* (1874) IR 9 Eq 471; *Brew v Haren* (1877) IR 11 CL 198, Ir Ex Ch. Possession of the foreshore is sufficient to support a claim against a trespasser: *Hastings Corp'n v Ivall* (1874) LR 19 Eq 558; *Stoney v Keane* (1903) 37 ILT 212. As to wrongful interference with goods see **TORT** vol 45(2) (Reissue) PARA 542 et seq.

4 *R v Clinton* (1869) IR 4 CL 6.

5 *Margate Pier and Harbour (Co of Proprietors) v Margate Town Council* (1869) 20 LT 564; and see discussion of this point in *Neath RDC v Williams* [1951] 1 KB 115, [1950] 2 All ER 625, DC; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1978] QB 849, [1978] 3 All ER 234; affd [1980] QB 485, [1980] 1 All ER 17, CA.

6 *Calmady v Rowe* (1844) 6 CB 861; *Healy v Thorne* (1870) IR 4 CL 495; *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770, HL; *Daly v Murray* (1885) 17 LR Ir 185, Ir CA; *Stoney v Keane* (1903) 37 ILT 212; *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979, CA.

7 *Hamilton v A-G* (1880) 5 LR Ir 555 at 575 (affd (1881) 9 LR Ir 271, Ir CA); *Lord Advocate v Young, North British Rly Co v Young* (1887) 12 App Cas 544, HL.

8 *Benest v Pison* (1829) 1 Knapp 60, PC.

9 *Wyse v Leahy* (1875) IR 9 CL 384 (claim by occupier of farm); *Hamilton v A-G* (1880) 5 LR Ir 555 at 576 (affd (1881) 9 LR Ir 271, Ir CA). See also *A-G v Hanmer* (1858) 31 LTOS 379 at 380. As to profits à prendre generally see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 254 et seq.

10 *Baird v Fortune* (1861) 4 Macq 127 at 151, HL.



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## 62. Shells.

It is doubtful whether the public has any right to take the shells of sea fish left upon the seashore<sup>1</sup>. Where there is a private fishery, there is no public right to take shellfish there, such as mussels attached to rocks on the shore, for these belong to the owner of the shore<sup>2</sup>; but there may be a public right to take shellfish from the sand of the foreshore, in the absence of any private right<sup>3</sup>. Bait digging is, however, recognised as justified by the public right to fish in tidal waters, when the bait is taken by or on behalf of persons who require it for use in the exercise of that right<sup>4</sup>.

1 *Bagott v Orr* (1801) 2 Bos & P 472. As to the seashore see PARA 34.

2 *Le Strange v Rowe* (1866) 4 F & F 1048. The public right of fishing for shellfish is limited to fishing in the water, including water covering the foreshore: see *Truro Corp v Rowe* [1902] 2 KB 709, CA. As to the public right to fish see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 797 et seq.

3 *Anderson v Alnwick District Council* [1993] 3 All ER 613 at 623, [1993] 1 WLR 1156 at 1168, DC, per Evans LJ, discussing *Bagott v Orr* (1801) 2 Bos & P 472.

4 *Anderson v Alnwick District Council* [1993] 3 All ER 613, [1993] 1 WLR 1156, DC.



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### 3. INLAND WATERS

#### (1) INTERESTS IN WATER

##### 63. Rights in flowing water at common law.

Although certain rights as regards flowing water<sup>1</sup> are incident to the ownership of riparian property<sup>2</sup>, the water itself, whether flowing in a known and defined channel<sup>3</sup> or percolating through the soil<sup>4</sup>, is not, at common law<sup>5</sup>, the subject of property<sup>6</sup> or capable of being granted to anybody<sup>7</sup>. Flowing water is only of public right<sup>8</sup> in the sense that it is public or common to all who have a right of access to it<sup>9</sup>.

1 As to appropriated water and water in a receptacle see PARAS 66-67.

2 As to riparian rights see PARA 81 et seq. Rights in the nature of easements may be acquired by grant or prescription in addition to or in extension of the rights incident to the ownership of riparian land, and rights adverse to that land may be similarly acquired: *Bealey v Shaw* (1805) 6 East 208; *Wright v Howard* (1823) 1 Sim & St 190; *Mason v Hill* (1833) 5 B & Ad 1; *Rolle v Whyte* (1868) LR 3 QB 286; *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL. See further PARAS 70, 89; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 197 et seq.

3 As to the meaning of 'known and defined channel' see PARA 88.

4 As to subterranean water see PARA 104 et seq.

5 As to statutory rights in flowing water see PARA 64.

6 As to rights in flowing water akin to a proprietary interest, however, see PARA 65.

7 *Wright v Howard* (1823) 1 Sim & St 190; *Williams v Morland* (1824) 2 B & C 910 at 917; *Embrey v Owen* (1851) 6 Exch 353 at 369-370; *Race v Ward* (1855) 4 E & B 702 at 709 per Lord Campbell LC; *Ballard v Tomlinson* (1885) 29 ChD 115 at 121, CA. Cf *Mason v Hill* (1833) 5 B & Ad 1; *Rawstron v Taylor* (1855) 11 Exch 369. A claim cannot be brought for the recovery of possession of a pool or other piece of water, but only for the land covered with water: *Race v Ward* (above); and see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 197.

8 The decisions in *Williams v Morland* (1824) 2 B & C 910, and *Liggins v Inge* (1831) 7 Bing 682, which were actions on the case in which proof of damage was required, imported the theory that, since flowing water was of public right (ie 'publici juris'), no right to it could arise except by occupancy (ie user), and that it could be appropriated by one person to the exclusion of others. However, in so far as they bear on the view that water is of public right, these decisions were explained or disapproved in *Mason v Hill* (1833) 5 B & Ad 1, and in *Chasemore v Richards* (1859) 7 HL Cas 349 (see note 9).

9 See *Embrey v Owen* (1851) 6 Exch 353. It was said in *Mason v Hill* (1833) 5 B & Ad 1 at 24 that it seems that Roman law considered running water not a bonum vacans in which anyone might acquire a property but as public or common in this sense only, that all might drink of it or apply it to the necessary purpose of supporting life, and that no one had any property in the water itself except in that particular portion which he might have abstracted from the stream and of which he had the possession, and during the time of such possession only. See also *Ewart v Belfast Guardians* (1881) 9 LR Ir 172, Ir CA. In *Chasemore v Richards* (1859) 7 HL Cas 349 at 384, Lord Wensleydale said that the expressions used by Bayley J in *Williams v Morland* (1824) 2 B & C 910 and by Tindal LCJ in *Liggins v Inge* (1831) 7 Bing 682 (see note 8) that water flowing in a stream is of public right and the property of the first occupier are founded on a mistake between the property in the water itself and the right to have its continual flow.

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#### **64. Statutory rights in flowing water.**

Proprietary interests in water flowing in certain channels may be, and have in certain instances<sup>1</sup> been, created by Act of Parliament<sup>2</sup>. Rights can also be obtained to abstract water<sup>3</sup>.

1 See eg the River Lee Water Act 1855 ss 9, 72 (as originally enacted; now repealed with savings for s 72).

2 *Rochdale Canal Co v King* (1849) 14 QB 122 (affd sub nom *King v Rochdale Canal Co* (1851) 14 QB 136, Ex Ch); *Medway Co v Earl of Romney* (1861) 9 CBNS 575.

3 As to abstraction rights see PARA 214 et seq.

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## **65. Rights in flowing water akin to proprietary interest.**

In some circumstances, a person's right to the enjoyment and use of flowing water may be such as to be akin to a proprietary interest, so that no one can claim a right against that person, for example where the water flows to a person's land and not beyond so that he may use it as he pleases without complaint by another<sup>1</sup>, or where the water does not flow beyond the land where it first rises from the earth<sup>2</sup>. Moreover, an owner of land has a right to appropriate or drain for agricultural purposes mere casual surface water<sup>3</sup>.

1 *Holker v Porritt* (1875) LR 10 Exch 59, Ex Ch, where the plaintiff established his right to the continuance of the flow to his land.

2 Although such water cannot be the subject of property, while it remains in the field where it issues forth nobody apart from the owner of the field has a right to appropriate it: *Race v Ward* (1855) 4 E & B 702 at 709 per Lord Campbell LCJ. See, however PARA 97.

3 As to surface water see PARA 68.

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## **66. Appropriated water.**

Water which has been appropriated or taken into possession from a known and defined channel<sup>1</sup> is the subject of property, the right of property existing only during such possession<sup>2</sup>, as is also percolating water which has been appropriated, even by artificial means such as pumping<sup>3</sup>.

1 As to the meaning of 'known and defined channel' see PARA 88.

2 2 Bl Com (14th Edn) 14, 18; *Mason v Hill* (1833) 5 B & Ad 1 at 29; *Holker v Porritt* (1875) LR 10 Exch 59, Ex Ch. A person who has appropriated water to a beneficial use may sue for any injury done to him in respect of that use: *Mason v Hill* (above) at 16 per Lord Denman.

3 *Ballard v Tomlinson* (1885) 29 ChD 115, CA. It has been said to be larceny (theft) at common law to take water from a person's pipes: *Ferens v O'Brien* (1883) 11 QBD 21, DC. Water has been held to be an 'article' for the purposes of what is now the Factories Act 1961 s 175(1) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 318): *Longhurst v Guildford, Godalming and District Water Board* [1963] AC 265, [1961] 3 All ER 545, HL.

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**67. Water in a receptacle.**

Water which does not flow but is in some receptacle is the property of the person who has the possession of the receptacle so long as he continues in such possession<sup>1</sup>.

<sup>1</sup> 2 Bl Com (14th Edn) 14; *Ferens v O'Brien* (1883) 11 QBD 21, DC. As to liability for the consequences of the escape of water from land see *Rylands v Fletcher* (1868) LR 3 HL 330; and PARA 667.

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## **68. Surface water.**

The owner of land has an unqualified right to appropriate or drain mere casual surface water, not flowing in a regular or definite course, for agricultural purposes<sup>1</sup>, and a neighbour cannot complain that it does not come to his land<sup>2</sup>.

1 *Rawstron v Taylor* (1885) 11 Exch 369.

2 *Briscoe v Drought* (1860) 11 ICLR 250; *R v Metropolitan Board of Works* (1863) 3 B & S 710; *Roberts v Fellowes* (1906) 94 LT 279. See also *Wood v Waud* (1849) 3 Exch 748; and *Greatrex v Hayward* (1853) 8 Exch 291, which established that an owner who appropriates or drains water in this manner is not obliged to continue to do so even after 20 years have elapsed.

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## 69. Grants of interests in water.

If and so far as a contrary intention is not expressed in it<sup>1</sup>, a conveyance<sup>2</sup> or transfer of land is deemed to include waters and watercourses appertaining or reputed to appertain to the land or any part of it, or, at the time of the conveyance, demised, occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part of it<sup>3</sup>. A grant of land can expressly reserve to the grantor the right to divest the water generally<sup>4</sup>, and may also reserve the benefit of the use of the water or a right over it, such as the right of fishing.

With regard to registration of title, the Land Registration Act 2002 applies to land covered by internal waters of the United Kingdom which are either within England or Wales, or adjacent to England or Wales and specified for the statutory purposes by order made by the Lord Chancellor<sup>5</sup>.

Where a pool<sup>6</sup> or pit of water is granted, the water passes too<sup>7</sup>, and an exception of all waters and watercourses from a lease is effective to except a well so that another lessee may obtain water from it with the lessor's permission<sup>8</sup>.

A riparian owner<sup>9</sup> may grant to another person the right to take or use running water so as to bind the grantor's estate<sup>10</sup>, but any user by a non-riparian owner, even under a grant from a riparian owner, is wrongful if it materially affects the flow of the water past the land of other people<sup>11</sup>.

For the benefit of any land of the Crown estate<sup>12</sup>, the Crown Estate Commissioners may dispose of a right or privilege over or in relation to land, without consideration or for such consideration as they think fit, where the right or privilege is to be enjoyed for: (1) the purposes of any public or local authority, or any authority or person<sup>13</sup> exercising statutory powers for the supply of water<sup>14</sup>; or (2) the construction, enlargement, improvement or maintenance of any drain, watercourse or reservoir<sup>15</sup>.

A tenant for life<sup>16</sup> may grant water rights to statutory authorities<sup>17</sup>, but such rights must not exceed those that could be created by a person absolutely entitled for his own benefit to the settled land affected<sup>18</sup>.

1 See the Law of Property Act 1925 s 62(4). Although percolating water cannot be reserved in a conveyance of land, the vendor can reserve the right to obtain water from the land: *Re Simeon and Isle of Wight RDC* [1937] Ch 525, [1937] 3 All ER 149.

2 'Conveyance' includes, inter alia, a lease: see the Law of Property Act 1925 s 205(1)(ii).

3 See the Law of Property Act 1925 s 62(1); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236. See also *Canham v Fisk* (1831) 2 Cr & J 126.

4 *Lord v Sydney City Comrs* (1859) 12 Moo PCC 473.

5 See the Land Registration Act 2002 s 130; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 826. As to the meaning of 'United Kingdom' see PARA 22 note 5. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

6 As to the meaning of 'pool' see PARA 80 note 1.

7 Co Litt 5; *Throckmerton v Tracy* (1555) 1 Plowd 145 at 151.

8 See *Whelan v Leonard* [1917] 2 IR 323, Ir CA; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 167.

9 As to who is a riparian owner see PARA 81.

10 *Mason v Hill* (1833) 5 B & Ad 1. For an instance of vendors not being entitled to deprive a riparian grantee of water power which was granted and warranted to him by the vendors see *Hamelin v Bannerman* [1895] AC 237, PC.

11 *Ormerod v Todmorden Joint Stock Mill Co Ltd* (1883) 11 QBD 155, CA. Cf *Kensit v Great Eastern Rly Co* (1884) 27 ChD 122, CA, where water was taken and returned by a non-riparian owner in such a manner that there was no significant diminution of the flow, and it was held that this was not wrongful. See also PARA 91.

12 For other purposes the Crown Estate Commissioners may grant rights over Crown land in the exercise of their general powers of management: see the Crown Estate Act 1961 ss 1(2), 3(1); and **CROWN PROPERTY** vol 12(1) (Reissue) PARAS 284, 290. As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 280 et seq. As to alienation of the ownership of the bed of a tidal river by a grant made prior to Magna Carta see PARA 71.

13 As to the meaning of 'person' see PARA 13 note 29.

14 See the Crown Estate Act 1961 s 4(1)(a); and **CROWN PROPERTY** vol 12(1) (Reissue) PARA 294. As to the statutory powers for the supply of water see PARA 318 et seq.

15 Crown Estate Act 1961 s 4(1)(b).

16 Note that, subject to certain exceptions, it has not been possible to create a strict settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 65; **SETTLEMENTS** vol 42 (Reissue) PARA 606.

17 'Statutory authority' means an authority or company for the time being empowered by any Act of Parliament, public general, or local or private, or by any order or certificate having the force of an Act of Parliament, to provide with a supply of water any town, parish or place in which the settled land or any part thereof is situated: Settled Land Act 1925 s 54(3); and see **SETTLEMENTS** vol 42 (Reissue) PARA 868. As to water undertakers see PARA 134 et seq.

18 See the Settled Land Act 1925 s 54(1), (2); and **SETTLEMENTS** vol 42 (Reissue) PARA 868.



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## 70. Acquisition of easements as to water.

A right to take or use water from a known and defined channel<sup>1</sup> or to obstruct its flow, may be acquired by prescription as an easement<sup>2</sup>. The natural right to the use and enjoyment of water in a known and defined channel incident to the ownership of riparian land<sup>3</sup> is defeasible only by a right which has been lawfully acquired by statute, custom, grant or prescription and to the extent only of that statute, custom, grant or prescription<sup>4</sup>. The natural drainage of percolating and undefined surface water from one piece of land to another, lower piece of land is an incident of ownership of the higher land and cannot form the subject matter of an easement<sup>5</sup>.

1 As to the meaning of 'known and defined channel' see PARA 88.

2 *Bealey v Shaw* (1805) 6 East 208; *Mason v Hill* (1833) 5 B & Ad 1; *Manning v Wasdale* (1836) 5 Ad & El 758; *Race v Ward* (1855) 4 E & B 702. See also *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441, CA; PARA 89; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 197 et seq. Acquiring a right to pollute will, however, be difficult to achieve: see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARAS 96, 214-219; and *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227.

3 As to the right to a flow of water see PARA 86.

4 *Bealey v Shaw* (1805) 6 East 208; *Wright v Howard* (1823) 1 Sim & St 190. As to restrictions on the erection of any structure in, over or under a watercourse, and on the erection or alteration of obstructions or culverts in a manner likely to affect the flow of any ordinary watercourse see PARAS 602-603. As to public rights of navigation see *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* 1976 SC 30, HL; *A-G (ex rel Yorkshire Derwent Trust Ltd) v Brotherton* [1992] 1 AC 425, [1992] 1 All ER 230, HL; and PARA 702.

5 See *Palmer v Bowman* [2000] 1 All ER 22, [2000] 1 WLR 842, CA. As to an easement of drainage see eg *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2004] 1 P & CR 520, [2003] All ER (D) 426 (Feb).

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## (2) OWNERSHIP OF THE SOIL

### (i) Tidal Waters

#### 71. Foreshore and bed.

The ownership of the foreshore and bed in tidal waters<sup>1</sup> is determined by the same rules as the ownership of the seashore<sup>2</sup>, and prima facie the soil of the foreshore and bed is vested in the Crown on the presumption that it is waste of the kingdom which has not been granted<sup>3</sup>.

Whether the foreshore and bed have become the property of a subject or, having been granted to a subject, have again become the property of the Crown by reason of succession, escheat, forfeiture or purchase, is also ascertained by the rules of law relating to ownership of the seashore<sup>4</sup>.

If a tidal river changes its course so that a new channel is formed, even though the rights of the Crown and of the public may come into existence and be exercised over the new channel, the right to the soil under it remains in the owner; and where the river reverts to its original course, leaving the new channel dry, the soil of the new channel becomes again the exclusive property of the owner free from any rights of the Crown or the public<sup>5</sup>.

The Crown may, however, have alienated the ownership of the bed of a tidal river by a grant made prior to Magna Carta. In many instances the proprietary right of the owners of manors abutting on tidal waters which are between headlands<sup>6</sup> extends below the low-water mark, and even as far as the centre of the river opposite to such manors<sup>7</sup>. It appears that it was commonly the case in the comparatively narrow sections of tidal rivers for the grant of a riparian manor to extend to the middle of a tidal river.

The alienation by the Crown of the bed of the river would not affect the public right of navigation as the grantee would take subject to the right of the public to navigate the river<sup>8</sup>.

1 'Tidal waters' means waters which are subject to the regular ebb and flow of the ordinary highest tides, irrespective of what occurs under unusual circumstances (*Reece v Miller* (1882) 8 QBD 626, DC), and includes those waters not only when there is a horizontal ebb and flow but also where there is a vertical rise and fall caused by the ordinary sea tide (*Calcraft v Guest* (1897) cited in Moore *History and Law of Fisheries* (1903) p 102; *West Riding of Yorkshire Rivers Board v Tadcaster RDC* (1907) 97 LT 436, DC; *Ingram v Percival* [1969] 1 QB 548, [1968] 3 All ER 657, DC). As to navigation rights in tidal waters see PARA 689 et seq. As to the meaning of 'foreshore' see PARA 34. See also *Kingsway Furniture (Dartford) Ltd v Harpglow Ltd and Kylefield Ltd* [1991] Water Law 10; *Ipswich Borough Council v Moore* [2001] EWCA Civ 1273, [2001] All ER (D) 349 (Jul).

2 See PARA 38; and **BOUNDARIES** vol 4(1) (2002 Reissue) PARAS 922, 924.

3 In *Reece v Miller* (1882) 8 QBD 626, DC, where the question of Crown ownership was considered, it was held on the facts that although the river was navigable it was not tidal (see note 1) because it was affected only by exceptionally high tides, and accordingly there was no public right of fishing. It appears that Crown ownership was not considered in *West Riding of Yorkshire Rivers Board v Tadcaster RDC* (1907) 97 LT 436, DC. Various earlier authorities speak of the soil of 'tidal navigable rivers' belonging to the Crown: see *A-G v Smith and Lord Berkeley* (1637) Hale's de Jure Maris, cap 6 (Hargrave's Law Tracts 34); Moore *History of the Foreshore and the Law Relating Thereto* (3rd Edn, 1888) p 402; *R v Trinity House* (1662) 1 Sid 86; *Bulstrode v Hall and Stephens* (1663) 1 Sid 148; *Hanmer v Eytton* (1845) 5 LTOS 390. The expression used in *R v Smith* (1780) 2 Doug KB 441 was 'navigable river', but since the case concerned the tidal part of the River Thames 'tidal navigable river' was clearly intended. The expression used in *Lord Advocate for Scotland v Hamilton* (1852) 1 Macq 46, HL, was 'public navigable river'. In *Malcomson v O'Dea* (1863) 10 HL Cas 593 it was held that the soil

of a navigable river 'so far as the tide flows and reflows' is prima facie vested in the Crown, and in *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192 'the bed of all tidal navigable rivers and of all arms of the sea' was held to be vested in the Crown.

In *Murphy v Ryan* (1868) IR 2 CL 143, O'Hagan J, rejecting the suggestion that the rights of the Crown, and consequently a public right of fishing, extended to the non-tidal section of a navigable river (ie upstream of where it flowed and reflowed with the tide), explained that the word 'navigable', used in the legal sense as applied to a river in which the soil prima facie belongs to the Crown, imports that the river is one in which the tide ebbs and flows, ie that 'navigable' meant 'where the tide flows and reflows', since in the common law sense of the term only those rivers were deemed navigable in which the tide ebbed and flowed (citing Kent's Commentaries 3, 412), but that the criterion of Crown ownership was not whether the waters were in fact navigable but whether they were tidal. See also *Earl of Ilchester v Raishleigh* (1889) 61 LT 477. Whilst, therefore, the proposition that the soil of tidal waters belongs to the Crown is in general correct and that, therefore, the ownership of the soil would be in the Crown in the case of certain waters which, although tidal (ie subject to the ebb and flow of the tide), are not navigable in the strict sense (*R v Montague* (1825) 4 B & C 598; *Sim E Bak v Ang Yong Huat* [1923] AC 429, PC: see PARA 689), it is considered that, in the case of certain waters which must be treated as tidal by reason of the cases cited in note 1 (ie where there is a vertical rise and fall), the soil would not prima facie be vested in the Crown. See also JH Bates *Water and Drainage Law* (1990) paras 1.09-1.14.

4 See the text to note 2. As to escheat see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 233.

5 See *Carlisle Corpn v Graham* (1869) LR 4 Exch 361 at 368; and **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 926. When the tide recedes, the owner of land bounded by tidal water has a private right of access to the sea across the foreshore: *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418.

6 Ie inter fauces terrae.

7 Thus the medium filum aquae (the middle thread of the water) is the common boundary of the River Severn, whatsoever course the river takes: Hale's de Jure Maris, cap 1 (Hargrave's Law Tracts 1); *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. Riparian manors extending to the midstream of tidal waters are also found in the Tyne, Tees, Trent, Ouse, Derwent, Mersey, Dee and Leven, and in such comparatively narrow rivers as the Crouch, Roach, Itchen and Helford. In the broader parts of the Thames and Humber, the manors appear to be limited to the foreshore.

The oyster ground at Whitstable is an instance of ownership of the soil below low-water mark, and not inter fauces terrae.

8 *Williams v Wilcox* (1838) 8 Ad & El 314. As to the public right of navigation see PARA 689 et seq.

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## 72. Public rights.

The public has no rights over the foreshore of a tidal<sup>1</sup> river when it is not covered by the tide, except such as are ancillary to its rights of fishing and navigation in the sea<sup>2</sup>. When the foreshore<sup>3</sup> is covered by the tide it is part of the sea, and the only rights of the public in or over it are the rights of navigation<sup>4</sup> and fishing<sup>5</sup> and rights ancillary to them<sup>6</sup>.

1 As to the meaning of 'tidal' see PARA 71 note 1.

2 See *Blundell v Catterall* (1821) 5 B & Ald 268; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; and PARA 46 et seq.

3 As to the meaning of 'foreshore' see PARA 34.

4 The right of public navigation is a right of coming and going and of doing things incidental to that right, and in tidal water it includes the right to moor, to ground and to unload; however, the rights must be exercised reasonably, and must not be exercised in such a way as to prevent or hinder others in the exercise of their similar rights: *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192; *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171, CA. See generally PARA 689 et seq. Any right relating to navigation claimed over tidal waters must be incidental to the navigation of the person using it, and not a right incidental to the navigation of others; thus a claim by colliery owners of a right as members of the public permanently to moor a coal hulk in a public harbour for the supply of coal to merchant ships failed as the mooring was not incidental to the navigation of the hulk: *Denaby and Cadeby Main Collieries Ltd v Anson* (above).

5 As to the public right to fish see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 797 et seq.

6 *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. See also **CROWN PROPERTY** vol 12(1) (Reissue) PARA 243.

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### **73. Islands in tidal waters.**

An island which arises in tidal waters<sup>1</sup> prima facie belongs to the Crown unless the site of the island has been granted, or belongs, to a subject, in which case the island is the property of the subject by reason of his grant or possession<sup>2</sup>.

1 As to the meaning of 'tidal waters' see PARA 71 note 1.

2 Hale's de Jure Maris, caps 4, 6 (Hargrave's Law Tracts 17, 36). For examples of subjects having proprietary rights in islands formed in tidal waters see *Wedderburn v Paterson* (1864) 2 M 902, Ct of Sess; *Earl of Zetland v Glover Incorporation of Perth* (1870) LR 2 Sc & Div 70, HL (island in the River Tay).

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## (ii) Non-tidal Waters

### 74. Presumption of ownership.

By a presumption of law, and in the absence of any evidence to the contrary<sup>1</sup>, the ownership of the bed of a non-tidal river or stream belongs in equal halves to the owners of the riparian land<sup>2</sup>. This presumption that the riparian owners own the bed of the river as far as the centre line of the stream<sup>3</sup> applies whether the land is freehold, leasehold or former copyhold<sup>4</sup>, and whether the river is navigable or non-navigable<sup>5</sup>. Ownership of the whole bed of the river will be presumed from ownership of the land on both sides unless it is a tidal river<sup>6</sup>. Where the bank and the bed of the river are in separate ownership, the dividing line between bed and bank is the ordinary high-water mark of the river<sup>7</sup>.

1 As to the rebuttal of this presumption see PARA 75.

2 *Lamb v Newbiggin* (1844) 1 Car & Kir 549; *Wishart v Wyllie* (1853) 1 Macq 389, HL; *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL; *Bristow v Cormican* (1878) 3 App Cas 641 at 666, HL; *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133, CA; *Blount v Layard* (1888) reported in [1891] 2 Ch 681n, CA. See also *Central London Rly Co v City of London Land Tax Comrs* [1911] 2 Ch 467 at 473-474, CA; affd sub nom *City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364, HL.

It was held in *Menzies v Marquess of Breadalbane* (1901) 4 F 55, Ct of Sess that where the river bed between the banks is divided by an island or islands into a main and subsidiary channels, the subsidiary channels being at times dry but carrying water when the river is in its ordinary state, the middle of the river (the medium filum) is the centre line of the bed (the alveus) from bank to bank, and not the centre line of the main stream. This case does not appear to have been considered in *Great Torrington Commons Conservators v Moore Stevens* [1904] 1 Ch 347, where it was held that where land abuts on a river and, being defined in a schedule and by reference to a map, is vested by statute in conservators, and there is an island in the river, the centre line ought to be drawn not through the island but through the stream between the conservators' land and the island.

As to who is a riparian owner see PARA 81.

3 *le usque ad medium filum aquae*.

4 *Tilbury v Silva* (1890) 45 ChD 98, CA.

5 *Foster v Wright* (1878) 4 CPD 438; *Hindson v Ashby* [1896] 2 Ch 1 at 10, CA; *Ecroyd v Coulthard* [1897] 2 Ch 554 at 570 (affd [1898] 2 Ch 358, CA). It has been held in Scotland that the proprietor of a riparian estate may fish for salmon by rod and line from his own bank or by wading to the medium filum, and by fishing across the river as far as he can reach by normal casting or spinning: *Fotheringham v Kerr or Passmore* (1984) 48 P & CR 173, HL. See also *Lovett v Fairclough* (1990) 61 P & CR 385, where one bank of the river was in England and the other was in Scotland.

6 *Blount v Layard* (1888) reported in [1891] 2 Ch 681n, CA. As to the ownership of the bed of a tidal river see PARA 71 et seq.

7 See *Electronic Leasing Ltd v Jackson* [1993] EGCS 152. Ordinary high-water mark means the level of the river during a normal winter outside the range of any flood condition.

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## 75. Rebuttal of riparian presumption.

The presumption of ownership of the bed of a non-tidal river or stream by riparian owners<sup>1</sup> refers only to the origin of title, and the right to the bed of the stream is not inseparably bound up for ever with the right to the bank; an owner may retain one and part with the other<sup>2</sup>. In rebuttal of the riparian presumption, ownership of the bed of a non-tidal river may be proved by documentary evidence of title supported by possession<sup>3</sup> or by possession sufficient to raise the presumption of a lost grant, or to give a statutory title<sup>4</sup>; but what amount of acts of possession is requisite to rebut the riparian presumption must vary according to the circumstances<sup>5</sup>. The riparian presumption may also be rebutted by proof of ownership of a private or several fishery<sup>6</sup> over the place in question<sup>7</sup>.

1 As to this presumption see PARA 74. As to who is a riparian owner see PARA 81.

2 *Smith v Andrews* [1891] 2 Ch 678.

3 *Blount v Layard* (1888) reported in [1891] 2 Ch 681n, CA; *Smith v Andrews* [1891] 2 Ch 678.

4 As to statutory title see **LIMITATION PERIODS** vol 68 (2008) PARA 1016 et seq. See also **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1021.

5 *R v Old Alresford* (1786) 1 Term Rep 358 (building piers and boathouses and cutting reeds); *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, HL; *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL; *Hindson v Ashby* [1896] 2 Ch 1, CA (scouring a ditch in the bed and making a causeway).

6 As to private fisheries see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 803 et seq.

7 *Hindson v Ashby* [1896] 2 Ch 1, CA. The taking by a riparian owner of gravel, stones and sand from a river, and the placing of stakes in it, is not sufficient to upset the presumption that the owner of a private fishery owns the river bed: *Hanbury v Jenkins* [1901] 2 Ch 401.

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## 76. Local government boundaries on rivers.

Where a parish comes down as far as the bank of a river, there is a prima facie presumption that the parish extends to the middle of the river<sup>1</sup>, and where two parishes are separated by a river, the centre line<sup>2</sup> is the presumptive boundary between them<sup>3</sup>. The middle of the river will also be the boundary between two riparian counties in the absence of any statutory provision determining that boundary<sup>4</sup>.

Where a watercourse forming a boundary between local government areas is straightened, widened or otherwise altered under statutory powers<sup>5</sup>, the drainage board<sup>6</sup> or other persons<sup>7</sup> under whose authority the alteration is made must send notice of the alteration to the Secretary of State<sup>8</sup> or, in relation to Wales, the Welsh Ministers<sup>9</sup>, and, after consulting the Electoral Commission or the Local Government Boundary Commission for Wales, the Secretary of State or, as the case may be, the Welsh Ministers may by order alter the boundary accordingly<sup>10</sup>.

1 *MacCannon v Sinclair* (1859) 2 E & E 53.

2 Ie the medium filum aquae.

3 *R v Landulph Inhabitants* (1834) 1 Mood & R 393.

4 *R v Brecon Inhabitants, Re Glasbury Bridge* (1850) 15 QB 813. As to the review and alteration of local government boundaries see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARA 92 et seq; **LOCAL GOVERNMENT** vol 69 (2009) PARA 56 et seq.

5 Ie in the exercise of any power conferred by the Water Resources Act 1991, the Land Drainage Act 1991 or any other enactment. As to the meaning of 'enactment' see PARA 14 note 31. As to the powers of drainage bodies see PARA 589 et seq.

6 As to internal drainage boards see PARA 569. As to the Environment Agency as a drainage board see PARA 579.

7 As to the meaning of 'person' see PARA 13 note 29.

8 As to the Secretary of State see PARA 15 note 1.

9 The functions of the Secretary of State under the Local Government Act 1972 s 73, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

10 See the Local Government Act 1972 s 73; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 90.



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## 77. Accretion.

The ownership of land which has become added to the riverside is determined by the same rules of law which determine the ownership of accretions to the seashore; and the rules concerning avulsion, which is the loss of land by the action of water, apply to rivers as to the seashore<sup>1</sup>. Thus, if the accretion has been gradual and imperceptible<sup>2</sup> in the ordinary course of nature, the land belongs to the riparian owner<sup>3</sup> and the boundary correspondingly advances<sup>4</sup>, even though the original boundary can be traced by old maps<sup>5</sup> or is otherwise ascertainable<sup>6</sup>.

When, however, the accretion is due to a sudden occurrence, for example where a river separating two estates suddenly changes its course, the property in the soil does not change and the boundaries of the estates are not thereby altered<sup>7</sup>.

1 *Re Hull and Selby Rly Co* (1839) 5 M & W 327; *Secretary of State for India in Council v Foucar & Co Ltd* (1933) 61 LR Ind App 18, PC. See **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 926. As to accretions to and avulsions from the seashore see PARAS 39-45.

2 As to the meaning of 'imperceptible' see PARA 39 note 2.

3 As to who is a riparian owner see PARA 81.

4 *Lopez v Muddun Mohun Thakoor* (1870) 13 Moo Ind App 467, PC.

5 *Foster v Wright* (1878) 4 CPD 438.

6 *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372, where accretion was assisted by groynes erected to prevent erosion; *Secretary of State for India in Council v Foucar & Co Ltd* (1933) 61 LR Ind App 18, PC. In *Mellor v Walmesley* [1905] 2 Ch 164, CA, land between medium high-water mark and that described in a conveyance was held to be an accretion subsequent to it. If land is subject to a valid legal custom, a gradual accretion to it will also be subject to the custom: *Mercer v Denne* [1905] 2 Ch 538, CA. It seems that the authorities cited in *Hindson v Ashby* [1896] 2 Ch 1, CA, to show that the doctrine of accretion does not apply where boundaries are well defined and known do not apply to land having no boundary next to flowing water except the water itself: *Hindson v Ashby* (above) at 13.

7 *Thakurain Ritraj Koer v Thakurain Sarfaraz Koer* (1905) 21 TLR 637, PC, following *Carlisle Corpn v Graham* (1869) LR 4 Exch 361. See also PARA 42. As to rights after a change in the course of a tidal river see PARA 71. Where the course of a river has changed and there is no evidence whether the change was gradual or sudden it is doubtful whether it is to be presumed that the change was gradual: see *Ford v Lacy* (1861) 7 H & N 151.

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## 78. Effect of riparian grant.

A conveyance, transfer or lease of land described as abutting on or bounded by a river and made by a person who himself has the soil as far as the centre line of the stream<sup>1</sup> is presumed to include half the bed of the river even though it is not expressly referred to as part of the land conveyed or demised<sup>2</sup>. The presumption applies:

- 49 (1) even though the grant is by plan and quantity and the grantor is owner of the whole of the river bed<sup>3</sup>;
- 50 (2) where specific or scheduled measurements, or delineations or colouring on a plan attached to the conveyance or lease, do not include any part of the river<sup>4</sup>;
- 51 (3) where the river is very wide<sup>5</sup>;
- 52 (4) where the land is conveyed by Act of Parliament<sup>6</sup>; and
- 53 (5) (formerly) to the grant of a manor on its subinfeudation<sup>7</sup>.

However, the presumption does not apply in the case of an award under an Inclosure Act<sup>8</sup>, and it may be rebutted by showing:

- 54 (a) that a private or several fishery<sup>9</sup> not belonging to the grantor exists over the half of the river bed in question<sup>10</sup>;
- 55 (b) that at the time of the grant of the riparian land there was no intention on the grantor's part to part with the bed as far as the centre line<sup>11</sup>; or
- 56 (c) that the grantor did not own the bed of the river<sup>12</sup>.

1 *le usque ad medium filum aquae*. As to the presumption as to the ownership of the bed of a river see PARAS 74-75.

2 *Tilbury v Silva* (1890) 45 ChD 98, CA; *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133, CA. In the absence of sufficient evidence of a contrary intention, a conveyance of land by reference to a plan and said to be bounded by a towpath passes to the grantee the soil of the towpath and half the bed of the river: *Thames Conservators v Kent* [1918] 2 KB 272, CA. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 229, 232.

3 *Berridge v Ward* (1861) 10 CBNS 400.

4 *Doe d Freeland v Burt* (1787) 1 Term Rep 701; *Davies v Jones* (1902) 18 TLR 367, DC; *City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364, HL; *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 621, PC.

5 *Dwyer v Rich* (1870) IR 4 CL 424.

6 *R v Strand Board of Works* (1863) 4 B & S 526 at 547-548; *affd* (1864) 4 B & S 551.

7 *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 417, CA; *affd sub nom Harris v Earl of Chesterfield* [1911] AC 623, HL. As to subinfeudation and its abolition see **REAL PROPERTY** vol 39(2) (Reissue) PARA 7.

8 *Ecroyd v Coulthard* [1898] 2 Ch 358, CA; *Hough v Clark and Hall* (1907) 23 TLR 682. As to the inclosure of commons generally see **COMMONS** vol 13 (2009) PARA 418 et seq.

9 As to private fisheries see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 803 et seq.

10 *Hindson v Ashby* [1896] 2 Ch 1 at 10, CA. It is not necessary that the fishery should be described in ancient documents as a several fishery: *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602.

11 *Duke of Devonshire v Pattinson* (1887) 20 QBD 263, CA. To ascertain the grantor's intention, the facts known to the parties at the time of the conveyance may be investigated, but not circumstances which occur later: *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133, CA. The presumption is rebutted by facts showing the grantor's intention to do something which made it necessary for him to retain the soil in the half of the river bed: *Micklethwait v Newlay Bridge Co* (above) at 145, 147 per Cotton LJ.

12 *Ecroyd v Coulthard* [1897] 2 Ch 554 at 568; affd [1898] 2 Ch 358, CA.

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## **79. Islands in non-tidal rivers.**

Where an island arises in a non-tidal river to the soil of which the riparian owners<sup>1</sup> are entitled as far as the centre line of the stream<sup>2</sup>, the property in the island is fixed by ascertaining where the centre line would be irrespective of the island, and apportioning to the owner of the bed on each side of that line so much of the island as may lie between that line and his riparian land<sup>3</sup>. It can be said, therefore, that the ownership of an island follows the ownership of the soil before the island arose into existence but, on the other hand, the centre line is not necessarily permanent but is a movable line the position of which is capable of being changed by gradual and imperceptible changes in the course of the river, with resultant changes in the ownership of the bed and all that is on it<sup>4</sup>.

1 As to who is a riparian owner see PARA 81. As to islands in tidal waters see PARA 73.

2 *Le usque ad medium filum aquae*. As to the presumption as to the ownership of the bed of a river see PARAS 74-75.

3 See the authorities cited in note 4.

4 Hale's *de Jure Maris*, caps 4, 6 (Hargrave's Law Tracts 17, 36); 2 Bract c 3; Moore *History of the Foreshore and the Law Relating Thereto* (3rd Edn, 1888) p 405; *Wedderburn v Paterson* (1864) 2 M (Ct of Sess) 902. As to the meaning of 'imperceptible' see PARA 39 note 2. Where a sandbank was formed dividing the river at low water into two equal streams, a line drawn down the middle of the river at low water, taking the two channels together, should be regarded as the limit of the respective rights of the proprietors on each bank, leaving it open to the parties to try any question that might arise in the event of any subsequent change in the river bed: *Wedderburn v Paterson* (above) at 947. Where a sandbank was moved downstream by the force of the current so that it was mainly on one side of the centre line of the river, the rights of the riparian proprietors extended to the centre line, the sandbank being only a portion of the river bed and not affecting the proprietors' rights: *Earl of Zetland v Glover Incorporation of Perth* (1870) LR 2 Sc & Div 70, HL. See also *Menzies v Marquess of Breadalbane* (1901) 4 F 55, Ct of Sess; *Great Torrington Commons Conservators v Moore Stevens* [1904] 1 Ch 347; and PARA 74.

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## 80. Lakes and pools.

The soil of lakes and pools<sup>1</sup>, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown<sup>2</sup>, and, where an entire lake is surrounded by the land of a single proprietor, the presumption is that the soil belongs to that proprietor<sup>3</sup>.

Where the boundary passes along a pool it is taken to coincide with the centre line<sup>4</sup> of the pool, even if it is proved expressly to have some other direction<sup>5</sup>.

Where the land abutting on a large inland lake belongs to more than one proprietor<sup>6</sup>, it seems that the law as to the ownership of the soil of the lake is not settled<sup>7</sup>.

1 'Pool' means standing water without any current; 'pond' means a standing ditch cast by man's labour in his private grounds or for his private use to serve his household with necessary water: *Callis on Sewers* (4th Edn) 102-103. 'Pool' means a small body of standing water, especially, one of natural formation; 'pond' means a small body of still water of artificial formation, made either by excavating a hollow in the ground or by embanking and damming up a watercourse in a natural hollow: Oxford English Dictionary.

2 *Johnston v O'Neill* [1911] AC 552, HL. Whether the Crown has established title by evidence of acts in pais is a question of fact, not of law: *Bristow v Cormican* (1878) 3 App Cas 641, HL. However, the Crown may own the lake by forfeiture or transference: see *Johnston v O'Neill* (above) at 593.

3 That is the law of Scotland: see *Cochrane v Earl of Minto* (1815) 6 Pat App 139 at 142 per Lord Redesdale; and *Mackenzie v Bankes* (1878) 3 App Cas 1324 at 1338, HL, per Lord Selborne.

4 Ie medium filum.

5 Coulson and Forbes *Water and Land Drainage* (6th Edn) p 124, citing Phear's Rights of Water 1, and Woolrych on Waters 121.

6 In the law of Scotland, in the absence of anything to the contrary in a title, and in the absence of exclusive possession for a sufficient period, the common prima facie right of riparian proprietors on a lake is to enjoy in common those rights such as fishing, boating and shooting on the lake which cannot conveniently be enjoyed in severalty: *Mackenzie v Bankes* (1878) 3 App Cas 1324 at 1340-1341, HL, per Lord Blackburn.

7 It seems that when in *Johnston v O'Neill* [1911] AC 552 at 578, HL, Lord Macnaghten said 'In this country one and the same law applies to inland non-tidal waters whatever the size of water space may be', he was not pronouncing that the presumption of ownership up to the centre line of the water (see PARA 74) applied in the case of such waters, but was referring only to the two propositions he had earlier stated, namely (1) that the Crown is not by common right entitled to the soil of waters of an inland non-tidal lake; and (2) that no right can exist in the public to fish in the waters of such a lake. The question whether the soil of lakes belonged to the owners of the land on either side as far as the centre line was left undecided in *Marshall v Ulleswater Steam Navigation Co* (1863) 3 B & S 732; affd (1865) 6 B & S 570. In *Cochrane v Earl of Minto* (1815) 6 Pat App 139 it was held that each riparian proprietor's interest in the loch extended on the other side of his own land from the shore to the middle of the loch. Discussing the law of Scotland, Lord Selborne has suggested that the boundary line would be drawn along the middle of the lake, the soil of the lake belonging in severalty to the several riparian proprietors and the space enclosed by lines drawn from the boundaries of each property as far as the centre line of the lake being deemed appurtenant to the land of each proprietor exactly as in the case of a river: *Mackenzie v Bankes* (1878) 3 App Cas 1324 at 1338, HL. However, Lord Blackburn has doubted whether the rule that each proprietor is entitled as far as the centre line applies to a lake: *Bristow v Cormican* (1878) 3 App Cas 641 at 666, HL. In *Bloomfield v Johnston* (1868) IR 8 CL 68 it was held that a grant by James I of land in Ulster adjacent to a large lake and of islands in the lake did not pass to the grantee the soil covered by water adjacent to the land and to the islands as far as the centre line of the lake. See also **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 923.

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### (3) RIPARIAN RIGHTS

#### (i) Rights of Access

##### 81. Rights of access of riparian owners.

An owner of land abutting on water (a 'riparian owner') is entitled in the natural course of things to access and regress from that water, whether it is a tidal<sup>1</sup> or non-tidal river<sup>2</sup>, a lake<sup>3</sup> or the sea<sup>4</sup>, where it is in contact with his frontage<sup>5</sup>, provided his land is in actual daily contact with the water, either laterally or vertically<sup>6</sup>. In the case of land abutting on a tidal river or the sea, where the foreshore is left bare at low water so that there is no continuous contact between the riparian land and the water, there is sufficient contact to support a right of access, for there is actual contact for much of the day<sup>7</sup>.

If in the course of time the water recedes from the riparian land owing to natural silting up<sup>8</sup> or artificial reclamation, the riparian owner may exercise his right of access over the accreted or reclaimed land<sup>9</sup>.

1 *Lyon v Fishmongers' Co* (1876) 1 App Cas 662, HL. This right is applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority: *North Shore Rly Co v Pion* (1889) 14 App Cas 612 at 620, PC. In the case of land abutting on a river, the right of access is the same whether the river is navigable or not: *North Shore Rly Co v Pion* (above); *Tetreault v Montreal Harbour Comrs* [1926] AC 299, PC.

2 *Hindson v Ashby* [1896] 2 Ch 1, CA.

3 *Marshall v Ulleswater Steam Navigation Co* (1871) LR 7 QB 166, as to which see *Earl of Iveagh v Martin* [1961] 1 QB 232 at 274-275, [1960] 2 All ER 668 at 684-685.

4 *A-G of Straits Settlement v Wemyss* (1888) 13 App Cas 192, PC; *Coppinger v Sheehan* [1906] 1 IR 519. As to the seashore generally see PARA 34 et seq.

5 Land in one occupation or ownership abutting on a river is sometimes referred to as a 'riparian tenement' and, although riparian rights will attach to a mere strip of land acquired for the purpose of obtaining such rights (*Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478), the question whether a particular piece of land which extends back some distance from the water is a riparian tenement, so as to entitle the owner to riparian rights in respect of the whole of the land, is a question of fact to be determined according to the circumstances (*Attwood v Llay Main Collieries Ltd* [1926] Ch 444, where it was held that a strip of land half a mile long connecting industrial premises did not make the premises a riparian tenement). In addition to contact with the water, 'riparian tenement' connotes a reasonable proximity to the river bank; the proposition that every piece of land in the same occupation which includes a portion of the river bank and therefore affords access to the river is a riparian tenement is too wide: see *Attwood v Llay Main Collieries Ltd* (above) at 459 per Lawrence J. In *A-G v Rowley Bros and Oxley* (1910) 75 JP 81 it was held that land owned by the first defendants which was separated from a watercourse by a strip of land which they had conveyed to the second defendant did not abut on the watercourse.

6 *North Shore Rly Co v Pion* (1889) 14 App Cas 612, PC. The existence of a sea wall vested in a land drainage authority does not deprive the owner of adjoining land of his right of access: *Port of London Authority v Canvey Island Comrs* [1932] 1 Ch 446, CA, overruling in part *Canvey Island Comrs v Preedy* [1922] 1 Ch 179. Ownership of the soil of a highway does not give a right to discharge sewage from the end of the highway where it abuts on a river: *Montreal City v Montreal Harbour Comrs* [1926] AC 299, PC.

7 *Lyon v Fishmongers' Co* (1876) 1 App Cas 662 at 683, HL.

8 As to the effect of accretion generally see PARA 77.

9 *A-G of Straits Settlement v Wemyss* (1888) 13 App Cas 192, PC; *Hindson v Ashby* [1896] 2 Ch 1, CA, where a riparian owner was held entitled to a right of access over land formerly part of the river bed belonging to the owner of a several fishery; *Mercer v Denne* [1904] 2 Ch 534 (affd [1905] 2 Ch 538, CA); *Mellor v Walmesley* [1905] 2 Ch 164, CA, where land between medium and high-water mark and that described in a conveyance was held to be an accretion subsequent thereto so that the grantee under the conveyance had a right of access to the sea over the land, the grantor being estopped from saying that it was not seashore; *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, PC, where it was held that reclamation of the foreshore by the Crown or a third person would have no effect on the frontagers' riparian rights, so their rights may exist even after the land has ceased to be subject to the flow and reflow of the tide.

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## **82. Nature and exercise of rights of access.**

The right of a riparian owner<sup>1</sup> to access to the water on which his land abuts is a private and not a public right, and any interference with it is actionable without proof of special damage<sup>2</sup>. It does not depend on ownership of the bed of the river or other water<sup>3</sup>, and is wholly distinct from the public right of navigation<sup>4</sup>. In addition to his right to access to and regress from the water, he is entitled:

- 57 (1) to land or to pass over the shore or bed at all states of the water for that purpose, even if the shore or bed is not vested in him<sup>5</sup>; and
- 58 (2) to moor vessels adjacent to his land for such period as is necessary to load or unload them and, if the waters are tidal and the vessels cannot be loaded or unloaded in one tide, to keep them there until the operation is completed<sup>6</sup>; although he must not moor a vessel in such a way as to interfere with the right of access of another riparian owner or with any public right of navigation<sup>7</sup>; and he is not entitled to have any particular depth of water maintained<sup>8</sup>.

In the exercise of his right of access the riparian owner must not put down anything which disturbs the foreshore<sup>9</sup>, although if there is an erection there, such as a pier or a causeway, he, and those whom he permits to go on his land<sup>10</sup>, may use it as a means of access<sup>11</sup>.

1 As to who is a riparian owner see PARA 81.

2 *Rose v Groves* (1843) 5 Man & G 613; *Lyon v Fishmongers' Co* (1876) 1 App Cas 662, HL; *A-G of Straits Settlement v Wemyss* (1888) 13 App Cas 192, PC.

3 As to the ownership of tidal and non-tidal waters see PARA 71 et seq.

4 *Lyon v Fishmongers' Co* (1876) 1 App Cas 662, HL; *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL. As to public rights of navigation see PARA 689 et seq.

5 *Macey v Metropolitan Board of Works* (1864) 3 New Rep 669; *A-G of Straits Settlement v Wemyss* (1888) 13 App Cas 192, PC; *Hindson v Ashby* [1896] 2 Ch 1, CA.

6 *Macey v Metropolitan Board of Works* (1864) 3 New Rep 669; *Temple Pier Co Ltd v Metropolitan Board of Works* (1865) 34 LJ Ch 262.

7 *Macey v Metropolitan Board of Works* (1864) 3 New Rep 669; *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713. As to interference with public rights of navigation see PARAS 692, 705; and as to remedies for their protection see PARAS 693, 705. As to works interfering with rights of navigation see PARA 706.

8 *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL.

9 *A-G v Johnson* (1819) 2 Wils Ch 87.

10 As to lessees and licensees see PARA 83.

11 *Eastern Counties Rly Co v Dorling* (1859) 5 CBNS 821; *Marshall v Ulleswater Steam Navigation Co* (1871) LR 7 QB 166, where a pier was built partly on the soil of the riparian owner and partly on that of another person. See also *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668.



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### **83. Rights of lessees and licensees.**

The right of access of the riparian owner<sup>1</sup> to water on which his land abuts is exercisable by the occupier under a lease or tenancy granted by the riparian owner<sup>2</sup>, subject to any contrary intention expressed in, and to the terms of, the relevant instrument<sup>3</sup>; and is also exercisable by licensees and other persons whom the riparian owner permits to use the foreshore as a means of access to use the waters<sup>4</sup>.

1 As to who is a riparian owner see PARA 81.

2 See the Law of Property Act 1925 s 62(1); and PARA 69.

3 See the Law of Property Act 1925 s 62(4); and PARA 69.

4 *Marshall v Ulleswater Steam Navigation Co* (1871) LR 7 QB 166. However, except against himself a riparian owner cannot confer on someone who is not a riparian owner any right to use the water, and any use by a non-riparian owner is wrongful if it appreciably affects the flow of the water by the land of other riparian owners: *Ormerod v Todmorden Joint Stock Mill Co Ltd* (1883) 11 QBD 155, CA. As to the acquisition of rights by non-riparian owners see PARA 91.

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#### **84. Interference with right of access.**

Interference with the right of access of a riparian owner<sup>1</sup> is actionable without proof of special damage<sup>2</sup>. However, if the interference complained of is in reality an interference with a public right of navigation which thereby affects the right of access, then special damage must be proved<sup>3</sup>, for interference with the public right of navigation which merely renders access more difficult, but not impossible, is an interference with a public and not a private right and the riparian owner has no cause of action unless he can prove special damage<sup>4</sup>.

If the right of access is taken away as a result of works authorised by a statute which incorporates the Land Clauses Acts<sup>5</sup> the riparian owner has a right to compensation for injurious affection<sup>6</sup>.

1 As to who is a riparian owner see PARA 81.

2 *Rose v Groves* (1843) 5 Man & G 613; *Lyon v Fishmongers' Co* (1876) 1 App Cas 662, HL; *A-G of Straits Settlement v Wemyss* (1888) 13 App Cas 192, PC. As to special damage see **DAMAGES** vol 12(1) (Reissue) PARA 812.

3 *Rose v Miles* (1815) 4 M & S 101; *Rose v Groves* (1843) 5 Man & G 613; *Dobson v Blackmore* (1847) 9 QB 991; *Bell v Quebec Corpn* (1879) 5 App Cas 84, PC; *Land Securities Co Ltd v Commercial Gas Co* (1902) 18 TLR 405. As to public rights of navigation see PARA 689 et seq.

4 *A-G v Thames Conservators* (1862) 1 Hem & M 1.

5 As to the incorporation of these Acts see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 509.

6 *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418; *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243. As to compensation for injurious affection see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 811.

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### **85. Right of entry to effect repairs.**

A person who is entitled to an easement<sup>1</sup> in a watercourse generally also has the right to enter on another's land through which the watercourse runs in order to repair it or to keep it cleansed<sup>2</sup>. If the owner of the land proposes to build on it in a way which will necessarily render it more difficult to effect repairs to pipes through which the water flows, an injunction to restrain the proposed building may be granted at the request or application of the persons entitled to the easement<sup>3</sup>.

1 As to the acquisition of easements see PARA 70.

2 See *Liford's Case* (1614) 11 Co Rep 46b at 52a; *Goodhart v Hyett* (1883) 25 ChD 182; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARAS 21, 220.

3 *Goodhart v Hyett* (1883) 25 ChD 182. Cf *Abingdon Corpn v James* [1940] Ch 287, [1940] 1 All ER 446; *Central Regional Council v Ferns* 1980 SLT 126.

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## **(ii) Rights to Flow of Water**

### **A. IN GENERAL**

#### **86. General right to continuance of flow.**

A riparian owner<sup>1</sup> has as incident to his property in the riparian land a natural and proprietary right, not dependent on prescription, grant or acquiescence of the riparian owner above, but arising in the natural course of things<sup>2</sup>, to have the water in any natural channel<sup>3</sup> which is known and defined<sup>4</sup>, on which his land abuts or which passes through or under<sup>5</sup> his land, flow to him in its natural state both as regards quantity<sup>6</sup> and quality<sup>7</sup>, whether he has made use of it or not<sup>8</sup>.

Any invasion of this right causing actual damage, or calculated to found a claim which may ripen into an adverse right, entitles the party injured to the intervention of the court<sup>9</sup>, but the right is defeasible to the extent to which adverse rights have in fact been acquired by grant or prescription<sup>10</sup> or conferred by statute<sup>11</sup>.

A riparian owner also has the right to have the water go from his land without obstruction<sup>12</sup>, and he is entitled to make certain uses of the water which comes to him whilst it is on his property<sup>13</sup>. Conversely, a lower riparian owner is under an obligation to receive the natural flow of water, but he is not bound to receive foreign water brought on to the upper land and there added to the stream even if the foreign water is pure<sup>14</sup>.

1 As to who is a riparian owner see PARA 81.

2 *Ie jure naturae*. As to the meaning of 'jure naturae' in this context see *Bradford Corp'n v Ferrand* [1902] 2 Ch 655 at 661 per Farwell J.

3 As to riparian rights in artificial channels see PARA 87.

4 As to the meaning of 'known and defined channel' see PARA 88. As to water in an unascertained channel or which percolates through the ground see PARA 105.

5 As to known and defined subterranean channels see PARA 106.

6 However, the quantity rights of a riparian owner are subject to the rights of upstream riparian owners to use water for ordinary purposes: see PARA 93 et seq.

7 As to pollution of water and its prevention see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270 et seq.

8 Bract 221a, 232a; *Sury v Pigott* (1626) Poph 166; *Cox v Matthews* (1673) 1 Vent 239; *Brown v Best* (1747) 1 Wils 174; *Bealey v Shaw* (1805) 6 East 208 at 214; *Wright v Howard* (1823) 1 Sim & St 190 at 203; *Mason v Hill* (1833) 5 B & Ad 1; *Embrey v Owen* (1851) 6 Exch 353 at 369; *Chasemore v Richards* (1859) 7 HL Cas 349; *Miner v Gilmour* (1859) 12 Moo PCC 131; *Waller v Manchester Corp'n* (1861) 6 H & N 667 (wrongful diversion by water undertakers); *Bickett v Morris* (1866) 14 LT 835, HL; *Earl of Norbury v Kitchin* (1866) 15 LT 501; *Ewart v Belfast Guardians* (1881) 9 LR Ir 172 at 185, Ir CA; *Kensit v Great Eastern Rly Co* (1884) 27 ChD 122, CA; *John Young & Co v Bankier Distillery Co* [1893] AC 691, HL; *Bradford Corp'n v Ferrand* [1902] 2 Ch 655 at 660, DC; *McCartney v Londonderry and Lough Swilly Rly Co* [1904] AC 301, HL; *John White & Sons v White* [1906] AC 72 at 80, HL; *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL. The decisions in *Williams v Morland* (1824) 2 B & C 910 and *Liggins v Inge* (1831) 7 Bing 682, which imported the theory that the rights of a riparian owner depended on occupancy (ie user of the water), were disapproved in

*Mason v Hill* (above) and *Chasemore v Richards* (above). The mere existence of a right in one riparian owner to discharge effluent does not create a right in the others to its continued discharge: *John S Deed & Sons Ltd v British Electricity Authority and Croydon Corpn* (1950) 114 JP 533. See also **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARAS 93, 202.

9 *John Young & Co v Bankier Distillery Co* [1893] AC 691 at 698, HL, per Lord Macnaghten. See also *Wood v Waud* (1849) 3 Exch 748; *Tipping v Eckersley* (1855) 2 K & J 264; *Lingwood v Stowmarket Co* (1865) LR 1 Eq 77 (for the form of order see LR 1 Eq 336); *Earl of Norbury v Kitchin* (1866) 15 LT 501; *Roberts v Gwyrfa District Council* [1899] 2 Ch 608, CA (wrongful alteration of flow of stream by local authority in purported exercise of a statutory power to supply water to its district); *Jones v Llanrwst UDC* [1911] 1 Ch 393. As to the remedies see PARA 103. Relief will be granted without proof of damage where the act complained of, although not capable of ripening into an adverse right, results in confiscation of a significant proportion of the flow: *Attwood v Llay Main Collieries Ltd* [1926] Ch 444. Cf *Kensit v Great Eastern Rly Co* (1884) 27 ChD 122, CA, where no relief was granted in respect of abstraction of water by a non-riparian owner in circumstances which caused no material diminution in the flow; and see also PARA 95. An upper riparian owner cannot restrain the sale of water by a lower riparian owner: *Bunting v Hicks* (1894) 70 LT 455, CA.

10 *Bealey v Shaw* (1805) 6 East 208; *Alder v Savill* (1814) 5 Taunt 454; *Wright v Howard* (1823) 1 Sim & St 190. See also PARA 89; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 197 et seq; and see *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227 (the prescriptive right of the former National Coal Board to discharge chloride into the river was not established where the riparian owner did not know of the pollution).

11 As to the control of the abstraction of water see PARA 214 et seq.

12 *Mason v Hill* (1833) 5 B & Ad 1; *Chasemore v Richards* (1859) 7 HL Cas 349; *Claxton v Claxton* (1873) IR 7 CL 23; *Orr Ewing v Colquhoun* (1877) 2 App Cas 839 at 854, HL. The lower riparian owners must not interfere and stop the flow of water to their land, and the upper riparian owners must not send the water down in an irregular way so that it does damage (*Robinson v Lord Byron* (1785) 1 Bro CC 588), but if an upper riparian owner collects water in one body in the ordinary use of his property for draining and improving it, a lower riparian owner is bound to receive it (*Gibbons v Lenfestey* (1915) 84 LJPC 158).

13 As to the use of water see PARAS 94-95. As to the powers of a local planning authority to carry out work for facilitating the public use of a waterway in a National Park see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 646.

14 *John Young & Co v Bankier Distillery Co* [1893] AC 691 at 696-697, HL.

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### **87. Rights as to flow in artificial channels.**

The right to water flowing to land through an artificial channel does not rest on the same principle as the right to the water of a river flowing in a natural channel<sup>1</sup>. The right to the flow of water in an artificial channel must rest on some grant or arrangement either proved or presumed from or with the owners of the land from which the water is artificially brought, or on some other legal origin<sup>2</sup>. In the case of an artificial watercourse the origin of which is unknown, however, the proper inference from the user of the water and from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights as they would have had if the stream had been a natural one<sup>3</sup>.

1 As to the general right to continuance of flow see PARA 86.

2 *Greatrex v Hayward* (1853) 8 Exch 291; *Sampson v Hoddinott* (1857) 1 CBNS 590; *Rameshur Pershad Narain Singh v Koonj Behari Pattuk* (1878) 4 App Cas 121, PC. Riparian rights identical with those attaching to natural streams may be acquired by prescription in an artificial channel: *Blackburne v Somers* (1879) 5 LR Ir 1; *Burrows v Lang* [1901] 2 Ch 502 at 509; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427.

3 *Sutcliffe v Booth* (1863) 32 LJQB 136; *Roberts v Richards* (1881) 50 LJ Ch 297; *Baily & Co v Clark, Son and Morland* [1902] 1 Ch 649, CA; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427; *Maung Bya v Maung Kyi Nyo* (1925) LR 52 Ind App 385; *Yesu Sakharam Pujari v Ladu Nana Savant Bhosale* (1926) 1 LR 51 Bom 243. See also **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 208 et seq.

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### 88. Meaning of 'known and defined channel'.

By 'known' in relation to a channel<sup>1</sup> is meant the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground, and the word is not synonymous with 'visible', nor is it restricted to knowledge derived from exposure of the channel by excavation. 'Defined channel' means a contracted and bounded channel, even if the course of the stream may be undefined by human knowledge<sup>2</sup>. A channel may, therefore, be defined but not known<sup>3</sup>.

A stream which flows in a permanent defined channel but ceases during a considerable part of the year is a watercourse, and the owners of land on the banks are entitled to riparian rights and to have those rights protected even though they suffer no damage<sup>4</sup>.

1 As to rights in known and defined channels see PARA 86.

2 *Chasemore v Richards* (1859) 7 HL Cas 349; *Black v Ballymena Township Comrs* (1886) 17 LR Ir 459; *Bradford Corp v Ferrand* [1902] 2 Ch 655, DC. The onus of proof is on the person claiming riparian rights, and it lies on him to show that, without opening the ground by excavation or having recourse to abstruse speculations of scientific persons, persons of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream when it emerges into light comes from and has flowed through a defined subterranean channel: *Black v Ballymena Township Comrs* (above) at 474-475 per Chatterton V-C, referred to and adopted by Luxmoore J in *Bleachers' Association Ltd and Bennett and Jackson Ltd v Chapel-en-le-Frith RDC* [1933] Ch 356 at 365. See also *Kibble v Chipping Norton UDC* (1901) Times, 27 February. As to underground rivers the course of which can be presumed to be known see PARA 106.

3 *Bleachers' Association Ltd and Bennett and Jackson Ltd v Chapel-en-le-Frith RDC* [1933] Ch 356. See also PARA 107.

4 *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485, PC. A defined channel is a watercourse notwithstanding that in the lower part of its course the water gradually filters into and is absorbed by the land: *Maxwell Willshire v Bromley RDC* (1917) 87 LJ Ch 241.

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## 89. Acquisition of additional riparian rights.

In addition to the natural rights incidental to the ownership of riparian land<sup>1</sup>, a riparian owner may acquire a right in the nature of an easement<sup>2</sup> to the use or enjoyment of water in a known and defined natural channel<sup>3</sup>, or to obstruct<sup>4</sup> its flow or to pollute<sup>5</sup>, by grant or prescription<sup>6</sup>. Those natural rights of any riparian owner are subject to any such right or rights lawfully acquired, and thus adverse to his right, by another or others<sup>7</sup>. To maintain a claim to such an acquired right a riparian owner must either prove an express or implied grant, to himself or a predecessor in title, from the other riparian owners whose natural rights are thus adversely affected or must prove an uninterrupted enjoyment of 20 years or longer by himself and his predecessors affording conclusive presumption of a grant<sup>8</sup>.

Where water escapes<sup>9</sup> because the banks of a watercourse are not kept in repair<sup>10</sup>, the owner of the land over which the water flows does not acquire a prescriptive right to the flow<sup>11</sup>.

1 As to riparian rights generally see PARA 81 et seq.

2 As to the acquisition of easements see PARA 70. A right to enter on land to take water is an easement, and may exist by custom for the benefit of the inhabitants of a township: see *Race v Ward* (1855) 4 E & B 702. See also **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 158.

3 As to the meaning of 'known and defined channel' see PARA 88.

4 As to statutory restrictions on the erection or alteration of any obstruction or culvert likely to affect the flow of a watercourse see PARAS 602-603.

5 In *Wood v Waud* (1849) 3 Exch 748 it was recognised that a riparian owner could by long enjoyment or grant acquire a right to pollute a stream so as to occasion damage to another riparian owner; but since, and to the extent to which, it is now an offence to discharge polluting matter into a stream, no prescriptive right to do so may now be acquired: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 278. As to the right to pollute see also PARA 70 note 2.

6 A right of fishery by way of a profit à prendre may be acquired in similar fashion: see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 829; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 254 et seq.

7 *Bealey v Shaw* (1805) 6 East 208; *Wright v Howard* (1823) 1 Sim & St 190; *Mason v Hill* (1833) 5 B & Ad 1; *Wood v Waud* (1849) 3 Exch 748; *Rolle v Whyte* (1868) LR 3 QB 286 at 302 per Cockburn CJ. Where a right to obstruct has been acquired by a miller, he may continue the easement by keeping the mill wheel in repair and, where little damage is done because the mill wheel and waste gates are defective, it seems that the miller may repair the defects even though more water is thus penned back and greater damage is done to the adjoining land: *Alder v Savill* (1814) 5 Taunt 454. A licence to erect a dam at one spot will not authorise its erection at another spot so as to prevent the licensor from treating it as an obstruction: *Mason v Hill* (above).

8 See *Wright v Howard* (1823) 1 Sim & St 190; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 206 et seq. The right must have been exercised evenly over the prescriptive period: see *Wood v Waud* (1849) 3 Exch 748.

9 As to liability for damage caused by the escape of water see PARA 662 et seq.

10 As to the right of entry to do repairs see *M'Swiney v Haynes* (1839) 1 I Eq R 322; and PARA 666.

11 *Brymbo Water Co v Lesters Lime Co* (1894) 8 R 329.



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#### **90. Restrictions on exercise of additional rights.**

Where a person has acquired the right to abstract water from a natural channel for a particular purpose, he may not use it for other purposes<sup>1</sup> or increase the amount which he takes. Thus, if he has acquired the right to have a pond replenished from a river, he may cleanse the pond, but he must not enlarge it so that a greater quantity of water can be taken from the river<sup>2</sup>. Similarly, if he has the right to take water by a channel of a certain size, he may not enlarge it so as to divert more water to the prejudice of another proprietor<sup>3</sup>.

<sup>1</sup> *A-G v Great Eastern Rly Co* (1871) 6 Ch App 572. See also *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441, CA.

<sup>2</sup> *Brown v Best* (1747) 1 Wils 174. See also *Holker v Porritt* (1875) LR 10 Exch 59, Ex Ch.

<sup>3</sup> *Bealey v Shaw* (1805) 6 East 208. As to when an embankment which narrows a stream may be actionable see *Thompson v Horner* [1927] NI 191.

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## **91. Effect of grant of water rights to non-riparian owners.**

Although a person who is not a riparian owner<sup>1</sup> may acquire by grant from a riparian owner a right to use the water of the stream<sup>2</sup>, any use by the non-riparian owner which materially affects the flow of the water by the land of other riparian owners is wrongful<sup>3</sup>. In such a case the non-riparian owner would not by reason of his grant acquire any rights as against other riparian owners<sup>4</sup>.

1 As to who is a riparian owner see PARA 81.

2 As to the grant of water rights see PARA 69.

3 *Ormerod v Todmorden Joint Stock Mill Co Ltd* (1883) 11 QBD 155; *Kensit v Great Eastern Rly Co* (1884) 27 ChD 122, CA, where the taking and return of water by a non-riparian owner in such a manner that there was no significant diminution of the flow was not wrongful. It was held in *Nuttall v Bracewell* (1866) LR 2 Exch 1 that a lessee of a mill on riparian land whose predecessor in title had acquired a right to the flow of water to the mill through a goit could recover damages from an upper riparian owner who had interfered with the flow.

4 *Stockport Waterworks Co v Potter* (1864) 3 H & C 300. However, a riparian owner may sell his interest in the power which can be obtained from flowing water so as to bind himself: *Hamelin v Bannerman* [1895] AC 237, PC.

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## 92. Mills.

A riparian owner<sup>1</sup> has a right to the ordinary use of the water in a stream flowing past his land<sup>2</sup>, and may dam it up for the purpose of a mill provided he does not thereby interfere with the rights of higher or lower proprietors<sup>3</sup>. He may maintain a dam to work his mill<sup>4</sup>, may harness the water to produce power<sup>5</sup>, and may sell water power to others<sup>6</sup>. The water in a dam does not become the property of the owner of the dam; it remains the water of the stream which feeds the dam, and the owner of the dam has no exclusive right to use the whole of it<sup>7</sup>. The owner of a mill who is entitled to a flow of water to work the mill has a right of action against a person who improperly diverts or interferes with the flow<sup>8</sup>; but, if the flow has not been substantially diminished in quantity or quality, the proper remedy is an award of damages and not an injunction<sup>9</sup>.

On navigable rivers, weirs and mills which interfere with the passage of vessels are illegal unless they existed before the time of Edward I<sup>10</sup>, although an easement to erect a weir in a non-navigable river may be acquired by grant or enjoyment<sup>11</sup>.

1 As to who is a riparian owner see PARA 81.

2 As to the ordinary use of water see PARA 94.

3 *Miner v Gilmour* (1859) 12 Moo PCC 131 at 156 per Lord Kingsdown. As to the right of a riparian owner to make grants to others see *Stockport Waterworks Co v Potter* (1864) 3 H & C 300; *Nuttall v Bracewell* (1866) LR 2 Exch 1. As to statutory restrictions on the construction of dams and other obstructions see PARAS 602-603.

4 *Roy v Fraser* (1903) 36 NBR 113, NB App Div.

5 *Belfast Ropeworks Co Ltd v Boyd* (1887) 21 LR Ir 560, Ir CA.

6 *Hamelin v Bannerman* [1895] AC 237, PC.

7 *John White & Sons v White* [1906] AC 72, HL.

8 *Nuttall v Bracewell* (1866) LR 2 Exch 1. There is no right of action if the defendant has an absolute right to the water: *Morgan v Last* (1886) 2 TLR 262.

9 *Edleston v Crossley & Sons Ltd* (1868) 18 LT 15.

10 See eg *Williams v Wilcox* (1838) 8 Ad & El 314; *Rolle v Whyte* (1868) LR 3 QB 286.

11 *Rolle v Whyte* (1868) LR 3 QB 286.

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## **B. QUANTITY OF WATER**

### **93. Rights and duties as to quantity of water.**

The right of a riparian owner<sup>1</sup> to the flow of water<sup>2</sup> is subject to certain qualifications with respect to the quantity of water which he is entitled to receive. The right is subject to the similar rights of other riparian owners on the same stream to the reasonable enjoyment of it, and each riparian owner has a right of action in respect of any unreasonable use of the water by another riparian owner<sup>3</sup>. A riparian owner cannot complain of a decrease in the depth of the water when the only effect of the decrease is to obstruct the public right of navigation<sup>4</sup>. Furthermore, and subject to certain statutory exceptions, no person<sup>5</sup> may abstract or impound water from any source of supply, or cause or permit any other person to do so, except in pursuance of a licence granted by the Environment Agency<sup>6</sup>.

A riparian owner must not use and apply the water so as to cause any material injury or annoyance to his neighbours opposite, above or below him, who have equal rights to the use of the water and an equal duty towards him<sup>7</sup>.

1 As to who is a riparian owner see PARA 81.

2 As to the right to the flow of water see PARA 86 et seq.

3 *Embrey v Owen* (1851) 6 Exch 353. As to the remedies for infringement see PARA 103.

4 *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL. As to public rights of navigation see PARA 689 et seq.

5 As to the meaning of 'person' see PARA 13 note 29.

6 See the Water Resources Act 1991 ss 24, 25; and PARA 214 et seq. As to the Environment Agency see PARA 17.

7 *Sampson v Hoddinott* (1857) 1 CBNS 590; *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL. An abstraction of water by a lower riparian owner which prevents fish ascending the stream may be restrained by an upper riparian owner: *Alex Pirie & Sons Ltd v Earl of Kintore* [1906] AC 478, HL. See also *Weld v Hornby* (1806) 7 East 195 (altering weir); *Briscoe v Drought* (1860) 11 ICLR 250.

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#### **94. Extent of use for ordinary or domestic purposes.**

The extent to which a riparian owner<sup>1</sup> may take and use water from a stream flowing past, through or under<sup>2</sup> his land in a known and defined channel<sup>3</sup> in lawful exercise of his riparian rights depends on the purpose for which he takes the water<sup>4</sup>.

The right of a riparian owner to the reasonable enjoyment of the stream includes the right to take water from it for all ordinary or domestic purposes<sup>5</sup> connected with the riparian tenement<sup>6</sup>, such as drinking and culinary purposes, cleaning and washing, feeding and supplying the ordinary quantity of cattle on his land<sup>7</sup>, and water power<sup>8</sup>. If the taking of water for these purposes exhausts the water in the stream altogether the lower riparian owners may not complain<sup>9</sup>. A riparian owner who does not require to take water for domestic purposes, however, may be restrained from taking the quantity he could take for those purposes and using it for other purposes<sup>10</sup>.

1 As to who is a riparian owner see PARA 81.

2 As to restrictions on the construction or extension of wells, boreholes or other works for the purpose of abstracting underground water without a licence granted by the Environment Agency see PARA 214 et seq. As to the Environment Agency see PARA 17.

3 As to the meaning of 'known and defined channel' see PARA 88. As to water flowing in an undefined channel see PARA 105.

4 See also PARA 95. As to the statutory control of the abstraction of water see PARA 214 et seq.

5 As to domestic purposes in the context of water supply see PARA 334.

6 As to the extent of a riparian tenement see PARA 81 note 5.

7 *Miner v Gilmour* (1859) 12 Moo PCC 131; *Owen v Davies* [1874] WN 175; *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697.

8 *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL.

9 *Miner v Gilmour* (1859) 12 Moo PCC 131; *Lord Norbury v Kitchin* (1863) 1 New Rep 241; *McCartney v Londonderry and Lough Swilly Rly Co* [1904] AC 301, HL; *Attwood v Llay Main Collieries Ltd* [1926] Ch 444 at 458. However, the abstraction of water from a navigable river to such an extent as to affect the right of navigation is a public nuisance: *Hind v Manfield* (1614) Noy 103. As to rights of navigation see PARA 689 et seq. In *Medway Co v Earl of Romney* (1861) 9 CBNS 575 it was decided that a canal company had sufficient proprietary interest to restrain a riparian owner from abstracting water to a greater extent than was consistent with ordinary riparian rights even though the abstraction did not impede the navigation, but whether the company could prevent an abstraction for ordinary purposes by a riparian owner was left undecided.

10 *A-G v Great Eastern Rly Co* (1870) 18 WR 1187; affd (1871) 6 Ch App 572. Certain obiter dicta in *Ormerod v Todmorden Joint Stock Mill Co Ltd* (1883) 11 QBD 155 at 168, CA, per Brett MR suggest that the use of water for manufacture or other extraordinary purposes could possibly be regarded as use for ordinary purposes in certain circumstances. See further Hudson 'Industry as a Riparian Use' (1959) 22 Mod LR 35. As to what amounts to a natural use of land see also *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL. As to use of water for extraordinary purposes see PARA 95.

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## **95. Extent of use for extraordinary purposes.**

The right of a riparian owner<sup>1</sup> to the reasonable enjoyment of a stream includes the right to take water from the stream for extraordinary purposes<sup>2</sup>, but only subject to certain restrictions<sup>3</sup>. Thus the user must be reasonable<sup>4</sup>, the purposes for which the water is taken must be connected with the riparian tenement<sup>5</sup> and the water taken must be returned to the stream substantially undiminished in quantity and unaltered in character<sup>6</sup>.

On the basis of these principles, the taking of water for irrigation is permissible provided it is taken at such times and in such manner that the flow of the stream is not perceptibly diminished<sup>7</sup> and the water is not unduly detained in the process<sup>8</sup>, but the taking for spray irrigation of large quantities of water which evaporates either into the atmosphere or through the medium of growing crops is not permitted<sup>9</sup>. Similarly, the taking of water by a riparian owner for a tannery<sup>10</sup>, for mills or bleaching works<sup>11</sup> or for a dye works<sup>12</sup> is permissible as being for an extraordinary purpose provided the flow of the stream and its lawful use by other riparian owners is not materially affected.

However, the taking of water, from a river made navigable under statutory powers, for the supply of a mental hospital and a gaol situated up to three miles from the river, was held not to be permitted<sup>13</sup>; and the taking of water by a riparian owner to supply a town<sup>14</sup> or to fill a distant tank to provide a supply for steam locomotives<sup>15</sup>, being purposes not connected with the riparian tenement, are uses not covered by the right of a riparian owner to take water for extraordinary purposes.

If, to compensate for an appreciable quantity of water lost during its use for manufacturing purposes, the manufacturer turns into the stream before it leaves his land water obtained from other sources, this is no defence to a claim by a lower riparian owner (even if he receives the quantity to which he is entitled) for his right is to have the natural water of the stream<sup>16</sup>, and he is not bound to receive the foreign water<sup>17</sup>.

1 As to who is a riparian owner see PARA 81.

2 I.e. purposes other than ordinary purposes, as to which see PARA 94.

3 As to the statutory control of the abstraction of water see PARA 214 et seq.

4 Thus the user must not be to such an extent or of such a nature as to interfere with the rights of other riparian owners: see *Miner v Gilmour* (1859) 12 Moo PCC 131; *Baily & Co v Clark, Son and Morland* [1902] 1 Ch 649 at 655, CA; *Sharp v Wilson, Rotheray & Co* (1905) 93 LT 155. As to property in the water see *Embrey v Owen* (1851) 6 Exch 353 at 369 per Parke B. Interference with the rights of other riparian owners is actionable without proof of any special damage: *Attwood v Llay Main Collieries Ltd* [1926] Ch 444. See also *Swan Fisheries Ltd v Holberton* (December 1987, unreported), QBD, which suggests that the test of reasonableness is a function of the use by the upper owner and that by the lower owner. Thus, if the lower owner uses water for a purpose which is unusually sensitive, it might prevent him from a claim against an upper owner.

5 *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697; *McCartney v Londonderry and Lough Swilly Rly Co* [1904] AC 301, HL. As to the extent of the riparian tenement see PARA 81 note 5.

6 *A-G v Great Eastern Rly Co* (1870) 18 WR 1187 (affd (1871) 6 Ch App 572); *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697; *McCartney v Londonderry and Lough Swilly Rly Co* [1904] AC 301 at 306-307, HL, per Lord Macnaghten; *Attwood v Llay Main Collieries Ltd* [1926] Ch 444 at 458; *Rugby*

*Joint Water Board v Walters* [1967] Ch 397, [1966] 3 All ER 497, where the authorities are reviewed and where dicta in *Lord Norbury v Kitchin* (1862) 3 F & F 292 and *Earl of Sandwich v Great Eastern Rly Co* (1878) 10 ChD 707 were disapproved. In *Kensit v Great Eastern Rly Co* (1884) 27 ChD 122, CA, it was held that the taking and return of water by a non-riparian owner with the permission of one riparian owner in such a way that no loss resulted or was likely to result later was not actionable by another riparian owner. This case was distinguished from *Earl of Norbury v Kitchin* (1866) 15 LT 501, where the act complained of could have resulted in an adverse right: see PARA 86 the text to note 9. See also **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 202 et seq.

7 *Embrey v Owen* (1851) 6 Exch 353; *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697 at 704 per Lord Cairns, who referred to irrigation as an extraordinary purpose.

8 *Sampson v Hoddinott* (1857) 1 CBNS 590. Where there is a right to irrigate it is immaterial what means are taken to turn the water onto the land, provided that not more than the lawful quantity of water is diverted: *Greenslade v Halliday* (1830) 6 Bing 379. As to the construction of an agreement between neighbouring landowners conferring exclusive rights to take water for irrigation see *Sturdy v Cullinane* (1962) 183 Estates Gazette 229, CA.

9 *Rugby Joint Water Board v Walters* [1967] Ch 397, [1966] 3 All ER 497. The use of water by a riparian owner for spray irrigation does not affect that owner's rights as against a non-riparian owner: *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227. As to emergency variation of abstraction licences for spray irrigation purposes see PARA 262.

10 *Miner v Gilmour* (1859) 12 Moo PCC 131.

11 *Elmhirst v Spencer* (1849) 2 Mac & G 45 at 50.

12 *Sharp v Wilson, Rotheray & Co* (1905) 93 LT 155.

13 *Medway Co v Earl of Romney* (1861) 9 CBNS 575. Such purposes were more extensive than those for which a riparian owner, as such, could insist upon appropriating the stream as it passed his land: *Medway Co v Earl of Romney* (above) at 591 per Willes J.

14 *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697.

15 *McCartney v Londonderry and Lough Swilly Rly Co* [1904] AC 301, HL, disapproving *Earl of Sandwich v Great Northern Rly Co* (1878) 10 ChD 707. In *Attwood v Llay Main Collieries Ltd* [1926] Ch 444, the diversion and confiscation of part of the flow of a river to colliery works (even assuming the site to be a riparian tenement) was held to be in excess of the right of the colliery company as a riparian owner to the use of the water for extraordinary purposes. As to the use of water and its discharge in connection with mining operations generally see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 265 et seq.

16 As to the general right to continuance of the natural flow of a stream and the converse duty to receive it see PARA 86 et seq.

17 *John Young & Co v Bankier Distillery Co* [1893] AC 691, HL; *Brymbo Water Co v Lesters Lime Co* (1894) 8 R 329; *Roberts v Gwyrfai District Council* [1899] 2 Ch 608, CA; *Sharp v Wilson, Rotheray & Co* (1905) 93 LT 155.

Where an upper riparian owner alleges that he has by artificial means increased the flow of a spring the water from which ought to flow to a lower riparian owner, the burden of proof of the increased flow is on the upper riparian owner: *Portsmouth Borough Waterworks Co v London, Brighton and South Coast Rly Co* (1909) 74 JP 61.

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### **C. DIVERSION OF WATER**

#### **96. Restraint and effect of diversion of water.**

Unless otherwise authorised<sup>1</sup>, the diversion of water from a known and defined channel<sup>2</sup> for a non-riparian purpose, or for an extraordinary purpose<sup>3</sup> in such a manner that it is not returned substantially undiminished in quantity or unaltered in character, may be restrained without proof of special damage<sup>4</sup>.

Similarly, except as against himself, a riparian owner<sup>5</sup> who diverts water for the use of a non-riparian owner cannot confer on him any right to use the water; any use by the non-riparian owner, even under a grant from a riparian owner, is wrongful if it materially affects the flow of the water passing the land of any other riparian owner<sup>6</sup>. It is otherwise, however, if the grantor had lawfully appropriated the water to a beneficial use before supplying it to the non-riparian owner, or had a right to take a certain quantity of water from the stream and use it at his pleasure<sup>7</sup>.

A person who diverts a watercourse is liable for damage caused by the escape of water from, and due to, an inadequate or defective new channel<sup>8</sup>.

1 Eg an order under the Highways Act 1980 s 108 may authorise a highway authority to divert a navigable watercourse: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 879. As to drainage works improving watercourses see PARA 589.

2 As to the meaning of 'known and defined channel' see PARA 88.

3 As to ordinary and extraordinary purposes see PARAS 94-95.

4 *Earl of Norbury v Kitchin* (1866) 15 LT 501; *Harrop v Hirst* (1868) LR 4 Exch 43; *Attwood v Llay Main Collieries Ltd* [1926] Ch 444. One of the reasons for granting relief where the claimant has suffered no special damage is that such acts of abstraction, if continued long enough, would furnish the foundation of a claim of right in derogation of the right to a flow of water, and another reason is that the abstraction amounts to a confiscation of a significant proportion of the flow: see *Attwood v Llay Main Collieries Ltd* (above); and PARA 86. As to the diversion of uncharted underground water see PARA 105. As to special damage see **DAMAGES** vol 12(1) (Reissue) PARA 812.

5 As to who is a riparian owner see PARA 81.

6 *Lord Norbury v Kitchin* (1863) 9 Jur NS 132; *Stockport Waterworks Co v Potter* (1864) 3 H & C 300; *Ormerod v Todmorden Joint Stock Mill Co Ltd* (1883) 11 QBD 155, CA.

7 *Holker v Porritt* (1875) LR 10 Exch 59, Ex Ch (a right to all the water in a stream which terminated in the riparian tenement). As to the acquisition by non-riparian owners of rights adverse to those of riparian owners see PARAS 69-70, 91; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARAS 199, 206 et seq. As to licences to abstract or impound water see PARA 227 et seq.

8 See PARA 665.



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## **97. Diversion at source.**

The owner of land where a spring rises from which water flows into a natural channel may be restrained by a riparian owner<sup>1</sup> on that channel from diverting the water so that it does not reach the land of the riparian owner<sup>2</sup>.

If, however, the water from a spring, pond or swamp flows over land, but not in a defined channel<sup>3</sup>, the owner of that land may appropriate the water to his own use or divert it<sup>4</sup>; and, subject to any rights granted to or acquired by other riparian owners<sup>5</sup>, an owner may do the same in the case of water flowing in an artificial channel<sup>6</sup>.

1 As to who is a riparian owner see PARA 81.

2 *Dudden v Clutton Union Guardians* (1857) 1 H & N 627. Cf *French Hoek Comrs v Hugo* (1885) 10 App Cas 336, PC (approving *Miner v Gilmour* (1859) 12 Moo PCC 131, and *Van Breda v Silberbauer* (1869) LR 3 PC 84). The rights of the riparian owner remain effective if a well is built around the spring and the water is made to flow in an artificial channel for a short distance before entering the natural channel: *Mostyn v Atherton* [1899] 2 Ch 360.

3 As to the meaning of 'defined channel' see PARA 88.

4 *Broadbent v Ramsbotham* (1856) 11 Exch 602 (approved in *Chasemore v Richards* (1859) 7 HL Cas 349); *Ennor v Barwell* (1860) 2 Giff 410.

5 As to rights in relation to the flow in an artificial channel see PARA 87.

6 *Ennor v Barwell* (1860) 2 Giff 410 at 420-421.

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## 98. Culverting of watercourses.

It is not lawful within the district of any local authority<sup>1</sup> to culvert or cover any stream or watercourse except in accordance with plans and sections to be submitted to and approved by the local authority<sup>2</sup>. However, such approval may not be withheld unreasonably and if the authority, within six weeks after plans and sections have been submitted to it, fails to notify its determination to the person by whom they were submitted, the authority is deemed to have approved them<sup>3</sup>. Any question arising under this provision between a local authority and an owner as to the reasonableness of any works which the authority requires to be executed as a condition of its approval, or as to the reasonableness of its refusal to give approval, may be determined by a magistrates' court on the application of either party<sup>4</sup>.

A local authority may not require an owner, as a condition of approval, to receive upon his land, or to make provision for the passage of, a greater quantity of water than he is otherwise obliged to receive or to permit to pass, and if the owner accedes to such a request any additional cost reasonably incurred by him in complying with the request must be borne by the authority<sup>5</sup>.

1 As to the meaning of 'local authority' see PARA 51 note 1.

2 Public Health Act 1936 s 263(1) (amended by the Statute Law (Repeals) Act 2004); Local Government Act 1972 Sch 14 Pt I para 4. Any person who contravenes this requirement is liable, on summary conviction, to a fine not exceeding level 1 on the standard scale, and to a further fine not exceeding £2 for each day on which the offence continues after conviction: Public Health Act 1936 ss 263(4), 296 (s 263(4) amended by the Decimal Currency Act 1969 s 10(1); the Criminal Law Act 1977 s 31(5)(a), (6)(a), (9); and the Criminal Justice Act 1982 s 46(1), (4)). As to the meaning of 'person' see PARA 13 note 29. As to the standard scale see PARA 141 note 18. Nothing in this requirement applies to anything done by a highway authority under its statutory power to fill in roadside ditches etc: see the Highways Act 1980 s 101(4); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 286. As to the contribution by a local authority to the cost of any works or the carrying out of such works by an authority see PARA 100.

3 Public Health Act 1936 s 263(1).

4 Public Health Act 1936 s 263(2).

5 Public Health Act 1936 s 263(3). As to restrictions on the erection or alteration of a culvert likely to affect the flow of any watercourse see PARAS 602-603.

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## 99. Culverting on building land.

If a local authority<sup>1</sup> considers that any watercourse or ditch situated upon land prepared for building, or on which any land prepared for building abuts<sup>2</sup>, should be wholly or partially filled up or covered over, the authority may by notice require the owner of the land prepared for building, before any building operations are begun or while any such operations are in progress, wholly or partially to fill up the watercourse or ditch, or to substitute for it a pipe, drain or culvert with all necessary gullies and other means of conveying surface water into and through it<sup>3</sup>. Any question arising under this provision between a local authority and an owner as to the reasonableness of any works which the authority requires to be executed may be determined by a magistrates' court on the application of either party<sup>4</sup>.

1 As to the meaning of 'local authority' see PARA 51 note 1.

2 In *A-G v Rowley Bros and Oxley* (1910) 75 JP 81 it was held that land owned by one person and separated from a watercourse by a strip of land which that person had conveyed to someone else did not abut on the watercourse.

3 Public Health Act 1936 s 262(1). Any person who, on any land to which such a notice applies, begins or proceeds with any building operations before executing the required works is liable, on summary conviction, to a fine not exceeding level 1 on the standard scale, and to a further fine not exceeding £2 for each day on which the offence continues after conviction: ss 262(3), 296 (s 262(3) amended by the Decimal Currency Act 1969 s10(1); the Criminal Law Act 1977 s 31(5)(a), (6)(a), (9); and the Criminal Justice Act 1982 s 46(1), (4)). As to the meaning of 'person' see PARA 13 note 29. As to the standard scale see PARA 141 note 18. Nothing in this provision empowers an authority to require the execution of works upon the land of any person other than the owner of the land laid out for building, without the consent of that person, or prejudicially affects the rights of any person not being the owner of the land so laid out: Public Health Act 1936 s 262(4). As to the contribution by a local authority to the cost of any works or the carrying out of such works by an authority see PARA 100.

4 Public Health Act s 262(2).

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**100. Contribution by local authority to expenses.**

If it thinks fit, a local authority<sup>1</sup> may contribute the whole or a part of the expenses of the execution of works in relation to culverts<sup>2</sup>, or may by agreement with any owner or occupier itself execute any such works which he may be required, or is entitled, to execute<sup>3</sup>.

1 As to the meaning of 'local authority' see PARA 51 note 1.

2 I.e. works as mentioned in the Public Health Act 1936 ss 262 and 263: see PARAS 98-99.

3 See the Public Health Act 1936 s 265.

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## **D. OBSTRUCTION**

### **101. Prevention and removal of obstructions.**

The bed of a stream must be preserved from all obstructions which could by reasonable possibility interfere with the rights of any of the riparian owners<sup>1</sup> or with rights of navigation<sup>2</sup>. A riparian owner is entitled to have removed any obstruction which infringes his rights without proof of actual or prospective damage<sup>3</sup>, although in certain circumstances an injunction for this purpose may not be granted or its issue may be postponed<sup>4</sup>. Where, however, a structure on the stream bed was properly placed and maintained and has become an obstruction only because an increased flow in the stream has caused erosion of the stream bed, exposing the structure, its owner is not liable for damage caused by eddying and turbulence of the water around the structure<sup>5</sup>. When an obstruction is a natural one, or is formed by long natural accumulations, it must not be removed if removal would cause injury to a lower riparian owner<sup>6</sup>.

1 *Palmer v Persse* (1877) 11 IR 11 Eq 616. Cf *Hanley v Edinburgh Corp* [1913] AC 488, HL. As to who is a riparian owner see PARA 81.

2 See *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL. As to rights of navigation generally see PARA 689 et seq; and as to works interfering with such rights see PARA 706. As to the statutory control of obstructions in watercourses see PARAS 602-603.

3 *Embrey v Owen* (1851) 6 Exch 353; *Dickinson v Grand Junction Canal Co* (1852) 7 Exch 282 at 300-301; *Sampson v Hoddinott* (1857) 1 CBNS 590; *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL; *Earl of Norbury v Kitchin* (1866) 15 LT 501; *M'Glone v Smith* (1888) 22 LR Ir 559; *Roberts v Gwyrfai District Council* [1899] 2 Ch 608, CA. In *Thompson v Horner* [1927] NI 191 it was held that an embankment which narrowed a stream without obstructing it gave no cause of action without proof of damage. If two methods of abating an obstruction are available, the less mischievous must be used, unless it would cause injury to an innocent third person or the public: *Roberts v Rose* (1865) LR 1 Exch 82, Ex Ch; *Hill v Cock* (1872) 26 LT 185.

4 See PARA 103.

5 *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock UDC* [1968] Ch 605, [1968] 2 All ER 59, CA.

6 *Withers v Purchase* (1889) 60 LT 819; *Fear v Vickers* (1911) 27 TLR 558, CA. Cf *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 526, [1980] 1 All ER 17 at 37, CA, per Megaw LJ; and see also *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2004] 1 P & CR 520.

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## 102. Restrictions on works by riparian owners.

In general, even if a riparian owner<sup>1</sup> is the owner of half the bed of the stream<sup>2</sup>, he may not build upon the stream bed, even if no damage is or is likely to be occasioned by his works<sup>3</sup>, but he may dam up the stream for the purpose of a mill provided he does not interrupt the regular flow of the stream and thereby interfere with the use of the water by other proprietors and inflict on them a material injury<sup>4</sup>. Similarly he must not raise the level of the water as it flows by riparian land above<sup>5</sup>, or cause it to flood the land of an upper riparian owner or injure his mill<sup>6</sup>. Neither will the conversion by a riparian owner of a stream into a pond by placing a dam across it give him, as owner of the dam, an exclusive right to use the whole of the water, for he is bound to pass the water on to the lower riparian owners<sup>7</sup>. A riparian owner may not do anything to obstruct the passage of fish which is not essential to enable him to exercise his right of catching fish during their passage up the river<sup>8</sup>.

1 As to who is a riparian owner see PARA 81.

2 As to the ownership of the bed of a stream see PARA 74 et seq.

3 *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL. As to statutory restrictions on the erection of any structure in, over or under a watercourse, and on the erection or alteration of obstructions or culverts in a manner likely to affect the flow of any ordinary watercourse, see PARAS 602-603.

4 *Miner v Gilmour* (1859) 12 Moo PCC 131; *John White & Sons v White* [1906] AC 72 at 80, HL. As to the acquisition of the right to have a dam across a river adversely affecting the rights of other riparian owners see PARA 89; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 207. An impounding licence may be required: see PARA 215 et seq.

5 *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, HL; *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL; *Earl of Norbury v Kitchin* (1866) 15 LT 501; *Belfast Rope Works Co Ltd v Boyd* (1887) 21 LR Ir 560, Ir CA; *M'Glone v Smith* (1888) 22 LR Ir 559.

6 *Saunders v Newman* (1818) 1 B & Ald 258; *Wright v Howard* (1823) 1 Sim & St 190.

7 *John White & Sons v White* [1906] AC 72, HL.

8 *Hamilton v Marquess of Donegal* (1795) 3 Ridg Parl Rep 267. For statutory restrictions on obstructions to the passage of fish see the Salmon and Freshwater Fisheries Act 1975 ss 7-9; and **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARAS 850, 851, 861.

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### 103. Remedies for infringement of rights of riparian owners.

A riparian owner<sup>1</sup> may maintain a claim for infringement of his rights, even if he has never used them<sup>2</sup>. The remedies for infringement of his rights are damages and an injunction<sup>3</sup>. However, an injunction will not necessarily be granted where an upper proprietor is obstructing a stream and there is a probability that the steps taken by him to pass on the right amount of water will be effective<sup>4</sup>. Moreover, where little actual damage is being done the issue of an injunction may be postponed to allow a riparian owner a reasonable time to find means of securing that his operations cease to infringe the rights of another riparian owner<sup>5</sup>. If an injunction is not granted, a declaration as to the rights of the parties may be made<sup>6</sup>, or a suitable undertaking may be required from the infringer<sup>7</sup>.

A riparian owner is under no duty at common law to clear the channel of a watercourse which becomes blocked by natural causes<sup>8</sup>. Equally a riparian owner may not alter the bed of the river or remove accretions or obstructions which have become embedded in the river<sup>9</sup>.

1 As to who is a riparian owner see PARA 81.

2 *Sampson v Hoddinott* (1857) 1 CBNS 590.

3 See eg *Stollmeyer v Petroleum Development Co Ltd* [1918] AC 498n, PC. A sequestration order may be obtained against a public authority which fails to comply with an injunction: see eg *Spokes v Banbury Board of Health* (1865) LR 1 Eq 42; and **CIVIL PROCEDURE** vol 12 (2008) PARAS 1269, 1380 et seq.

4 *Edleston v Crossley & Sons Ltd* (1868) 18 LT 15.

5 *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485, PC.

6 See eg *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485, PC.

7 See eg *Elwell v Crowther* (1862) 31 Beav 163, where a stream to a mill was lowered but the banks were raised so that no actual diminution was made to the supply of water to the mill, an injunction was refused but an undertaking not to work minerals so as to obstruct or interfere with the flow of water to the mill was required; *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485, PC, where the infringer was required to undertake to pay from time to time any pecuniary damage found to have been suffered by the other party.

8 See *Repair of Bridges, Highways, etc Case* (1609) 13 Co Rep 33. Persons empowered to improve the navigation of a river are not obliged to clear the channel of weeds unless it is necessary for the navigation, and are not liable for injury to the riparian owner caused by the blockage: *Parrett Navigation Co v Robins* (1842) 10 M & W 593; *Cracknell v Thetford Corp* (1869) LR 4 CP 629. As to the powers of drainage bodies with respect to the maintenance of watercourses see PARAS 589, 599.

9 See *Withers v Purchase* (1889) 60 LT 819. As to the statutory provisions relating to the removal of obstructions see PARAS 602-603.

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## (4) SUBTERRANEAN WATER

### 104. Introduction.

The common law confers no rights in respect of subterranean water running in undefined or unknown channels<sup>1</sup>, except that the owner of land may sink wells in his own land and so obtain a supply of water, although another owner, by doing the same, may draw off the water from his neighbours<sup>2</sup>. In the same way, an owner of land may drain off the water in his land and so prevent it reaching the springs from which the statutory water undertakers draw their supply<sup>3</sup>. The common law rights of abstraction are now, however, subject to statutory restrictions<sup>4</sup>; and statutory provision is made for civil remedies for loss or damage due to water abstraction<sup>5</sup>.

1 *Acton v Blundell* (1843) 12 M & W 324, Ex Ch; *Chasemore v Richards* (1859) 7 HL Cas 349 (underground water prevented from reaching a river); *English v Metropolitan Water Board* [1907] 1 KB 588 (well below surface of stream, but stream affected); *Rugby Joint Water Board v Walters* [1967] Ch 397, [1966] 3 All ER 497 (water from existing land drains etc and percolating and surface water from adjoining boggy land flowing into reservoir). As to water flowing in definite but unknown channels see *Black v Ballymena Township Comrs* (1886) 17 LR Ir 459; *Bradford Corp v Ferrand* [1902] 2 Ch 655, DC; and PARAS 88, 105.

2 See PARA 105. A claim will not lie for pumping water from a well which, by withdrawing the support of lower subterranean water, causes water in a stream to sink into the ground: *English v Metropolitan Water Board* [1907] 1 KB 588.

3 *South Shields Waterworks Co v Cookson* (1845) 15 LJ Ex 315; *Bradford Corp v Pickles* [1895] AC 587, HL; *Blackrod UDC v John Crankshaw Co Ltd* (1913) 136 LT Jo 239.

4 As to statutory restrictions on abstraction rights see the Water Resources Act 1991 ss 24, 25; and PARA 214 et seq.

5 See the Water Resources Act 1991 s 48A; and PARA 220.



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### **105. Subterranean water not in a known and defined channel.**

The general law as to the rights of riparian owners<sup>1</sup> does not apply to underground water flowing otherwise than in a known and defined channel<sup>2</sup>, nor to water which merely percolates or flows through the soil<sup>3</sup>. At common law, therefore, an owner of land under which there is subterranean water not in a known and defined channel has no right to the support of such water<sup>4</sup>, and his neighbour may draw off such water as he pleases<sup>5</sup>. Furthermore, water in an unknown channel or percolating water cannot be the subject of prescription or grant<sup>6</sup>, and its diversion or appropriation by one landowner may not be challenged by another, whatever the former's motive for doing so may be and however long the latter may have enjoyed the use of the water<sup>7</sup>. Thus, at common law the owner of land containing underground water which percolates or flows by unknown and undefined channels to the land of an adjoining owner may divert or appropriate it as he pleases so that none reaches the land of the adjoining owner, or so that the flow of a stream in that land is diminished in consequence of the diversion or appropriation<sup>8</sup>. Similarly, if a landowner, by drainage or other works on his own land, drains another landowner's well, the other landowner has no remedy at common law<sup>9</sup>. If in the course of draining the water from under his neighbour's land a landowner removes and appropriates soluble matter, at common law he commits no actionable wrong<sup>10</sup>, but he must not remove insoluble matter forming a support to the surface<sup>11</sup>.

The common law rights of abstraction are now, however, subject to statutory restrictions<sup>12</sup>; and statutory provision is made for civil remedies for loss or damage due to water abstraction<sup>13</sup>.

1 As to who is a riparian owner see PARA 81. As to riparian rights generally see PARA 81 et seq.

2 As to the meaning of 'known and defined channel' see PARA 88. As to rights relating to water in a known and defined channel see PARAS 86, 106. As to rights in respect of water in an artificial channel see PARA 87.

3 *Acton v Blundell* (1843) 12 M & W 324, Ex Ch; *Ewart v Belfast Guardians* (1881) 9 LR Ir 172, Ir CA; *Bradford Corp v Ferrand* [1902] 2 Ch 655, DC, where a spring was alleged to be fed by underground water flowing in a defined channel, the course and existence of which was not known and could not be ascertained except by excavation, and it was held that a diversion of the underground supply which diminished the flow from the spring gave no cause of action. In *Bleachers' Association Ltd and Bennett and Jackson Ltd v Chapel-en-le-Frith RDC* [1933] Ch 356 (see PARA 107), the meanings of 'known' and 'defined' given in *Black v Ballymena Township Comrs* (1886) 17 LR Ir 459 (see PARA 88) were adopted and it was held that the water in question did not flow in a defined channel or that, if it did, excavations made subsequent to commencement of the action had not established that the channel was known. In the case, however, of a river like the Mole, which disappears under the ground and reappears again so that there is a terminus a quo and a terminus ad quem, the owners of land between and their riparian neighbours can fairly be presumed to know the existence and course of the stream, and the owner of the soil under which the stream flows may maintain a claim for its diversion if the diversion is made in circumstances which would have enabled him to recover if the stream had been wholly above ground: *Bradford Corp v Ferrand* [1902] 2 Ch 655 at 665, DC, per Farwell J, citing *Dickinson v Grand Junction Canal Co* (1852) 7 Exch 282, the dictum in which had previously been approved in *Chasemore v Richards* (1859) 7 HL Cas 349 at 374 per Lord Chelmsford.

4 *Popplewell v Hodgkinson* (1869) LR 4 Exch 248, Ex Ch.

5 *Acton v Blundell* (1843) 12 M & W 324, Ex Ch; *Chasemore v Richards* (1859) 7 HL Cas 349; *Grand Junction Canal v Shugar* (1871) 24 LT 402; *Rugby Joint Water Board v Walters* [1967] Ch 397, [1966] 3 All ER 497; *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA. See also *R v Metropolitan Board of Works* (1863) 3 B & S 710, where it was held that interference with the flow of underground water in the exercise of statutory powers did not give rise to a right to compensation.

6 *Briscoe v Drought* (1860) 11 ICLR 250; *R v Metropolitan Board of Works* (1863) 3 B & S 710; *Roberts v Fellowes* (1906) 94 LT 279; *Blackrod UDC v John Crankshaw & Co Ltd* (1913) 136 LT Jo 239. Although percolating water cannot be reserved in a conveyance of land, the vendor can reserve the right to obtain water from the land: *Re Simeon and Isle of Wight RDC* [1937] Ch 525, [1937] 3 All ER 149.

7 *Chasemore v Richards* (1859) 7 HL Cas 349; *Bradford Corp v Pickles* [1895] AC 587, HL, where water was alleged to have been diverted by one landowner to compel another to purchase his land; *Kibble v Chipping Norton UDC* (1901) Times, 27 February. See also *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA.

8 *Dickinson v Grand Junction Canal Co* (1852) 7 Exch 282; *Chasemore v Richards* (1859) 7 HL Cas 349; *Ewart v Belfast Guardians* (1881) 9 LR Ir 172, Ir CA; *Black v Ballymena Township Comrs* (1886) 17 LR Ir 459; *Blackrod UDC v John Crankshaw & Co Ltd* (1913) 136 LT Jo 239.

9 *Hammond v Hall* (1840) 10 Sim 551; *Acton v Blundell* (1843) 12 M & W 324, Ex Ch. See generally **NUISANCE** vol 78 (2010) PARA 101 et seq.

10 *Salt Union Ltd v Brunner, Mond & Co Ltd* [1906] 2 KB 822.

11 *Broadbent v Ramsbotham* (1856) 11 Exch 602; *New River Co v Johnson* (1860) 6 Jur NS 374; *Trinidad Asphalt Co v Ambard* [1899] AC 594, PC; *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1899] 2 Ch 217, CA; *Mostyn v Atherton* [1899] 2 Ch 360. See also **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 183; **NUISANCE** vol 78 (2010) PARA 116 et seq.

12 As to statutory restrictions on abstraction rights see the Water Resources Act 1991 ss 24, 25; and PARA 214 et seq.

13 See the Water Resources Act 1991 s 48A; and PARA 220.

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### **106. Rights as to flow in known and defined subterranean channels.**

In the case of a subterranean stream the course of which is known and defined<sup>1</sup> or which can be presumed to be known<sup>2</sup>, the rights of the landowners with regard to the flow of the water are similar to those which arise in the case of water flowing upon the surface in a defined natural course<sup>3</sup>. There are restrictions on the abstraction of water<sup>4</sup>; and statutory provision is made for civil remedies for loss or damage due to water abstraction<sup>5</sup>.

1 As to the meaning of 'known and defined channel' see PARA 88.

2 See PARA 105.

3 *Acton v Blundell* (1843) 12 M & W 324, Ex Ch; *Dickinson v Grand Junction Canal Co* (1852) 7 Exch 282 at 300-301 per Pollock CB; *Broadbent v Ramsbotham* (1856) 11 Exch 602; *Dudden v Clutton Union Guardians* (1857) 1 H & N 627; *Chasemore v Richards* (1859) 7 HL Cas 349; *Ewart v Belfast Guardians* (1881) 9 LR Ir 172, Ir CA; *Black v Ballymena Township Comrs* (1886) 17 LR Ir 459; *Bradford Corp v Pickles* [1895] AC 587, HL; *Bradford Corp v Ferrand* [1902] 2 Ch 655, DC. As to rights relating to water on the surface flowing in a defined natural course see PARA 86.

4 A licensee or a person in possession of land on which a spring rises which feeds a stream is not entitled to abstract water from the spring and so interfere with the accustomed flow of water in the stream: *Mostyn v Atherton* [1899] 2 Ch 360. The owner of land through which water flows in an artificial channel is not entitled to diminish the flow by abstracting water from the springs which feed the channel: *Bunting v Hicks* (1894) 70 LT 455. As to rights in respect of water in an artificial channel see PARA 87. As to the statutory restrictions on the construction or extension of wells, boreholes or other works for the purpose of abstracting underground water without a licence granted by the Environment Agency see PARA 214 et seq. As to the Environment Agency see PARA 17.

5 See the Water Resources Act 1991 s 48A; and PARA 220.

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**107. Defined but unknown subterranean channel.**

Subterranean water flowing in a defined channel<sup>1</sup> the course of which is not known and cannot be presumed to be known and which cannot be ascertained except by subsequent excavation will be looked upon as percolating water which at common law can be abstracted or diverted notwithstanding any loss or damage which may thereby be caused<sup>2</sup>. But once the course of the channel has been established by excavation, and to the extent to which its course has thus been established, it will become a channel which is both defined and known<sup>3</sup>.

Statutory provision is made for civil remedies for loss or damage due to water abstraction<sup>4</sup>.

1 As to the meaning of 'known and defined channel' see PARA 88.

2 See *Bradford Corp v Ferrand* [1902] 2 Ch 655, DC; and PARA 105.

3 *Bleachers' Association Ltd and Bennett and Jackson Ltd v Chapel-en-le-Frith RDC* [1933] Ch 356, where it was held that 'subsequent' should be added in the headnote to *Bradford Corp v Ferrand* [1902] 2 Ch 655, DC, so that it reads 'cannot be ascertained except by subsequent excavation' (as in the text to note 2). See also PARA 105. As to rights in relation to subterranean water in a defined and known channel see PARA 106.

4 See the Water Resources Act 1991 s 48A; and PARA 220.

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## **4. ORGANISATION OF THE WATER INDUSTRY**

### **(1) INTRODUCTION**

#### **108. Privatisation of the water industry.**

On 1 September 1989 the functions of the ten water authorities which had been established by the Water Act 1973<sup>1</sup> were transferred to the former National Rivers Authority (the 'NRA') (now replaced by the Environment Agency)<sup>2</sup>, water undertakers and sewerage undertakers by the Water Act 1989, now consolidated in the 1991 legislation<sup>3</sup>. Water undertakers and sewerage undertakers are those companies appointed as such<sup>4</sup>. Schemes made by water authorities provided for the division of their property, rights and liabilities between their successor companies and the NRA as from the above date<sup>5</sup>. Successor companies (limited companies initially wholly owned by the Crown) were nominated<sup>6</sup>. Provision was made for the eventual dissolution of the water authorities<sup>7</sup>, and transitional provisions were also made<sup>8</sup>.

As a consequence of the vesting in accordance with such a transfer scheme of property, rights and liabilities of any water authority in that authority's successor company, that company was directed by the Secretary of State to issue securities<sup>9</sup> to him and to the limited company nominated by him<sup>10</sup> as the nominated holding company of the successor company<sup>11</sup>. As a consequence of any such issue to a nominated holding company, the holding company was to issue securities as directed by the Secretary of State either to the Treasury or to him, or to any person entitled to require the issue of the securities following their initial allotment as so directed<sup>12</sup>. The Secretary of State was not to give any such direction, however, except at a time when the company directed to issue the securities in question was wholly owned by the Crown<sup>13</sup> and he was not to exercise any power so conferred on him, or dispose of any securities issued, or of any rights to securities initially allotted, to him without the consent of the Treasury<sup>14</sup>. The Treasury or the Secretary of State was empowered at any time to acquire securities of the holding companies or rights to subscribe for any such securities<sup>15</sup>. The functions of the Treasury or, with its consent, of the Secretary of State under any of the above provisions might be exercised through nominees<sup>16</sup>. A target investment limit was set by order on the proportion of issued voting shares held by the government in each nominated holding company of a successor company<sup>17</sup>.

At any time before a successor company ceased to be wholly owned by the Crown, the Secretary of State had power to direct that specified sums were to be carried by the company to a reserve instead of being applied in any other way<sup>18</sup>. At any time when a successor company was wholly owned by the Crown, the aggregate amount outstanding in respect of the principal of the relevant borrowing<sup>19</sup> of a group to which it belonged was not to exceed a specified limit<sup>20</sup>.

Provision was made with regard to the statutory accounts of successor companies and nominated holding companies<sup>21</sup> and for their tax treatment<sup>22</sup>. The Secretary of State was given power to make payments, with the consent of the Treasury, into any superannuation fund<sup>23</sup> as he considered appropriate in respect of the actual and prospective liabilities falling from time to time to be met out of that fund to or in respect of persons, or classes of persons, who ceased to be officers or employees of a water authority or who ceased to be officers or employees of any person designated for these purposes by an order<sup>24</sup> made by the Secretary of State<sup>25</sup>.

1 See the Water Act 1973 s 2 (repealed).

2 As to the Environment Agency see PARA 17.

3 See the Water Act 1989 s 4(1)(a); the Water Authorities (Transfer of Functions) (Appointed Day) Order 1989, SI 1989/1530. As to the 1991 legislation see PARA 12.

4 See the Water Industry Act 1991 ss 6-8; and PARA 137 et seq. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. There are basically two types of water undertakers: (1) statutory water companies, which are purely water supply undertakers, most of which were established in the nineteenth century (eg Bristol Water Company, Mid Kent Water Company, Bournemouth Water Company); and (2) relevant undertakers, which are both water supply and sewerage undertakers, of which there are ten, replacing the former ten water authorities established under the Water Act 1973 (repealed). As to statutory water companies see PARA 134 et seq; as to the meaning of 'relevant undertaker' see PARA 137 note 8; and as to the former ten water authorities and the successor companies see note 6. As to water undertakers see further PARA 134 et seq. As to sewerage undertakers see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 999 et seq.

5 See the Water Act 1989 s 4(1)(b), Sch 2. See also *Sheffield City Council v Yorkshire Water Services Ltd* [1991] 2 All ER 280, [1991] 1 WLR 58 (assets vested in the old local authorities for water purposes vested in the water authorities on the transfer of water undertakings pursuant to the Water Act 1973 (repealed); local authorities retained no property rights in those assets and were not entitled either to the proceeds of sale or to compensation on privatisation).

Where a scheme under the Water Act 1989 Sch 2 was made by a water authority it did not take effect unless it was approved by the Secretary of State: see Sch 2 para 1(2). The Secretary of State might modify the scheme before approving it (Sch 2 para 1(3)) or, if the water authority failed to submit such a scheme for approval, or the Secretary of State decided not to approve a scheme submitted to him, he might himself make a scheme (see Sch 2 para 1(4)). As to modification of the scheme after it had come into force see Sch 2 para 1(5)-(7). A water authority was under a duty to provide the Secretary of State with all such information and other assistance as he might reasonably require for the purposes of, or in connection with, the exercise of any power conferred on him by Sch 2 para 1: Sch 2 para 1(8). As to transfers made by such a scheme see Sch 2 para 2; as to supplemental provisions of schemes see Sch 2 para 3; and as to duties of water authorities after the scheme came into force see Sch 2 para 4. As to the Secretary of State see PARA 15 note 1.

6 The nominated successor companies, and the relevant water authorities, were: (1) Anglian Water Services Ltd (Anglian Water Authority); (2) Northumbrian Water Ltd (Northumbrian Water Authority); (3) North West Water Ltd (North West Water Authority); (4) Severn Trent Water Ltd (Severn Trent Water Authority); (5) Southern Water Services Ltd (Southern Water Authority); (6) South West Water Services Ltd (South West Water Authority); (7) Thames Water Utilities Ltd (Thames Water Authority); (8) Dwr Cymru Cyfyngedig (Welsh Water Authority); (9) Wessex Water Services Ltd (Wessex Water Authority); and (10) Yorkshire Water Services Ltd (Yorkshire Water Authority): Water Authorities (Successor Companies) Order 1989, SI 1989/1465, art 2, Schedule. A company was regarded for the purposes of the Water Act 1989 as wholly owned by the Crown at any time when each of the issued shares was held by, or by a nominee of, the Treasury, the Secretary of State or another company which was wholly owned by the Crown: s 189(6). 'Successor company' means a company so nominated as the successor company of a water authority and, in relation to any water authority, means the company so nominated in relation to that authority; and 'water authority' means an authority established in accordance with the Water Act 1973 s 2 (repealed): Water Act 1989 s 189(1). 'The Treasury' means the Commissioners of Her Majesty's Treasury: Interpretation Act 1978 s 5, Sch 1. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

7 The Secretary of State was, by order made before the transfer date, to nominate a company in relation to each water authority as that authority's successor company; but a company was not to be so nominated unless it was a limited company and, at the time when the order was made, was wholly owned by the Crown: Water Act 1989 s 4(2). Subject to s 4(4), each water authority continued in existence after the transfer date until such time as it was dissolved by order made by the Secretary of State: s 4(3). On the transfer date the chairman and members of each water authority ceased to hold office; and on and after that date each such authority: (1) consisted only of a chairman appointed by the Secretary of State and, if the Secretary of State thought fit, such one or more other persons as the Secretary of State might appoint as members of that authority; and (2) had only the functions which fell to be carried out by that authority under any scheme under Sch 2 with respect to that authority: s 4(4). The Secretary of State was not to make an order under s 4(3) in relation to any water authority unless he was satisfied, after consultation with the water authority and with the NRA and the water authority's successor company, that nothing further remained to be done by the water authority under any scheme under Sch 2: s 4(5). The power to make an such order was exercisable by statutory instrument and such an order was not to be amended or revoked: (a) in the case of an order under s 4(2), on or after the transfer date; or (b) in the case of an order under s 4(3), after the dissolution of the water authority to which the order related: s 4(6). As to the order made see the Water Authorities (Successor Companies) Order 1989, SI 1989/1465. See also note 11.

8 See the Water Act 1989 Sch 26. See further the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 2.

9 For these purposes, 'securities', in relation to a company, includes shares, debentures, bonds and other securities of the company, whether or not constituting a charge on the assets of the company; 'debentures' includes debenture stock; and 'shares' includes stock: Water Act 1989 s 96. Securities required to be issued in pursuance of s 83 (see the text and notes 10-14) were to be issued or allotted at such times, and on such terms, as the Secretary of State directed (s 83(4)); and shares in a company so issued were to be of such nominal value as the Secretary of State directed and to be issued as fully paid and treated for the purposes of the application of the Companies Act 1985 in relation to that company as if they had been paid up by virtue of the payment to the company of their nominal value in cash (Water Act 1989 s 83(5)).

10 Ie by order made by statutory instrument, whether before or after the transfer date: Water Act 1989 s 83(1)(a).

11 Water Act 1989 s 83(1)(a), (b). The Secretary of State was not to make an order nominating any company as the nominated holding company of a successor company except at a time when the company so nominated was wholly owned by the Crown: s 83(3)(a). The nominated holding companies, and the relevant successor companies, in 1989 were: (1) Anglian Water plc (Anglian Water Services Ltd); (2) Welsh Water plc (Dwr Cymru Cyfyngedig); (3) Northumbrian Water Group plc (Northumbrian Water Ltd); (4) North West Water Group plc (North West Water Ltd); (5) Severn Trent plc (Severn Trent Water Ltd); (6) Southern Water plc (Southern Water Services Ltd); (7) South West Water plc (South West Water Services Ltd); (8) Thames Water plc (Thames Water Utilities Ltd); (9) Wessex Water plc (Wessex Water Services Ltd); and (10) Yorkshire Water plc (Yorkshire Water Services Ltd): Water Reorganisation (Holding Companies of Successor Companies) Order 1989, SI 1989/1531, art 2, Schedule.

12 Water Act 1989 s 83(2).

13 Water Act 1989 s 83(3)(b). The Secretary of State was empowered to provide financial assistance for holding companies while they were wholly owned by the Crown: see s 84. Provision was made for the transfer to holding companies of certain National Loans Fund debts of the successor companies: see s 85; and the Water Reorganisation (Successor Companies) (Transfer of Loans) Order 1989, SI 1989/1532 (revoked). The transferred liabilities and all liabilities of the successor companies under debentures issued in respect of the transferred liabilities are now extinguished by virtue of the Water Act 1989 s 86 and the Water Reorganisation (Nominated Holding Companies) (Extinguishment of Loans) Order 1989, SI 1989/2018.

14 Water Act 1989 s 83(6). Any dividends or other sums received by the Treasury or the Secretary of State in right of, or on the disposal of, any securities or rights acquired by virtue of s 83 were to be paid into the Consolidated Fund: s 83(7). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

15 Water Act 1989 s 87(1). Any expenses incurred in the exercise of this power were to be paid out of money provided by Parliament: s 87(3). The Secretary of State was not to dispose of any securities so acquired without the consent of the Treasury: s 87(2). Any dividends or other sums received by the Treasury or the Secretary of State in right of, or on the disposal of, any securities or rights so acquired were to be paid into the Consolidated Fund: s 87(4).

16 See the Water Act 1989 s 88(1). However: (1) the issue in pursuance of s 83 (see the text to notes 9-14) of securities of a successor company to any nominee of the Secretary of State appointed for the purposes of s 83; (2) the issue in pursuance of s 83 or s 86 (see note 13) of securities of such a company's nominated holding company to a nominee of the Treasury or of the Secretary of State appointed for those purposes or to any person entitled to require the issue of the securities following their initial allotment to any such nominee; and (3) the acquisition by any nominee of the Treasury or the Secretary of State appointed for the purposes of s 87 (see the text to note 15) of any securities or rights thereunder, were to be in accordance with directions given from time to time by the Treasury or by the Secretary of State with Treasury consent: s 88(1)(a)-(c). Any person holding any securities or rights as such a nominee by virtue of these provisions was to hold and deal with them, or any of them, on such terms and in such manner as the Treasury, or, with its consent, the Secretary of State, directed: s 88(2).

17 See the Water Act 1989 s 89(1)-(3). As soon as he considered it expedient and in any case not later than six months after the company ceased to be wholly owned by the Crown, the Secretary of State was to fix such a limit in relation to each nominated holding company in relation to the aggregate of the shares held in it by the Treasury, the Secretary of State or any nominee of it or of him (the 'government shareholding'): s 89(1), (2). The target investment limit for the government shareholding in the company was to be expressed as a proportion of the voting rights exercisable in all circumstances at a general meeting of the company (the 'ordinary voting rights'): s 89(3). The temporary suspension of any of the ordinary voting rights was disregarded for these purposes: s 89(9). The first such limit was not to exceed, by more than 0.5% of the ordinary voting rights, the proportion of those rights in fact carried by the government shareholding in the company at the time

when the order fixing the limit was made: s 89(4). From time to time, the Secretary of State may by order fix a new target investment limit for the government shareholding but any new limit must be lower than the one it replaces in relation to that company and any order previously made may be revoked only by an order fixing a new limit: s 89(5). The power to make any such order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 89(10). For the first limit fixed by order under s 89(4) see the Water (Target Investment Limit) Order 1990, SI 1990/1083, art 2, Schedule, which sets limits varying from 1.41% in the case of South West Water plc to 2.46% in the case of Thames Water plc.

It was the duty of the Treasury and of the Secretary of State to exercise their powers under the Water Act 1989 s 87, any power to dispose of any shares held by virtue of Pt II Ch V (ss 83-96) and their power to give directions to their respective nominees so as to secure that the government shareholding in the company did not carry a proportion of the ordinary voting rights exceeding any target investment limit for the time being in force in relation to the company: s 89(6)(a). It is also their duty not to exercise any power to acquire, or to authorise any nominee to acquire, at any time on or after the fixing of the first target investment limit in relation to the company, any shares in the successor company of which the company is the nominated holding company: s 89(6)(b). Notwithstanding s 89(6), the Treasury or the Secretary of State may take up, or direct any nominee to take up, any rights for the time being available to it or him or to the nominee as an existing holder of shares or other securities of the company or by reason of the rescission of any contracts for their sale, but if, as a result, the proportion of the ordinary voting rights carried by the government shareholding in the company at any time exceeds the target investment limit for the time being in force in relation to it, it is the duty of the Treasury or of the Secretary of State to comply with s 89(6) as soon after that time as is reasonably practicable: s 89(7), (8).

Where the same document contains listing particulars for securities of two or more nominated holding companies and any person's responsibility for any information included in the document is stated in the document to be confined to its inclusion as part of the listing particulars for securities of any one of those companies, that person is not treated as responsible for that information in so far as it is stated in the document to form part of the listing particulars for securities of any other of those companies: s 90(1). 'Listing particulars' has the same meaning as in the Financial Services and Markets Act 2000 s 90(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427); and 'responsible', in relation to listing particulars, has the meaning given in s 79(3) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 391); Water Act 1989 s 90(3) (amended by SI 2001/3649).

18 Water Act 1989 s 93(1). A company which had such a reserve might not apply it except in paying up unissued shares of the company to be allotted to members of the company as fully paid bonus shares: s 93(2).

19 'Relevant borrowing' means, in relation to a group to which a successor company belongs: (1) such loans made or treated as made to any company in the group, including loans treated by virtue of the issue of debentures in pursuance of the Water Act 1989 as having been made to any such company, as are not loans made or treated as made by one company belonging to the group to another such company; and (2) any sums borrowed, or treated as borrowed, by the local authorities in respect of the repayment of which, or the payment of interest on which, the successor company is required to make contributions by virtue of the transfer of any liability in accordance with a scheme under s 4(1)(b), Sch 2: s 92(5). 'Group', in relation to a successor company, means that company's nominated holding company and all of the nominated holding company's subsidiaries, including the successor company and its subsidiaries, taken together: s 92(5).

20 See the Water Act 1989 s 92(1). The specified limit was £1,400m or such greater sum, not exceeding £1,800m, as the Secretary of State might specify by order made by statutory instrument: s 92(1). Different amounts could be specified in relation to different groups, but no order was to be made unless a draft had been laid before, and approved by a resolution of, the House of Commons: s 92(2). At the date at which this volume states the law no such order had been made. If articles of association of a successor company or of its nominated holding company conferred on the Secretary of State powers exercisable with the Treasury's consent for, or in connection with, restricting the sums of money which might be borrowed or raised during any period by the group to which it belongs, those powers were exercisable in the national interest notwithstanding any rule of law and the provisions of any enactment: s 92(3). An alteration of the articles of association of a successor company or of its nominated holding company which has the effect of conferring or extending such powers is, however, to be disregarded if made at a time when the company has ceased to be wholly owned by the Crown: s 92(4).

Where any amount outstanding in respect of the principal of any relevant borrowing of a group is treated as repaid or extinguished in connection with the issue of any securities of a company belonging to that group, or would fall to be so treated, in the case of an extinguishment under s 86 (see note 13) if the Secretary of State had given a direction under s 86(3), it is deemed to continue to be outstanding for these purposes except to the extent that any amount payable by the company by reason of the issue of securities in connection with the repayment or extinguishment itself falls to be treated for these purposes as an amount outstanding in respect of the principal of any relevant borrowing of the group: s 92(6).

21 See the Water Act 1989 s 91 (amended by SI 2008/948); Water Act 1989 s 92(3).



22 See the Water Act 1989 s 95 (amended by the Taxation of Chargeable Gains Act 1992 s 290(1), Sch 10 para 18; the Finance Act 1996 ss 105(1), 205, Sch 41 Part V(3)).

23 Is any fund maintained for the purposes of any regulations under the Superannuation Act 1972 s 7 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 875): see the Local Government Superannuation (Water) Regulations 1989, SI 1989/1462 (amended by the Environment Act 1995 s 120, Sch 22 para 233(1); SI 1995/1019; and partially revoked by virtue of SI 1997/1613).

24 The power to make such an order was exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Water Act 1989 s 173(2). The Secretary of State was not to make an order designating a person for these purposes unless that person appeared to him to be a person whose activities at any time before the transfer date consisted in, or were connected with, the carrying out of any function transferred by the Water Act 1989 or which corresponded to any such function or to any other function under that Act: s 173(2). In exercise of this power, the Secretary of State made the Water Reorganisation (Pensions etc) (Designated Persons) Order 1989, SI 1989/1155 (amended by SI 1989/1382). In exercise of the general power to make regulations under the Water Act 1989 s 185(2), the Secretary of State also made the Water Reorganisation (Pensions etc) Regulations 1989, SI 1989/1161 (amended by SI 1989/1381); and the Water (Pensions and Compensation) (Transfer of Liabilities) Regulations 1989, SI 1989/1939.

25 Water Act 1989 s 173(1). These powers were to be exercised so as to ensure that all such liabilities were able to be met out of the fund out of which they fell to be met: s 173(2). Any amount paid into any fund by the Secretary of State under these provisions was to be paid out of money provided by Parliament: s 173(4).

## **UPDATE**

### **108 Privatisation of the water industry**

NOTE 9--Reference to Companies Act 1985 now to Companies Act 2006: Water Act 1989 s 83(5) (amended by SI 2009/1941).

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## **(2) REGULATORY ARRANGEMENTS**

### **(i) The Water Services Regulation Authority**

#### **109. Establishment of the Water Services Regulation Authority.**

A body corporate known as the Water Services Regulation Authority<sup>1</sup> is established for the purpose of carrying out the functions conferred on or transferred to it by the Water Industry Act 1991 or under or by virtue of any other enactment<sup>2</sup>. The functions of the Authority are to be performed on behalf of the Crown<sup>3</sup>.

The Authority consists of a chairman, and at least two other members, appointed by the Secretary of State<sup>4</sup>. The Secretary of State must consult the Welsh Ministers<sup>5</sup>, before appointing any member<sup>6</sup>, and the chairman, before appointing any other member<sup>7</sup>. Subject to the following provisions, the chairman and other members of the Authority are to hold and vacate office as such in accordance with the terms of their respective appointments<sup>8</sup>, which terms must be determined by the Secretary of State<sup>9</sup>. An appointment of a person to hold office as chairman or as one of the other members of the Authority is to be for a term not exceeding five years<sup>10</sup>. A person holding office as chairman or other member may resign that office by giving notice in writing<sup>11</sup> to the Secretary of State<sup>12</sup>, and may be removed from office by the Secretary of State on the ground of incapacity or misbehaviour<sup>13</sup>. A previous appointment as chairman or other member does not affect a person's eligibility for appointment to either office<sup>14</sup>.

The Authority must pay to its chairman and its other members such remuneration, and such travelling and other allowances, as may be determined by the Secretary of State<sup>15</sup>. It must also, if required to do so by the Secretary of State, pay such pension, allowances or gratuities as may be determined by the Secretary of State to or in respect of a person who is or has been the chairman or a member of the Authority<sup>16</sup>, or make such payments as may be so determined towards provision for the payment of a pension, allowances or gratuities to or in respect of such a person<sup>17</sup>. If the Secretary of State determines that there are special circumstances which make it right for a person ceasing to hold office as chairman or other member of the Authority to receive compensation, the Authority must pay to him a sum by way of compensation of such amount as may be determined by the Secretary of State<sup>18</sup>.

The Authority may, with the approval of the Minister for the Civil Service<sup>19</sup> as to numbers and terms and conditions of service, appoint such staff as it may determine<sup>20</sup>.

The Authority may establish committees and any of its committees may establish sub-committees<sup>21</sup>. The members of a committee of the Authority may include persons who are not members of the Authority, and the members of a sub-committee may include persons who are not members of the committee or the Authority<sup>22</sup>.

The Authority may regulate its own procedure<sup>23</sup>; and the validity of anything done by the Authority is not to be affected by a vacancy among its members or by a defect in the appointment of a member<sup>24</sup>. A document purporting to be duly executed under the seal of the Authority, or signed on its behalf, is to be received in evidence and, unless the contrary is proved, is to be taken to be so executed or signed<sup>25</sup>.

- 1 The Authority is known as Ofwat. In Welsh the Authority may be known as 'Awdurdod Rheoleiddio Gwasanaethau Dwr': Water Industry Act 1991 s 1A(4) (s 1A, Sch 1A added by the Water Act 2003 s 34(1), (2)).
- 2 Water Industry Act 1991 s 1A(1) (as added: see note 1). As to the meaning of 'enactment' see PARA 14 note 31. The Water Services Regulation Authority replaces the Director General of Water Services whose office is abolished with his functions being transferred to the Authority: see the Water Act 2003 ss 34(3), (4), 36; and PARA 110. The Parliamentary Commissioner Act 1967 applies to the Authority and any action taken by or on behalf of the Authority in the exercise of its administrative functions may be investigated by the Parliamentary Commissioner: see the Parliamentary Commissioner Act 1967 ss 4, 5, Sch 2 (substituted by SI 2007/3470); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq. Information about the composition and work of the Water Services Regulation Authority is available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 3 Water Industry Act 1991 s 1A(2) (as added: see note 1). As to the Crown see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 353; **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 1 et seq.
- 4 Water Industry Act 1991 Sch 1A para 1(1) (as added: see note 1). As to the Secretary of State see PARA 15 note 1. A member of the Water Services Regulation Authority is disqualified for membership of the House of Commons: see the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt II (amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 20(1), (2)); and **PARLIAMENT** vol 78 (2010) PARAS 905, 908. A member of the Authority is also disqualified for membership of the Northern Ireland Assembly: see the Northern Ireland Assembly Disqualification Act 1975 s 1(1)(f), Sch 1 Pt II (amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 21(1), (2)). As to the Northern Ireland Assembly see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 5 This function was originally vested in the National Assembly for Wales but is now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 6 Water Industry Act 1991 Sch 1A para 1(2)(a) (as added: see note 1).
- 7 Water Industry Act 1991 Sch 1A para 1(2)(b) (as added: see note 1).
- 8 Water Industry Act 1991 Sch 1A para 2(1) (as added: see note 1).
- 9 See the Water Industry Act 1991 Sch 1A para 2(2) (as added: see note 1).
- 10 Water Industry Act 1991 Sch 1A para 3(1) (as added: see note 1).
- 11 As to the meaning of 'writing' see PARA 22 note 1.
- 12 Water Industry Act 1991 Sch 1A para 3(2)(a) (as added: see note 1).
- 13 Water Industry Act 1991 Sch 1A para 3(2)(b) (as added: see note 1). The Secretary of State must consult the Welsh Ministers before removing from office a person holding office as chairman or other member: Sch 1A para 3(3) (as so added); Government of Wales Act 2006 Sch 11 para 32.
- 14 Water Industry Act 1991 Sch 1A para 3(4) (as added: see note 1).
- 15 Water Industry Act 1991 Sch 1A para 4(1) (as added: see note 1).
- 16 Water Industry Act 1991 Sch 1A para 4(2)(a) (as added: see note 1).
- 17 Water Industry Act 1991 Sch 1A para 4(2)(b) (as added: see note 1).
- 18 Water Industry Act 1991 Sch 1A para 4(3) (as added: see note 1).
- 19 As to the Minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 427 et seq.
- 20 Water Industry Act 1991 Sch 1A para 5 (as added: see note 1).
- 21 Water Industry Act 1991 Sch 1A para 6(1) (as added: see note 1).
- 22 Water Industry Act 1991 Sch 1A para 6(2) (as added: see note 1).
- 23 Water Industry Act 1991 Sch 1A para 7(1) (as added: see note 1).
- 24 Water Industry Act 1991 Sch 1A para 7(2) (as added: see note 1).

25 Water Industry Act 1991 Sch 1A para 8 (as added: see note 1).

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### **110. Functions of the Authority.**

The functions of the former Director General of Water Services are transferred to the Water Services Regulation Authority<sup>1</sup>. The Authority has duties imposed on it, in conjunction with the Secretary of State<sup>2</sup> or, in certain cases, with the Welsh Ministers<sup>3</sup>, with respect to the regulation of the water industry<sup>4</sup>, and specific powers and duties with respect to water and sewerage undertakers<sup>5</sup>. The Authority shares general environmental and recreational duties with the Secretary of State or the Welsh Ministers and with every company holding an appointment as a relevant undertaker<sup>6</sup> and has power to appoint a company to be the water undertaker or sewerage undertaker for any area of England and Wales<sup>7</sup>.

The Authority must prepare, and may revise, a code of practice governing the discharge by it of its functions<sup>8</sup>. In exercising its functions the Authority must have regard to the provisions of the code<sup>9</sup>. The Authority must publish, in such manner as it considers appropriate, the code as for the time being in force<sup>10</sup>.

Anything authorised or required to be done by the Authority may be done by any member or employee of the Authority<sup>11</sup> who is authorised for that purpose by the Authority, whether generally or specially<sup>12</sup>, or by any committee of the Authority which has been so authorised<sup>13</sup>. The Authority has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions<sup>14</sup>; and this power includes the formation of advisory bodies<sup>15</sup>.

In exercising each of its functions the Authority is under a duty to consult the Consumer Council for Water<sup>16</sup>. The Authority is also under a duty to make arrangements variously with the Consumer Council for Water, the Secretary of State, the Welsh Ministers and the Environment Agency with a view to securing co-operation and the exchange of information between them, and the consistent treatment of matters which affect them<sup>17</sup>. The Authority may direct the Consumer Council for Water to supply to it such information as it may require for the purpose of exercising its functions<sup>18</sup>. The Authority may also, for the purpose of exercising its functions, require the National Consumer Council to supply it with such information as the Authority may by notice specify<sup>19</sup>; and if so required by notice, the Authority must, likewise, provide information to the National Consumer Council<sup>20</sup>.

In exercising a regulatory function<sup>21</sup>, the Authority must keep that function under review and secure that in exercising the function it does not impose burdens which it considers to be unnecessary<sup>22</sup>, or maintain burdens which it considers to have become unnecessary<sup>23</sup>. Where this duty applies to a regulatory function, the Authority must from time to time publish a statement<sup>24</sup> setting out: (1) what it proposes to do pursuant to the duty in relation to the function in the period to which the statement relates<sup>25</sup>; (2) (except in the case of the first statement published by it) what it has done pursuant to the duty in relation to the function since the previous statement published by it<sup>26</sup>; and (3) where a burden relating to the exercise of the function which has become unnecessary is maintained<sup>27</sup>, the reasons why removal of the burden would, having regard to all the circumstances, be impracticable or disproportionate<sup>28</sup>. In exercising a regulatory function, the Authority must, during a period for which such a statement is in force, have regard to that statement<sup>29</sup>.

- 1 Water Act 2003 s 36(1). As to the Water Services Regulation Authority see PARA 109. Information about the functions and work of the Water Services Regulation Authority is available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 2 As to the Secretary of State see PARA 15 note 1.
- 3 As to the Welsh Ministers see PARA 16 note 5.
- 4 See the Water Industry Act 1991 s 2; and PARA 130.
- 5 See eg the Water Industry Act 1991 s 30A (determination of disputes: PARA 131); s 38A (power to collect information with respect to levels of performance of water undertakers: PARA 326); s 40A (variation and termination of bulk supply agreement: PARA 331); s 86A (review of complaints procedure established by water undertakers: PARA 391); s 150A (determination of billing disputes: PARA 443). As to water undertakers and sewerage undertakers see PARA 137 et seq.
- 6 See the Water Industry Act 1991 s 3; and PARA 676. As to the meaning of 'relevant undertaker' see PARA 137 note 8.
- 7 See the Water Industry Act 1991 s 6; and PARA 137.
- 8 Water Industry Act 1991 Sch 1A para 9(1) (Sch 1A added by the Water Act 2003 s 34(2), Sch 1). In preparing or revising the code, the Authority must consult: (1) the Secretary of State; (2) the Welsh Ministers; (3) the Environment Agency; (4) the Consumer Council for Water; (5) relevant undertakers; (6) licensed water suppliers; and (7) such other persons as the Authority considers appropriate: Water Industry Act 1991 Sch 1A para 9(3) (as so added); Government of Wales Act 2006 Sch 11 para 32. As to the Environment Agency see PARA 17. As to the Consumer Council for Water see PARA 115. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'person' see PARA 13 note 29. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 9 Water Industry Act 1991 Sch 1A para 9(2) (as added: see note 8).
- 10 Water Industry Act 1991 Sch 1A para 9(4) (as added: see note 8). The code of practice, called the Ofwat Strategy, is available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 11 As to membership and the staff of the Authority see PARA 109.
- 12 Water Industry Act 1991 Sch 1A para 10(1)(a) (as added: see note 8).
- 13 Water Industry Act 1991 Sch 1A para 10(1)(b) (as added: see note 8). The Authority may not so authorise a committee whose members include any person who is not a member or employee of the Authority: Sch 1A para 10(2) (as so added). As to committees see PARA 109.
- 14 Water Industry Act 1991 Sch 1A para 12(1) (as added: see note 8). As to the interpretation of a similar provision in relation to local government see **LOCAL GOVERNMENT** vol 69 (2009) PARA 462.
- 15 Water Industry Act 1991 Sch 1A para 12(2) (as added: see note 8).
- 16 See the Water Industry Act 1991 s 30ZA; and PARA 114.
- 17 See the Water Industry Act 1991 s 27B (PARA 127) and the Water Act 2003 s 52 (PARA 128).
- 18 See the Water Industry Act 1991 s 27j; and PARA 121.
- 19 See the Consumers, Estate Agents and Redress Act 2007 s 27; and **SALE OF GOODS AND SUPPLY OF SERVICES**. As to the National Consumer Council see **SALE OF GOODS AND SUPPLY OF SERVICES**.
- 20 See the Consumers, Estate Agents and Redress Act 2007 s 24; and **SALE OF GOODS AND SUPPLY OF SERVICES**. The information specified or described in such a notice must be information the Council requires for the purpose of exercising its functions: see s 24(2).
- 21 The Regulatory Enforcement and Sanctions Act 2008 s 72 applies to the regulatory functions of the Water Services Regulation Authority (other than any function exercised under competition law, or, if exercisable in Wales, if or to the extent that it relates to a Welsh ministerial matter), and any regulatory function specified by a Minister of the Crown or the Welsh Ministers by order: see s 73(1), (2), (3)(c). A Minister of the Crown may not specify a regulatory function so far as exercisable in Wales, if or to the extent that the function relates to a Welsh ministerial matter: s 73(4)(c). The Welsh Ministers may only specify a regulatory function if or to the extent that it relates to a Welsh ministerial matter: s 73(5). Before making an order under these provisions the

authority making the order must consult any person whose regulatory functions are to be specified in the order, and such other persons as the authority considers appropriate: s 73(6). An order may make such consequential, supplementary, incidental or transitional provision (including provision amending any enactment) as the authority making it considers appropriate (s 73(7)), and is to be made by statutory instrument (s 73(8)). A statutory instrument containing an order made by a Minister of the Crown may not be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament: s 73(9). A statutory instrument containing an order made by the Welsh Ministers may not be made unless a draft of the instrument has been laid before, and approved by resolution of, the National Assembly for Wales: s 73(10). 'Wales' has the same meaning as in the Government of Wales Act 2006 (see PARA 16 note 2): Regulatory Enforcement and Sanctions Act 2008 s 73(11). 'Minister of the Crown' has the same meaning as in the Ministers of the Crown Act 1975 (see PARA 188 note 22): Regulatory Enforcement and Sanctions Act 2008 s 74. 'Welsh ministerial matter' means a matter in Wales (within the meaning of the Government of Wales Act 2006) in respect of which the Welsh Ministers exercise functions: Regulatory Enforcement and Sanctions Act 2008 s 74. As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. As to the laying of documents by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 s 86; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. At the date at which this volume states the law no order had been made under these provisions.

'Regulatory function' means: (1) a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or (2) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity: Legislative and Regulatory Reform Act 2006 s 32(2); definition applied by the Regulatory Enforcement and Sanctions Act 2008 s 74. In this definition the references to a function: (a) include a function exercisable by or on behalf of the Crown; (b) do not include any function of conducting criminal or civil proceedings: see the Legislative and Regulatory Reform Act 2006 s 32(3); as so applied. In this definition the references to an activity include: (i) providing goods and services; and (ii) employing or offering employment to any person: s 32(4); as so applied. As to the meaning of 'enactment' see PARA 14 note 31.

22 See the Regulatory Enforcement and Sanctions Act 2008 s 72(1)(a).

23 See the Regulatory Enforcement and Sanctions Act 2008 s 72(1)(b). Section 72(1) does not require the removal of a burden which has become unnecessary where its removal would, having regard to all the circumstances, be impracticable or disproportionate: s 72(2).

24 The first such statement published by the Authority must be published as soon as reasonably practicable after 1 October 2008 (ie the commencement of the duty in the Regulatory Enforcement and Sanctions Act 2008 s 72(1): see the text to notes 21-23) in relation to the function (see s 72(4)(a)), and is to be a statement for the period of 12 months beginning with the day of its publication (see s 72(4)(b)). A subsequent such statement published by the Authority must be published during the period to which the previous statement related or as soon as reasonably practicable thereafter (see s 72(5)(a)), and must be a statement for the period of 12 months beginning with the end of the period to which the previous statement related (see s 72(5)(b)). The publication of any such statement must be in such manner as the Authority considers appropriate for bringing it to the attention of the persons likely to be affected by it: see s 72(6). As to the meaning of 'month' see PARA 23 note 10.

25 See the Regulatory Enforcement and Sanctions Act 2008 s 72(3)(a).

26 See the Regulatory Enforcement and Sanctions Act 2008 s 72(3)(b).

27 Ie pursuant to the Regulatory Enforcement and Sanctions Act 2008 s 72(2): see note 23.

28 See the Regulatory Enforcement and Sanctions Act 2008 s 72(3)(c).

29 See the Regulatory Enforcement and Sanctions Act 2008 s 72(7).

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### **111. Forward work programmes.**

The Water Services Regulation Authority<sup>1</sup> must, before each financial year<sup>2</sup>, publish a document (the 'forward work programme') containing a general description of the projects, other than those comprising routine activities in the exercise of its functions<sup>3</sup>, which it plans to undertake during the year<sup>4</sup>. That description must include the objectives of each project<sup>5</sup>. The forward work programme for any year must also include an estimate of the overall expenditure which the Authority expects to incur during the year in the exercise of its functions<sup>6</sup>.

Before publishing the forward work programme for any year, the Authority must give notice<sup>7</sup> containing a draft of the forward work programme<sup>8</sup> and specifying the time within which representations or objections to the proposals contained in it may be made<sup>9</sup>, and must consider any representations or objections which are duly made and not withdrawn<sup>10</sup>. The Authority must send a copy of any notice so given by it to the Consumer Council for Water<sup>11</sup>, to the Secretary of State<sup>12</sup> and to the Welsh Ministers<sup>13</sup>.

A strategic environmental assessment of the programme may be required<sup>14</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 'Financial year' means the 12 months ending with 31 March: Water Industry Act 1991 s 219(1). As to the meaning of 'month' see PARA 23 note 10.

3 As to the functions of the Water Services Regulation Authority see PARA 110.

4 Water Industry Act 1991 s 192A(1) (s 192A added by the Water Act 2003 s 38(1)). The Authority's annual report must report on the progress of projects described in the forward works programme for that year: see PARA 112. The forward works programmes and annual reports are available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

5 Water Industry Act 1991 s 192A(2) (as added: see note 4).

6 Water Industry Act 1991 s 192A(3) (as added: see note 4).

7 The notice must be published by the Authority in such manner as it considers appropriate for the purpose of bringing the matters contained in it to the attention of persons likely to be affected by them: Water Industry Act 1991 s 192A(5) (as added: see note 4). As to the meaning of 'notice' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29.

8 Water Industry Act 1991 s 192A(4)(a) (as added: see note 4).

9 Water Industry Act 1991 s 192A(4)(b) (as added: see note 4).

10 Water Industry Act 1991 s 192A(4) (as added: see note 4).

11 As to the Consumer Council for Water see PARA 115.

12 As to the Secretary of State see PARA 15 note 1.

13 Water Industry Act 1991 s 192A(6) (as added: see note 4); Government of Wales Act 2006 Sch 11 para 32. This function was originally vested in the National Assembly for Wales but is now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

14 See PARA 9.





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## **112. Annual and other reports.**

The Water Services Regulation Authority<sup>1</sup> must, as soon as practicable after the end of each financial year<sup>2</sup>, make to the Secretary of State<sup>3</sup> a report (the 'annual report' for that year) on its activities during that year<sup>4</sup>, and the activities of the Competition Commission<sup>5</sup> during that year in respect of any references made by it<sup>6</sup>. The annual report for each year must include:

- 59 (1) a general survey of developments in respect of matters falling within the scope of the Authority's functions<sup>7</sup>;
- 60 (2) a report on the progress of the projects described in the forward work programme for that year<sup>8</sup>;
- 61 (3) a summary of final and provisional orders made and penalties imposed by the Authority during the year<sup>9</sup>;
- 62 (4) a report on such matters relating to any relevant undertaker<sup>10</sup> whose area is wholly or mainly in Wales<sup>11</sup> as the Welsh Ministers<sup>12</sup> may from time to time require<sup>13</sup>; and
- 63 (5) a report on such other matters as the Secretary of State may from time to time require<sup>14</sup>;

and must set out any general directions given<sup>15</sup> by the Secretary of State<sup>16</sup>.

The Secretary of State must lay a copy of each annual report before each House of Parliament<sup>17</sup> and arrange for the report to be published in such manner as he considers appropriate<sup>18</sup>.

The Authority may also prepare other reports with respect to any matter falling within the scope of its functions and may arrange for any such report to be published in such manner as it considers appropriate<sup>19</sup>. In making or preparing any report under these provisions the Authority must have regard to the need for excluding, so far as that is practicable, any matter which relates to the affairs of a particular individual or body of persons<sup>20</sup>, corporate or unincorporate, where publication of that matter would or might, in the opinion of the Authority, seriously and prejudicially affect the interests of that individual or body<sup>21</sup>.

The Authority must send a copy of each annual or other report under the above provisions to the Welsh Ministers, to the Consumer Council for Water<sup>22</sup> and to the Chief Inspector of Drinking Water<sup>23</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the meaning of 'financial year' see PARA 111 note 2.

3 As to the Secretary of State see PARA 15 note 1.

4 Water Industry Act 1991 s 192B(1)(a) (s 192B added by the Water Act 2003 s 38(1)).

5 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

6 Water Industry Act 1991 s 192B(1)(b) (as added: see note 4).

7 Water Industry Act 1991 s 192B(2)(a) (as added: see note 4). As to the functions of the Water Services Regulation Authority see PARA 110.

- 8 Water Industry Act 1991 s 192B(2)(b) (as added: see note 4). As to the forward work programme see PARA 111.
- 9 Water Industry Act 1991 s 192B(2)(c) (as added: see note 4). As to such orders and penalties see PARA 163 et seq.
- 10 As to the meaning of 'relevant undertaker' see PARA 137 note 8.
- 11 As to the meaning of 'Wales' see PARA 16 note 2.
- 12 Functions under the Water Industry Act 1991 s 192B were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 13 Water Industry Act 1991 s 192B(2)(d) (as added: see note 4); Government of Wales Act 2006 Sch 11 para 32. The Welsh Ministers must consult the Authority before exercising the power under head (4) in the text in relation to any matter: Water Industry Act 1991 s 192B(4) (as so added); Government of Wales Act 2006 Sch 11 para 32.
- 14 Water Industry Act 1991 s 192B(2)(e) (as added: see note 4). The Secretary of State must consult the Authority before exercising the power under head (5) in the text in relation to any matter: s 192B(4) (as so added).
- 15 le under the Water Industry Act 1991 s 27(3): see PARA 133.
- 16 Water Industry Act 1991 s 192B(3) (as added: see note 4).
- 17 Water Industry Act 1991 s 192B(5)(a) (as added: see note 4). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.
- 18 Water Industry Act 1991 s 192B(5)(b) (as added: see note 4).
- 19 Water Industry Act 1991 s 192B(6) (as added: see note 4). The annual report and other reports prepared by the Water Services Regulation Authority are available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 20 As to the meaning of 'person' see PARA 13 note 29.
- 21 Water Industry Act 1991 s 192B(8) (as added: see note 4).
- 22 As to the Consumer Council for Water see PARA 115.
- 23 Water Industry Act 1991 s 192B(7) (as added: see note 4). As to the Chief Inspector of Drinking Water see PARA 126.

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### **113. Guidance to the Authority on social and environmental matters.**

Guidance may be issued from time to time:

- 64 (1) by the Welsh Ministers<sup>1</sup>, with respect to appointment areas<sup>2</sup> which are wholly or mainly in Wales<sup>3</sup>; and
- 65 (2) by the Secretary of State<sup>4</sup>, with respect to other appointment areas<sup>5</sup>,

about the making by the Water Services Regulation Authority<sup>6</sup> of a contribution towards the attainment of any social or environmental policies set out or referred to in the guidance<sup>7</sup>. In formulating guidance, the Secretary of State and the Welsh Ministers must, where practicable, have regard to the costs and benefits which may be expected to result from the guidance<sup>8</sup>. Before issuing such guidance the Secretary of State and the Welsh Ministers must consult: (a) the Authority<sup>9</sup>; (b) the Consumer Council for Water<sup>10</sup>; (c) in the case of the Secretary of State, the Welsh Ministers and vice versa<sup>11</sup>; (d) relevant undertakers<sup>12</sup>; (e) licensed water suppliers<sup>13</sup>; and (f) such other persons<sup>14</sup> as the Secretary of State or the Welsh Ministers considers it appropriate to consult in relation to the guidance<sup>15</sup>.

The Secretary of State and the Welsh Ministers must arrange for any guidance issued by him or by them under these provisions to be published in such manner as he or they consider appropriate<sup>16</sup>.

The Water Services Regulation Authority, in exercising and performing its general powers and duties<sup>17</sup>, must have regard to any guidance issued under the above provisions<sup>18</sup>. The above provisions do not, however, apply in relation to anything done by the Authority in the exercise of any Competition Act functions<sup>19</sup>; but the Authority may nevertheless, when exercising any Competition Act function, have regard to any matter in respect of which a duty is imposed by any of those provisions if it is a matter to which the Office of Fair Trading<sup>20</sup> could have regard when exercising that function<sup>21</sup>. Further, the duties imposed by these provisions do not affect the obligation of the Authority or, as the case may be, the Secretary of State or the Welsh Ministers<sup>22</sup> to perform or comply with any other duty or requirement, whether arising under the Water Industry Act 1991 or another enactment<sup>23</sup>, by virtue of any Community obligation<sup>24</sup> or otherwise<sup>25</sup>.

1 Functions under the Water Industry Act 1991 s 2A which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

2 For these purposes, an 'appointment area' is an area for which an appointment is held under the Water Industry Act 1991 Pt II Ch 1 (ss 6-17) (see PARA 137 et seq): s 2A(10) (s 2A added by the Water Act 2003 s 40).

3 Water Industry Act 1991 s 2A(1)(a) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'Wales' see PARA 16 note 2.

4 As to the Secretary of State see PARA 15 note 1. A draft of any guidance proposed to be so issued by the Secretary of State must be laid before each House of Parliament: Water Industry Act 1991 s 2A(5) (as added: see note 2). Guidance may not be so issued by the Secretary of State until after the period of 40 days beginning with: (1) the day on which the draft is laid before each House of Parliament (s 2A(6)(a) (as so added)); or (2) if

the draft is laid before the House of Lords on one day and the House of Commons on another, the later of those two days (s 2A(6)(b) (as so added)). If, before the end of that period, either House resolves that the guidance should not be issued, the Secretary of State must not issue it: s 2A(7) (as so added). In reckoning any period of 40 days for these purposes, no account is to be taken of any time during which: (a) Parliament is dissolved or prorogued (s 2A(8)(a) (as so added)); or (b) both Houses are adjourned for more than four days (s 2A(8)(b) (as so added)). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. As to the adjournment, prorogation and dissolution of Parliament see **PARLIAMENT** vol 78 (2010) PARA 1016 et seq.

5 Water Industry Act 1991 s 2A(1)(b) (as added: see note 2).

6 As to the Water Services Regulation Authority see PARA 109.

7 Water Industry Act 1991 s 2A(1) (as added: see note 2). The Secretary of State has issued such guidance entitled *Statutory Social and Environmental Guidance to the Water Services Regulation Authority (Ofwat)* which is available on the Department of Environment, Food and Rural Affairs website at [www.defra.gov.uk](http://www.defra.gov.uk). On 8 December 2008 the Welsh Ministers laid social and environmental guidance to Ofwat before the National Assembly for Wales, and resolved to issue it immediately following the 40 day period allowed for the laying of such document if there were no objections thereto. For further information see the Welsh Assembly Government website at [www.new.wales.gov.uk](http://www.new.wales.gov.uk).

8 Water Industry Act 1991 s 2A(2) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32.

9 Water Industry Act 1991 s 2A(4)(a) (as added: see note 2).

10 Water Industry Act 1991 s 2A(4)(b) (as added: see note 2). As to the Consumer Council for Water see PARA 115.

11 Water Industry Act 1991 s 2A(4)(c) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32.

12 Water Industry Act 1991 s 2A(4)(d) (as added: see note 2). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

13 Water Industry Act 1991 s 2A(4)(e) (as added: see note 2). As to the meaning of 'licensed water supplier' see PARA 152.

14 As to the meaning of 'person' see PARA 13 note 29.

15 Water Industry Act 1991 s 2A(4)(f) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

16 Water Industry Act 1991 s 2A(9) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32.

17 As to its general powers and duties mentioned in the Water Industry Act 1991 s 2(1) (subject to s 2(6)): see PARA 130.

18 Water Industry Act 1991 s 2A(3) (as added: see note 2).

19 Water Industry Act 1991 s 2(6A) (s 2(6A), (6B) added by the Competition Act 1998 s 54(2), Sch 10 para 5; and amended by the Water Act 2003 s 39(1), (7), (8)). 'Competition Act functions' are those functions assigned to the Authority by the Water Industry Act 1991 s 31(3) (see PARA 132): see s 2(6A) (as so added).

20 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

21 Water Industry Act 1991 s 2(6B) (as added and amended: see note 19).

22 Functions of the Secretary of State under the Water Industry Act 1991 s 2, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to: (1) any water or sewerage undertaker whose area is wholly or mainly in Wales; (2) any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(d)). By virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30 these functions are now exercisable by the Welsh Ministers. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

23 As to the meaning of 'enactment' see PARA 14 note 31.

24 As to the meaning of 'Community obligation' see the European Communities Act 1972 s 1, Sch 1 Pt II; Interpretation Act 1978 s 5, Sch 1.

25 Water Industry Act 1991 s 2(7) (added by the Water Act 2003 s 39(1), (9)).

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#### **114. Duty to consult the Consumer Council for Water.**

It is the duty of the Water Services Regulation Authority<sup>1</sup> to consult<sup>2</sup> the Consumer Council for Water<sup>3</sup> in relation to the exercise of each of its functions<sup>4</sup>, except where:

- 66 (1) the Council has indicated to the Authority, whether specifically or generally, that it does not wish to be consulted<sup>5</sup>; or
- 67 (2) the Authority considers that it would be clearly inappropriate to consult the Council<sup>6</sup>.

This duty is in addition to any duty on the Authority to consult the Council which is provided for elsewhere<sup>7</sup>.

Where the Authority is required by any provision of the Water Industry Act 1991 to publish a notice<sup>8</sup> or any other document, it must send a copy of the document to the Council<sup>9</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

3 As to the Consumer Council for Water see PARA 115.

4 As to the functions of the Water Services Regulation Authority see PARA 110.

5 Water Industry Act 1991 s 30ZA(1)(a) (ss 30ZA, 30ZB added by the Water Act 2003 s 43(2)).

6 Water Industry Act 1991 s 30ZA(1)(b) (as added: see note 5).

7 Water Industry Act 1991 s 30ZA(2) (as added: see note 5). As to the duty on the Authority to make arrangements with the Consumer Council for Water with a view to securing co-operation and the exchange of information between them, and the consistent treatment of matters which affect both of them see s 27B; and PARA 127.

8 As to the meaning of 'notice' see PARA 22 note 1.

9 Water Industry Act 1991 s 30ZB (as added: see note 5).

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## **(ii) The Consumer Council for Water**

### **115. Establishment of the Council.**

A body corporate known as the Consumer Council for Water<sup>1</sup> is established for the purpose of carrying out the functions of the Council under the Water Industry Act 1991<sup>2</sup>. The Council is not to be regarded as a servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown<sup>3</sup>.

The Council consists of:

- 68 (1) a chairman appointed by the Secretary of State<sup>4</sup>;
- 69 (2) one other member appointed by the Welsh Ministers<sup>5</sup>; and
- 70 (3) such other members as may be appointed by the Secretary of State<sup>6</sup>.

The Secretary of State must consult the Welsh Ministers before appointing the chairman<sup>7</sup>; and the Secretary of State and the Welsh Ministers must consult the chairman before appointing any other member<sup>8</sup>. In appointing persons under these provisions the Secretary of State and the Welsh Ministers must have regard to the desirability of including among the members one or more persons who have experience of work among, and the special needs of, disabled persons<sup>9</sup>, or who have or have had a disability<sup>10</sup>. An appointment under these provisions is to be for a term not exceeding five years<sup>11</sup>.

A person holding office as chairman or other member may resign that office by giving notice<sup>12</sup> to the Secretary of State (in the case of a member appointed by him), or to the Welsh Ministers (in the case of a member appointed by them)<sup>13</sup>. The Secretary of State may remove any person appointed by him from office as chairman or other member on the ground of incapacity or misbehaviour<sup>14</sup>, but must consult the Welsh Ministers before removing any person appointed by him as chairman<sup>15</sup>; and the Welsh Ministers may remove any person appointed by them from office as member on the ground of incapacity or misbehaviour<sup>16</sup>. Otherwise, the chairman and other members hold and vacate office as such in accordance with the terms of their respective appointments<sup>17</sup>, and a previous appointment as chairman or other member does not affect a person's eligibility for appointment to either office<sup>18</sup>.

The Council must pay to the chairman and other members of the Council such remuneration, and such travelling and other allowances, as the Secretary of State (or, in the case of a member appointed by the Welsh Ministers, the Welsh Ministers) may determine<sup>19</sup>.

The Council must, with the approval of the Secretary of State, appoint a principal officer on such terms of employment as it may, with that approval, determine<sup>20</sup>; and may, with the approval of the Secretary of State as to numbers and terms of employment, appoint such other employees as it may determine<sup>21</sup>.

1 In Welsh the Council may be known as 'Cyngor Defnyddwyr Dwr': Water Industry Act 1991 s 27A(2) (s 27A, Sch 3A added by the Water Act 2003 s 35(1), (2)).

2 Water Industry Act 1991 s 27A(1) (as added: see note 1). As to the functions of the Council see PARA 118. As to the designation of the Consumer Council for Water for abolition see PARA 116. Information as to the Consumer Council for Water and its work is available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk). The



Parliamentary Commissioner Act 1967 applies to the Council and any action taken by or on behalf of the Council in the exercise of its administrative functions may be investigated by the Parliamentary Commissioner: see the Parliamentary Commissioner Act 1967 ss 4, 5, Sch 2 (substituted by SI 2007/3470); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq.

3 Water Industry Act 1991 s 27A(3) (as added: see note 1). As to the legal status of such bodies see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 951 et seq.

4 Water Industry Act 1991 Sch 3A para 1(1)(a) (as added: see note 1). As to the Secretary of State see PARA 15 note 1.

5 Water Industry Act 1991 Sch 3A para 1(1)(b) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 27A, Sch 3A were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 Water Industry Act 1991 Sch 3A para 1(1)(c) (as added: see note 1). A member of the Council and of each regional committee of the Council is disqualified for membership of the House of Commons: see the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt II (amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 20(1), (2)); and **PARLIAMENT** vol 78 (2010) PARAS 905, 908. Such members are also disqualified for membership of the Northern Ireland Assembly: see the Northern Ireland Assembly Disqualification Act 1975 s 1(1)(f), Sch 1 Pt II (amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 21(1), (2)). As to the Northern Ireland Assembly see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to regional committees see PARA 117.

7 Water Industry Act 1991 Sch 3A para 1(2) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

8 Water Industry Act 1991 Sch 3A para 1(3) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

9 Water Industry Act 1991 Sch 3A para 1(5)(a) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

10 Water Industry Act 1991 Sch 3A para 1(5)(b) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32. 'Disability' and 'disabled person' are not defined for these purposes; as to the definition in the Disability Discrimination Act 1995 see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 511.

11 Water Industry Act 1991 Sch 3A para 1(4) (as added: see note 1).

12 As to the meaning of 'notice' see PARA 22 note 1.

13 Water Industry Act 1991 Sch 3A para 2(1) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

14 Water Industry Act 1991 Sch 3A para 2(2) (as added: see note 1).

15 Water Industry Act 1991 Sch 3A para 2(3) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

16 Water Industry Act 1991 Sch 3A para 2(4) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

17 Water Industry Act 1991 Sch 3A para 2(5) (as added: see note 1).

18 Water Industry Act 1991 Sch 3A para 2(6) (as added: see note 1).

19 Water Industry Act 1991 Sch 3A paras 3, 5 (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32. If the Secretary of State so determines in the case of any holder of the office of chairman or other member, the Council must pay: (1) such pension, allowance or gratuity to or in respect of him (Sch 3A para 4(1)(a) (as so added)); or (2) such contributions or payments towards provision for such a pension, allowance or gratuity, as the Secretary of State may determine (Sch 3A para 4(1)(b) (as so added)). If, when any person ceases to hold office as chairman or other member, the Secretary of State determines that there are special circumstances which make it right that he should receive compensation, the Council must pay to him a sum by way of compensation of such amount as may be determined by the Secretary of State: Sch 3A para 4(2) (as so added). In relation to any member of the Council appointed by the Welsh Ministers, the matters mentioned in

Sch 3A para 4 above are to be determined by them instead of by the Secretary of State: see Sch 3A para 5 (as so added); Government of Wales Act 2006 Sch 11 para 32.

20 Water Industry Act 1991 Sch 3A para 6(1) (as added: see note 1).

21 Water Industry Act 1991 Sch 3A para 6(2) (as added: see note 1). The persons to whom the Superannuation Act 1972 s 1 (persons to or in respect of whom benefits may be provided by schemes under s 1: see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 875) applies includes employees of the Council (Water Industry Act 1991 Sch 3A para 6(3) (as so added)); and the Council must pay to the Minister for the Civil Service, at such times as he may direct, such sums as he may determine in respect of any increase so attributable in the sums payable out of money provided by Parliament under the Superannuation Act 1972 (Water Industry Act 1991 Sch 3A para 6(4) (as so added)). As to the Minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 427 et seq.

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### **116. Designation of the Council for abolition.**

The Secretary of State<sup>1</sup> may by order<sup>2</sup> designate the Consumer Council for Water for abolition<sup>3</sup>. Before making such an order the Secretary of State must consult<sup>4</sup> the Consumer Council for Water, the National Consumer Council, and such other persons<sup>5</sup> as the Secretary of State considers appropriate<sup>6</sup>. Where the Consumer Council for Water is designated for abolition, the Secretary of State may make in respect of it<sup>7</sup>: (1) one or more transfer orders<sup>8</sup>; (2) an abolition order<sup>9</sup>. An order designating the Council for abolition<sup>10</sup>, a transfer order or abolition order may be made only with the consent of the Welsh Ministers<sup>11</sup>.

The Secretary of State may make a scheme or schemes for the transfer to the National Consumer Council of the property, rights and liabilities of the Consumer Council for Water<sup>12</sup>. If a transfer order has been made<sup>13</sup> (whether or not it has taken effect), the Secretary of State may direct the Consumer Council for Water to make a scheme or schemes for the transfer of its property, rights and liabilities to the National Consumer Council<sup>14</sup>, or to transfer such property, rights or obligations as are specified in the direction to a person (other than the National Consumer Council) so specified (the 'specified transferee')<sup>15</sup>. Before giving, varying or revoking such a direction, the Secretary of State must consult the Consumer Council for Water<sup>16</sup>, the National Consumer Council<sup>17</sup>, and in the case of a direction for a transfer to a specified transferee, the specified transferee<sup>18</sup>. The Secretary of State may direct<sup>19</sup> the Consumer Council for Water to supply to him such information specified or described in the direction<sup>20</sup> as the Secretary of State may require in relation to its property, rights or liabilities<sup>21</sup>, or the exercise by it of its functions<sup>22</sup>; and the Secretary of State may direct the Council not to take any action of a kind, or in circumstances, specified in the direction<sup>23</sup>.

The Secretary of State may pay such sums as he may, with the approval of the Treasury<sup>24</sup>, determine by way of compensation to any person who ceases to be a member of the Consumer Council for Water by virtue of its abolition<sup>25</sup>. The compensation is payable in respect of loss of office, or loss or diminution of pension rights<sup>26</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Such an order must be made by statutory instrument: Consumers, Estate Agents and Redress Act 2007 s 60(1). Such an order must specify the earliest date on which a transfer order or an abolition order under s 32 (see the text to notes 7-11) may take effect in respect of the Consumer Council for Water: s 31(2). As to the Consumer Council for Water see PARA 115.

3 Consumers, Estate Agents and Redress Act 2007 s 31(1). Where the Consumer Council for Water has been designated for abolition under s 31, the payment conditions of an appointment under the Water Industry Act 1991 Pt 2 Ch 1 (ss 6-17) (see PARA 137 et seq) or a licence under Pt 2 Ch 1A (ss 17A-17R) (see PARA 152 et seq) may (without prejudice to the generality of s 11(1)(c) (see PARA 142) and s 17G(1)(b) (see PARA 155)) require the payment by the company holding the appointment or licence of sums relating to any of the following expenses: Consumers, Estate Agents and Redress Act 2007 s 33(1), (3). Those expenses are:

- 7 (1) the appropriate proportion of the expenses of the National Consumer Council (other than those expenses within head (2) below and any expenses relating to the establishment of that Council) (s 33(4)(a));
- 8 (2) any expenses of the National Consumer Council, the Secretary of State or the Consumer Council for Water which relate to a transfer scheme made in respect of the Consumer Council for Water under s 35(2)(a) or (7) (see the text to notes 12-14) (s 33(4)(b));

- 9 (3) the expenses of the Secretary of State which relate to the abolition of the Consumer Council for Water (s 33(4)(c));
- 10 (4) the expenses of expanding an OFT scheme to enable it to cater for water consumers (s 33(4)(d));
- 11 (5) the appropriate proportion of the expenses of the Office of Fair Trading on, or in connection with, the support of any OFT scheme (s 33(4)(e)).

'Payment conditions' means: (a) in the case of an appointment under the Water Industry Act 1991 Pt 2 Ch 1 (ss 6-17), conditions included in the appointment by virtue of s 11(1)(c) of that Act; and (b) in the case of a water supply licence under Pt 2 Ch 1A (ss 17A-17R), conditions included in the licence by virtue of s 17G(1)(b) of that Act: Consumers, Estate Agents and Redress Act 2007 s 33(2). The 'appropriate proportion' of any relevant expenses means such proportion of the expenses as the Secretary of State considers is reasonable having regard to (i) in the case of expenses within head (1) above, the functions exercisable by the National Consumer Council in relation to water consumers; (ii) in the case of expenses within head (5) above, the functions under the OFT scheme which are exercisable in relation to water consumers: s 33(5). The Water Services Regulation Authority may, in accordance with these provisions, modify any payment conditions where it considers it necessary or expedient to do so in consequence of, or of preparations for the abolition of the Consumer Council for Water, or a transfer order or abolition order under s 32 (see the text to notes 7-11): s 33(6). The Authority may, in accordance with these provisions, make such incidental or consequential modifications of the other conditions which are included in an appointment under the Water Industry Act 1991 Pt 2 Ch 1 (ss 6-17), or a water supply licence under Pt 2 Ch 1A (ss 17A-17R), as it considers necessary or expedient in consequence of, or of preparations for, an event mentioned in the Consumers, Estate Agents and Redress Act 2007 s 33(6): s 33(7). Before modifying under s 33(6) or (7) the conditions included in an appointment or licence, the Authority must consult the company holding the appointment or licence: s 33(8). The Secretary of State may, after consulting the Welsh Ministers, give directions to the Authority for the purpose of securing that sums relating to any of the expenses mentioned in heads (1)-(5) above are included in the sums payable by virtue of payment conditions; and the Authority must comply with any such direction: s 33(9). 'OFT scheme' means any public consumer advice scheme supported by the Office of Fair Trading; and 'water consumers' means consumers in relation to services provided by a water undertaker, a sewerage undertaker or a licensed water supplier, in its capacity as such: s 33(10). As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the National Consumer Council see **SALE OF GOODS AND SUPPLY OF SERVICES**. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

4 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Consumers, Estate Agents and Redress Act 2007 s 31(3).

7 No provision of an order under the Consumers, Estate Agents and Redress Act 2007 s 32 may take effect before the date specified under s 31(2) (see note 2): s 32(4).

8 Consumers, Estate Agents and Redress Act 2007 s 32(1)(a). A transfer order is an order which provides for the transfer to the National Consumer Council of any function of the Consumer Council for Water: s 32(2). As to the functions of the Consumer Council for Water see PARA 118.

9 Consumers, Estate Agents and Redress Act 2007 s 32(1)(b). An abolition order is an order which provides for the abolition of the Consumer Council for Water: s 32(3).

10 Ie an order under the Consumers, Estate Agents and Redress Act 2007 s 31: see the text to notes 1-6.

11 Consumers, Estate Agents and Redress Act 2007 ss 31(4), 32(5). As to the Welsh Ministers see PARA 16 note 5.

12 Consumers, Estate Agents and Redress Act 2007 s 35(7). As to such transfer schemes see further s 35(8). Sch 4.

13 Ie under the Consumers, Estate Agents and Redress Act 2007 s 32: see the text to notes 7-11.

14 See the Consumers, Estate Agents and Redress Act 2007 s 35(1), (2)(a). If the Consumer Council for Water is given such a direction it must consult the National Consumer Council before making a transfer scheme: see s 35(4). A transfer scheme made pursuant to such a direction has effect only if approved by the Secretary of State (s 35(5)(a)), and subject to any modifications made by the Secretary of State (s 35(5)(b)). Before making any modifications the Secretary of State must consult the Consumer Council for Water: see s 35(6).

15 See the Consumers, Estate Agents and Redress Act 2007 s 35(1), (2)(b).

16 See the Consumers, Estate Agents and Redress Act 2007 s 35(3)(a).

17 Consumers, Estate Agents and Redress Act 2007 s 35(3)(b).

18 Consumers, Estate Agents and Redress Act 2007 s 35(3)(c).

19 Before giving, varying or revoking a direction under the Consumers, Estate Agents and Redress Act 2007 s 36, the Secretary of State must consult the Consumer Council for Water and the National Consumer Council: see the Consumers, Estate Agents and Redress Act 2007 s 36(5).

20 Such a direction must specify the period within which the information is to be provided, and may require the information to be supplied in a specified form: Consumers, Estate Agents and Redress Act 2007 s 36(2). The Consumer Council for Water must comply with such a direction within the specified period; see s 36(3).

21 See the Consumers, Estate Agents and Redress Act 2007 s 36(1)(a).

22 See the Consumers, Estate Agents and Redress Act 2007 s 36(1)(b).

23 See the Consumers, Estate Agents and Redress Act 2007 s 36(4), (6). See also note 19.

24 As to the meaning of 'Treasury' see PARA 108 note 6.

25 See the Consumers, Estate Agents and Redress Act 2007 s 34(1)(a). As to membership of the Consumer Council for Water see PARA 115.

26 Consumers, Estate Agents and Redress Act 2007 s 34(2).

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### **117. Establishment of regional and other committees.**

The Consumer Council for Water<sup>1</sup> must ensure that each relevant undertaker<sup>2</sup> is allocated to a regional committee<sup>3</sup>.

Prior to 31 January 2006<sup>4</sup>, the Council was under a duty to establish such regional committees of the Council: (1) as the Welsh Ministers<sup>5</sup> might direct, for relevant undertakers whose areas are wholly or mainly in Wales<sup>6</sup>; and (2) as the Secretary of State<sup>7</sup> might direct, for other relevant undertakers<sup>8</sup>. Such a direction might provide for the allocation of each relevant undertaker to a regional committee specified in the direction<sup>9</sup>.

Subsequent to that date, the Council may establish such regional committees for relevant undertakers as it considers appropriate<sup>10</sup>, or alter the allocation of a relevant undertaker to a regional committee so established<sup>11</sup>. However, the Council must not establish or abolish a regional committee, or alter the allocation of a relevant undertaker to a regional committee, without the approval of the appropriate authority<sup>12</sup>.

The purposes of a regional committee are:

- 71 (a) the provision of advice and information<sup>13</sup> to the Council on consumer matters<sup>14</sup> affecting the areas of the relevant undertakers allocated to that committee<sup>15</sup>;
- 72 (b) such other purposes as the Council may determine<sup>16</sup>.

A regional committee of the Council must consist of a chairman appointed by the appropriate authority<sup>17</sup>, and such other members as the Council may appoint<sup>18</sup>. Any regional committee may establish sub-committees<sup>19</sup>. In appointing members of a regional committee the Council must take account of any guidance given to it by the appropriate authority<sup>20</sup>. The Council may pay to the chairman and other members of a regional committee, or a sub-committee, such remuneration, and such travelling and other allowances, as the appropriate authority may determine<sup>21</sup>.

The provisions of the Public Bodies (Admission to Meetings) Act 1960 apply to regional committees<sup>22</sup>.

The Consumer Council for Water may establish committees other than regional committees and any such committee may establish sub-committees<sup>23</sup>. The Council may pay to the chairman and other members of any such committee, or of any sub-committee, such remuneration, and such travelling and other allowances, as the Secretary of State may determine<sup>24</sup>.

1 As to the Consumer Council for Water see PARA 115.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 See the Water Industry Act 1991 s 27A(8), (9) (s 27A, Sch 3A added by the Water Act 2003 s 35(1), (2)). Information as to the regional committees of the Consumer Council for Water is available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).

4 The power to give a direction under the Water Industry Act 1991 s 27A(4) (see the text to notes 5-8) was not be exercised after the end of the period of six months beginning with the commencement of the Water Act 2003 s 35 which commenced on 1 August 2005: see the Water Industry Act 1991 s 27A(6) (as added: see note

3); the Water Act 2003 (Commencement No 4, Transitional Provisions and Savings) Order 2005, SI 2005/968, art 3(a). As to the meaning of 'month' see PARA 23 note 10.

5 Certain functions under the Water Industry Act 1991 s 27A, and Sch 3A were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 See the Water Industry Act 1991 s 27A(4)(a) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'Wales' see PARA 16 note 2.

7 As to the Secretary of State see PARA 15 note 1.

8 See the Water Industry Act 1991 s 27A(4)(b) (as added: see note 3).

9 See the Water Industry Act 1991 s 27A(5) (as added: see note 3).

10 Water Industry Act 1991 s 27A(7)(a) (as added: see note 3).

11 Water Industry Act 1991 s 27A(7)(b) (as added: see note 3).

12 Water Industry Act 1991 Sch 3A para 11(1) (as added: see note 3). If the Council proposes to do anything mentioned in Sch 3A para 11(1) it must, after consulting the appropriate authority, give notice describing its proposals (Sch 3A para 11(2)(a) (as so added)), and specifying the time from the date of the notice (not being less than two months) within which representations may be made with respect to the proposals (Sch 3A para 11(2)(b) (as so added)). The Council must consider any representations that are duly made and not withdrawn: Sch 3A para 11(2) (as so added). Such a notice must be given by publishing it in such manner as the Council considers appropriate for bringing the proposals to the attention of those likely to be affected: Sch 3A para 11(3) (as so added). An appropriate authority must not give its approval until after the time specified in the notice: Sch 3A para 11(4) (as so added).

'Appropriate authority' means: (1) the Welsh Ministers, in relation to committees established (or proposed to be established) for relevant undertakers whose areas are wholly or mainly in Wales, to sub-committees of those committees, and to any relevant undertaker whose area is wholly or mainly in Wales (Sch 3A para 14(a) (as so added); Government of Wales Act 2006 Sch 11 para 32); (2) the Secretary of State, in relation to committees established (or proposed to be established) for other relevant undertakers, to sub-committees of those committees, and to any other relevant undertaker (Water Industry Act 1991 Sch 3A para 14(b) (as so added)).

13 'Information' includes anything contained in any records, accounts, estimates or returns: Water Industry Act 1991 s 219(1). 'Records' includes computer records and any other records kept otherwise than in a document: s 219(1). The Water Resources Act 1991 contains identical definitions: see s 221(1).

14 'Consumer matter' means any matter connected with the interests of consumers; 'consumers' includes both existing and future consumers; and 'the interests of consumers' means the interests of consumers in relation to: (1) the supply of water by means of a water undertaker's supply system to premises either by water undertakers or by licensed water suppliers acting in their capacity as such; and (2) the provision of sewerage services by sewerage undertakers: Water Industry Act 1991 s 27A(13) (as added: see note 3). As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

15 Water Industry Act 1991 s 27A(10)(a) (as added: see note 3). As to the Council's functions in relation to consumers see PARA 118.

16 Water Industry Act 1991 s 27A(10)(b) (as added: see note 3).

17 Water Industry Act 1991 Sch 3A para 12(1)(a) (as added: see note 3).

18 Water Industry Act 1991 Sch 3A para 12(1)(b) (as added: see note 3). The members of a regional committee of the Council may include persons who are not members of the Council (and the members of a sub-committee of the committee may include persons who are not members of the committee or the Council): Sch 3A para 12(3) (as so added). The members of a regional committee are disqualified for membership of the House of Commons and the Northern Ireland Assembly: see PARA 115 note 6.

19 Water Industry Act 1991 Sch 3A para 12(2) (as added: see note 3). See also note 18.

20 Water Industry Act 1991 Sch 3A para 12(4) (as added: see note 3).

21 Water Industry Act 1991 Sch 3A para 12(5) (as added: see note 3). If the appropriate authority so determines in the case of any holder of the office of chairman or other member of a regional committee, or of any sub-committee of a regional committee, the Council must pay, as the appropriate authority may determine (Sch 3A para 13(1) (as so added)): (1) such pension, allowance or gratuity to or in respect of him (Sch 3A para 13(1)(a) (as so added)); or (2) such contributions or payments towards provision for such a pension, allowance or gratuity (Sch 3A para 13(1)(b) (as so added)). If, when any person ceases to hold office as chairman or other member of a regional committee, the appropriate authority determines that there are special circumstances which make it right that he should receive compensation, the Council must pay to him a sum by way of compensation of such amount as may be determined by the appropriate authority: Sch 3A para 13(2) (as so added).

22 See the Public Bodies (Admission to Meetings) Act 1960 s 2, Schedule para 1(k) (substituted by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 17); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 40.

23 Water Industry Act 1991 Sch 3A para 15(1) (as added: see note 3). The members of any such committee may include persons who are not members of the Council (and the members of a sub-committee may include persons who are not members of the relevant committee or the Council): Sch 3A para 15(2) (as so added).

24 Water Industry Act 1991 Sch 3A para 15(3) (as added: see note 3). If the Secretary of State so determines in the case of any holder of the office of chairman or other member of any such committee, or of any sub-committee of such a committee, the Council must pay: (1) such pension, allowance or gratuity to or in respect of him (Sch 3A para 16(1)(a) (as so added)); or (2) such contributions or payments towards provision for such a pension, allowance or gratuity (Sch 3A para 16(1)(b) (as so added)), as the Secretary of State may determine (Sch 3A para 16(1) (as so added)). If, when any person ceases to hold office as chairman or other member of any such committee, or of any sub-committee of such a committee, the Secretary of State determines that there are special circumstances which make it right that he should receive compensation, the Council must pay to him a sum by way of compensation of such amount as may be determined by the Secretary of State: Sch 3A para 16(2) (as so added).



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### **118. General functions of the Council.**

In considering the interests of consumers<sup>1</sup>, the Consumer Council for Water<sup>2</sup> must have regard to the interests of:

- 73 (1) individuals who are disabled or chronically sick<sup>3</sup>;
- 74 (2) individuals of pensionable age<sup>4</sup>;
- 75 (3) individuals with low incomes<sup>5</sup>;
- 76 (4) individuals residing in rural areas<sup>6</sup>; and
- 77 (5) customers<sup>7</sup>, of companies holding a relevant appointment<sup>8</sup>, whose premises are not eligible to be supplied by a licensed water supplier<sup>9</sup>,

but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer<sup>10</sup>.

The Council has:

- 78 (a) the function of obtaining and keeping under review:
  - 5 7. (i) information<sup>11</sup> about consumer matters<sup>12</sup> (including matters affecting consumers in different areas)<sup>13</sup>; and
  - 8. (ii) information about the views of consumers on such matters (including the views of consumers in different areas)<sup>14</sup>;
- 6 79 (b) the function of:
  - 7 9. (i) making proposals, or providing advice and information, about consumer matters, including matters affecting consumers in different areas<sup>15</sup>; and
  - 10. (ii) representing the views of consumers on such matters, including the views of consumers in different areas<sup>16</sup>,
- 8 80 to public authorities<sup>17</sup>, companies holding a relevant appointment<sup>18</sup>, licensed water suppliers and other persons whose activities may affect the interests of consumers<sup>19</sup>;
- 81 (c) the function of providing information to consumers about consumer matters in such form as appears to the Council to be most useful to the recipients<sup>20</sup>.

If it appears to the Council that the publication of any advice and information about consumer matters, including information about the views of consumers on such matters, would promote the interests of consumers, the Council may publish that advice or information in such manner as it thinks fit<sup>21</sup>.

The Council has a duty to investigate consumer complaints<sup>22</sup>, and a general power to investigate any matter appearing to it to be one which relates to the interests of consumers<sup>23</sup>.

1 As to the meanings of 'consumers' and 'the interests of consumers' see PARA 117 note 14.

2 As to the Consumer Council for Water see PARA 115. As to the performance by the Council of its functions see PARA 119.

3 Water Industry Act 1991 s 27C(1)(a) (s 27C-27G added by the Water Act 2003 s 43(1)). 'Disabled' is not defined for these purposes; as to the definition of 'disability' and 'disabled person' in the Disability Discrimination Act 1995 see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 511.

4 Water Industry Act 1991 s 27C(1)(b) (as added: see note 3).

5 Water Industry Act 1991 s 27C(1)(c) (as added: see note 3).

6 Water Industry Act 1991 s 27C(1)(d) (as added: see note 3).

7 'Customer or potential customer', in relation to a company holding an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17) (see PARA 137 et seq), means: (1) any person for or to whom that company provides any services in the course of carrying out the functions of a water undertaker or sewerage undertaker (other than a licensed water supplier); or (2) any person who might become such a person on making an application for the purpose to the company: s 219(1) (definition amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 50(1), (2)(a)). As to the meaning of 'person' see PARA 13 note 29. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

8 The companies holding an appointment under the Water Industry Act 1991 Pt II Ch 1 (ss 6-17): see PARA 137 et seq.

9 Water Industry Act 1991 s 27C(1)(e) (as added: see note 3). For these purposes, premises are not eligible to be supplied by a licensed water supplier if: (1) they are household premises (as defined in s 17C: see PARA 152); or (2) the total quantity of water estimated to be supplied to the premises annually for the purposes of s 17D(2) (see PARA 152) is less than the quantity specified in s 17D(2): s 27C(2) (as so added).

10 Water Industry Act 1991 s 27C(1) (as added: see note 3).

11 As to the meaning of 'information' see PARA 117 note 13.

12 As to the meaning of 'consumer matters' see PARA 117 note 14.

13 Water Industry Act 1991 s 27D(a) (as added: see note 3).

14 Water Industry Act 1991 s 27D(b) (as added: see note 3).

15 Water Industry Act 1991 s 27E(1)(a) (as added: see note 3).

16 Water Industry Act 1991 s 27E(1)(b) (as added: see note 3).

17 'Public authority' means any minister of the Crown or government department, the Environment Agency, any local authority or county council or any person certified by the Secretary of State, or, in relation to Wales, the Welsh Ministers, to be a public authority for the purposes of the Water Industry Act 1991: s 219(1) (definition amended by the Environment Act 1995 s 120, Sch 22 para 125). The functions of the Secretary of State under the Water Industry Act 1991 s 219, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the Environment Agency see PARA 17. As to the meaning of 'person' see PARA 13 note 29. 'Local authority' means the council of a district or of a London borough or the Common Council of the City of London but, in relation to Wales, means the council of a county or county borough: Water Industry Act 1991 s 219(1) (definition amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 2(2)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

18 See note 8.

19 Water Industry Act 1991 s 27E(1) (as added: see note 3). Subject to s 27E(7) (see below), information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate) must not be disclosed in the exercise of the Council's function under s 27E unless one or more of s 27E(3)(a)-(c) applies

to the information: s 27E(2) (as so added). Information relating to a particular individual or body may be disclosed if: (1) the individual or body has consented to the disclosure (s 27E(3)(a) (as so added)); (2) it is information that is available to the public from some other source (s 27E(3)(b) (as so added)); or (3) it is not information the disclosure of which would or might, in the opinion of the Council, seriously and prejudicially affect the interests of the individual or body (s 27E(3)(c) (as so added)). Before deciding to disclose any information relating to a particular individual or body in pursuance of head (3) above, the Council must: (a) consult that individual or body (s 27E(4)(a) (as so added)); and (b) have regard to any opinion expressed by the Water Services Regulation Authority as to the application of head (3) to the information or as to the desirability or otherwise of its disclosure (s 27E(4)(b) (as so added)); and head (b) above applies whether the opinion is given in relation to the information itself or to information of a description which applies to that information (s 27E(4) (as so added)). Further, subject to s 27E(7), the Council must not in the exercise of its function under s 27E disclose any information which it considers relates to any matter which is, or is likely to be, the subject of criminal proceedings (s 27E(5) (as so added)); and in considering whether information relates to any such matter, the Council must have regard to any opinion expressed (whether in relation to the information itself or to information of a description which applies to that information) by the Secretary of State, the Welsh Ministers or the Director of Public Prosecutions (s 27E(6) (as so added); Government of Wales Act 2006 Sch 11 para 32). The Water Industry Act 1991 s 27E(2)-(5) does not apply to a disclosure of information which is made to the Water Services Regulation Authority, the Secretary of State, the Welsh Ministers, the Competition Commission or any other public authority: s 27E(7) (as so added); Government of Wales Act 2006 Sch 11 para 32. The disclosure by the Council of information in the exercise of its function under the Water Industry Act 1991 s 27E does not contravene s 206 (restriction on disclosure of information: see PARA 183): s 27E(8) (as so added). Functions under the Water Industry Act 1991 s 27E which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Water Services Regulation Authority see PARA 109. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066. As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12. As to the meaning of 'contravene' see PARA 20 note 5.

20 Water Industry Act 1991 s 27F(1) (as added: see note 3). This function may be exercised by: (1) publishing information in any manner the Council thinks appropriate for the purpose of bringing it to the attention of those likely to be interested (s 27F(2)(a) (as so added)); or (2) furnishing information to any consumer (whether in response to a request or otherwise) (s 27F(2)(b) (as so added)). Information may only be disclosed in the exercise of this function if it is information that is available to members of the public from some other source: s 27F(3) (as so added). The Council must maintain at least one office in each of England and Wales at which consumers may apply for information: s 27F(4) (as so added). As to the meaning of 'England' see PARA 19 note 8. Information as to the publications of the Consumer Council for Water is available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).

21 Water Industry Act 1991 s 27G(1) (as added: see note 3). Information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate) must not be published in the exercise of the Council's function under s 27G unless one or more of s 27G(3)(a)-(c) applies to the information: s 27G(2) (as so added). Information relating to a particular individual or body may be published if: (1) the individual or body has consented to the publication (s 27G(3)(a) (as so added)); (2) it is information that is available to the public from some other source (s 27G(3)(b) (as so added)); or (3) it is not information the publication of which would or might, in the opinion of the Council, seriously and prejudicially affect the interests of the individual or body (s 27G(3)(c) (as so added)). Before deciding to publish any information relating to a particular individual or body in pursuance of head (3) above, the Council must: (a) consult that individual or body (s 27G(4)(a) (as so added)); and (b) have regard to any opinion expressed by the Water Services Regulation Authority as to the application of head (3) to the information or as to the desirability or otherwise of its publication (s 27G(4)(b) (as so added)); and head (b) applies whether the opinion is given in relation to the information itself or to information of a description which applies to that information (s 27G(4) (as so added)). Further, the Council must not in the exercise of its functions under s 27G publish any information which it considers relates to any matter which is, or is likely to be, the subject of criminal proceedings (s 27G(5) (as so added)); and in considering whether information relates to any such matter, the Council must have regard to any opinion expressed (whether in relation to the information itself or to information of a description which applies to that information) by the Secretary of State, the Welsh Ministers or the Director of Public Prosecutions (s 27G(6) (as so added); Government of Wales Act 2006 Sch 11 para 32). The publication of information under the Water Industry Act 1991 s 27G does not contravene s 206 (general restriction on disclosure of information: see PARA 183): s 27G(7) (as so added). Functions under the Water Industry Act 1991 s 27G which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

22 See the Water Industry Act 1991 s 29; and PARA 122.

23 See the Water Industry Act 1991 s 29A; and PARA 123.

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### **119. Performance of functions.**

The Consumer Council for Water<sup>1</sup> has power to do anything which is calculated to facilitate, or is incidental or conducive to, the performance of any of its functions<sup>2</sup>, and that power includes, among other things, power to enter into agreements and to acquire and dispose of property<sup>3</sup>. The Council may make charges for facilities or services provided by it at the request of any person<sup>4</sup>. The Council must exercise and perform its powers and duties in the manner which it considers is best calculated to contribute to the achievement of sustainable development<sup>5</sup>.

Anything authorised or required to be done by the Council may be done by any member or employee<sup>6</sup> of the Council who, or any regional or other committee of the Council<sup>7</sup> which, is authorised for the purpose by the Council, whether generally or specially<sup>8</sup>. The validity of anything done by the Council is not to be affected by a vacancy among its members or by a defect in the appointment of a member<sup>9</sup>.

The Council must, annually, publish a forward work programme in relation to the exercise of its functions<sup>10</sup>. The Council has powers to direct the production to it of information it requires for the exercise of its functions<sup>11</sup>. The Council is under a duty to make arrangements with the Water Services Regulation Authority, the Secretary of State and the Welsh Ministers with a view to securing co-operation and the exchange of information between them and the Council, and the consistent treatment of matters which affect them<sup>12</sup>.

1 As to the Consumer Council for Water see PARA 115.

2 Water Industry Act 1991 Sch 3A para 19(1) (s 27A, Sch 3A added by the Water Act 2003 s 35(2), Sch 2). As to the interpretation of a similar provision in relation to local government see **LOCAL GOVERNMENT** vol 69 (2009) PARA 462. As to the functions of the Council see PARA 118.

3 Water Industry Act 1991 Sch 3A para 19(2) (as added: see note 2).

4 Water Industry Act 1991 Sch 3A para 19(3) (as added: see note 2). As to the meaning of 'person' see PARA 13 note 29. As to financial provisions and accounts see PARA 125.

5 Water Industry Act 1991 s 27A(12) (as added: see note 2).

6 As to the membership and staff of the Council see PARA 115.

7 As to regional and other committees see PARA 117.

8 Water Industry Act 1991 Sch 3A para 17 (as added: see note 2).

9 Water Industry Act 1991 Sch 3A para 18 (as added: see note 2).

10 See PARA 120.

11 See PARA 121.

12 See PARA 127.

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## **120. Forward work programmes.**

The Consumer Council for Water<sup>1</sup> must, before each financial year<sup>2</sup>, publish a forward work programme containing a general description of the projects, other than those comprising routine activities in the exercise of its functions<sup>3</sup>, which it plans to undertake during the year<sup>4</sup>. That description must include the objectives of each project<sup>5</sup>. The forward work programme for any year must also include an estimate of the overall expenditure which the Council expects to incur during the year in the exercise of its functions<sup>6</sup>.

Before publishing the forward work programme for any year, the Council must give notice<sup>7</sup> containing a draft of the forward work programme<sup>8</sup> and specifying the time within which representations or objections to the proposals contained in it may be made<sup>9</sup>. The Council must consider any representations or objections which are duly made and not withdrawn<sup>10</sup>. The Council must send a copy of any notice so given by it to the Water Services Regulation Authority<sup>11</sup>, to the Secretary of State<sup>12</sup> and to the Welsh Ministers<sup>13</sup>.

A strategic environmental assessment of the programme may be required<sup>14</sup>.

1 As to the Consumer Council for Water see PARA 115.

2 As to the meaning of 'financial year' see PARA 111 note 2.

3 As to the functions of the Council see PARA 118.

4 Water Industry Act 1991 s 192A(1) (s 192A added by the Water Act 2003 s 38(1)). The Council's annual report must report on the progress of projects described in the forward works programme for that year: see PARA 124. The forward work programmes and annual report are available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).

5 Water Industry Act 1991 s 192A(2) (as added: see note 4).

6 Water Industry Act 1991 s 192A(3) (as added: see note 4). As to financial provisions and accounts see PARA 125.

7 The notice must be published by the Council in such manner as it considers appropriate for the purpose of bringing the matters contained in it to the attention of persons likely to be affected by them: Water Industry Act 1991 s 192A(5) (as added: see note 4). As to the meaning of 'notice' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29.

8 Water Industry Act 1991 s 192A(4)(a) (as added: see note 4).

9 Water Industry Act 1991 s 192A(4)(b) (as added: see note 4).

10 Water Industry Act 1991 s 192A(4) (as added: see note 4).

11 As to the Water Services Regulation Authority see PARA 109.

12 As to the Secretary of State see PARA 15 note 1.

13 Water Industry Act 1991 s 192A(7) (as added: see note 4); Government of Wales Act 2006 Sch 11 para 32. This function was originally vested in the National Assembly for Wales but is now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

14 See PARA 9.



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## **121. Provision of information by and to the Council.**

The Consumer Council for Water<sup>1</sup> may direct the Water Services Regulation Authority<sup>2</sup>, a company holding a relevant appointment<sup>3</sup>, or a licensed water supplier<sup>4</sup>, to supply to it, in such form as it may reasonably specify, such information<sup>5</sup> specified or described in the direction as it may require for the purpose of exercising its functions<sup>6</sup>. A body to whom such a direction is given must, if the information specified or described in the direction is in its possession, comply with the direction as soon as reasonably practicable<sup>7</sup>. If a body to whom a direction is so given fails to comply with the direction it must, if so required by the Council, give notice<sup>8</sup> to the Council of the reasons for its failure<sup>9</sup>; and, subject to the statutory conditions<sup>10</sup>, the Council may publish such a notice given to it<sup>11</sup>.

Any of the Water Services Regulation Authority, the Secretary of State, or the Welsh Ministers, may direct the Council to supply to them, in such form as they may reasonably specify, such information specified or described in the direction as they may require for the purpose of exercising their functions<sup>12</sup>. The Council must, if the information specified or described in the direction is in its possession, comply with such a direction as soon as reasonably practicable<sup>13</sup>. Where the Council fails to comply with a direction so given it must give to the person who gave the direction notice of its reason for the failure, and that person may publish that notice in such manner as he considers appropriate<sup>14</sup>. A person publishing such a notice must, however, have regard to the need for excluding, so far as that is practicable, any matter which relates to the affairs of a particular individual or body of persons, corporate or unincorporate, where he considers that publication of that matter would or might seriously and prejudicially affect the interests of that individual or body<sup>15</sup>.

The Secretary of State may make regulations<sup>16</sup>:

- 82 (1) prescribing descriptions of information which a person to whom a direction is given under any of the above provisions may refuse to supply<sup>17</sup>; or
- 83 (2) prescribing circumstances in which such a person may refuse to comply with a direction so given<sup>18</sup>;
- 84 (3) for the purpose of enabling a failure to comply with such a direction to be referred by the person who gave the direction to such person, other than the Water Services Regulation Authority, as may be prescribed by the regulations<sup>19</sup>.

A person to whom such a failure as is described in head (3) above is referred<sup>20</sup> must: (a) consider any representations made by either party<sup>21</sup>; (b) determine whether the person failing to comply with the direction is entitled to refuse to do so, and, if not, order him to comply with the direction<sup>22</sup>; and (c) give notice of his determination and any order under head (b) above, with reasons, to both parties<sup>23</sup>.

1 As to the Consumer Council for Water see PARA 115.

2 Water Industry Act 1991 s 27H(1)(a) (ss 27H-27K added by the Water Act 2003 s 44). As to the Water Services Regulation Authority see PARA 109.

3 Water Industry Act 1991 s 27H(1)(b) (as added: see note 2). A relevant appointment is an appointment under Pt II Ch 1 (ss 6-17) (see PARA 137 et seq): s 27H(1)(b) (as so added).

4 Water Industry Act 1991 s 27H(1)(c) (as added: see note 2). As to the meaning of 'licensed water supplier' see PARA 152.

5 As to the meaning of 'information' see PARA 117 note 13.

6 Water Industry Act 1991 s 27H(1) (as added: see note 2). Before giving such a direction and in specifying the form in which any information is to be supplied, the Council must have regard to the desirability of minimising the costs, or any other detriment, to the body to whom the direction is given: s 27H(3) (as so added). As to the functions of the Council see PARA 118.

7 Water Industry Act 1991 s 27H(2) (as added: see note 2).

8 As to the meaning of 'notice' see PARA 22 note 1.

9 Water Industry Act 1991 s 27H(4) (as added: see note 2).

10 Information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate) must not be published under the Water Industry Act 1991 s 27I(1) unless one or more of s 27I(3) (a)-(c) applies to the information: s 27I(2) (as added: see note 2). Information relating to a particular individual or body may be published if: (1) that individual or body has consented to the publication (s 27I(3)(a) (as so added)); (2) it is information that is available to the public from some other source (s 27I(3)(b) (as so added)); or (3) it is not information the publication of which would or might, in the opinion of the Council, seriously and prejudicially affect the interests of the individual or body (s 27I(3)(c) (as so added)). Before deciding to publish any information relating to a particular individual or body in pursuance of head (3) above, the Council must: (a) consult that individual or body (s 27I(4)(a) (as so added)); and (b) have regard to any opinion expressed by the Water Services Regulation Authority as to the application of head (3) to the information or as to the desirability or otherwise of its publication (s 27I(4)(b) (as so added)); and head (b) applies whether the opinion is given in relation to the information itself or to information of a description which applies to that information (s 27I(4) (as so added)). Further, the Council must not in the exercise of its function under s 27I publish any information which it considers relates to any matter which is, or is likely to be, the subject of criminal proceedings (s 27I(5) (as so added)); and in considering whether information relates to any such matter, the Council must have regard to any opinion expressed (whether in relation to the information itself or to information of a description which applies to that information) by the Secretary of State, the Welsh Ministers or the Director of Public Prosecutions (s 27I(6) (as so added); Government of Wales Act 2006 Sch 11 para 32). The publication by the Council of information under the Water Industry Act 1991 s 27I does not contravene s 206 (general restriction on disclosure of information: see PARA 183): s 27I(7) (as so added). Functions under the Water Industry Act 1991 ss 27I, 27J (see the text to notes 11-15) which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'person' see PARA 13 note 29. As to the Secretary of State see PARA 15 note 1. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066. As to the meaning of 'contravene' see PARA 20 note 5.

11 Water Industry Act 1991 s 27I(1) (as added: see note 2).

12 Water Industry Act 1991 s 27J(1) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32.

13 Water Industry Act 1991 s 27J(2) (as added: see note 2).

14 Water Industry Act 1991 s 27J(3) (as added: see note 2).

15 Water Industry Act 1991 s 27J(4) (as added: see note 2).

16 As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

17 Water Industry Act 1991 s 27K(1)(a) (as added: see note 2).

18 Water Industry Act 1991 s 27K(1)(b) (as added: see note 2).

19 Water Industry Act 1991 s 27K(3) (as added: see note 2). The Council may, if no person is prescribed for the purpose under s 27K(3), refer a failure by a company holding an appointment (see note 3) or a licensed water supplier to comply with a direction under s 27H (see the text to notes 1-9) to the Water Services Regulation Authority: s 27K(2) (as so added).



20     le whether under the Water Industry Act 1991 s 27K(2) (see note 19) or regulations under s 27K(3) (see head (3) in the text).

21     Water Industry Act 1991 s 27K(4)(a) (as added: see note 2).

22     Water Industry Act 1991 s 27K(4)(b) (as added: see note 2). The duty of a company holding an appointment (see note 3) and a licensed water supplier to comply with an order under s 27K is enforceable by the Water Services Regulation Authority under s 18 (see PARA 163): s 27K(5) (as so added).

23     Water Industry Act 1991 s 27K(4) (as added: see note 2). Such a notice may be published by either party to the reference: s 27K(6) (as so added). Section 27I(2)-(7) (see note 10) applies to the publication of such a notice as it applies to the publication of a notice given to the Council under s 27H(4): s 27K(7) (as so added).

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## 122. Consumer complaints.

The following provisions<sup>1</sup> apply to a complaint which any person<sup>2</sup> (the 'complainant') has against a relevant undertaker<sup>3</sup> or a licensed water supplier<sup>4</sup> in relation to any matter connected with the functions of that undertaker or the services provided by that licensed water supplier<sup>5</sup>.

Where such a complaint, other than one appearing to the Consumer Council for Water<sup>6</sup> to be frivolous or vexatious, is referred to the Council by or on behalf of the complainant, the Council must, subject to certain exceptions<sup>7</sup>, investigate the complaint for the purpose of determining whether it is appropriate to take any action<sup>8</sup> with a view to assisting in reaching a satisfactory resolution of the complaint<sup>9</sup>. The Council is not, however, required to investigate any matter if it appears to the Council that:

- 85 (1) it is unlikely that the complaint could be resolved by action taken by the relevant undertaker or the licensed water supplier<sup>10</sup>;
- 86 (2) the relevant undertaker or the licensed water supplier has not been given a reasonable opportunity to deal with the complaint<sup>11</sup>; or
- 87 (3) in certain specified cases<sup>12</sup> it would be inappropriate to do so<sup>13</sup>.

Further, where it appears to the Council that the complaint is one which the Water Services Regulation Authority would be required to investigate<sup>14</sup>, the Council must, instead of investigating the matter to which it relates, refer the complaint to the Authority<sup>15</sup>.

Where it appears to the Council that the complaint relates to a matter in respect of which a specified enforcement function<sup>16</sup> is or may be exercisable by any person, the Council must, unless it considers that that person already has notice of the matter, refer the matter to that person<sup>17</sup>. Where it appears to the Council that the complaint relates to a matter which constitutes or might constitute an offence, the Council must refer the matter:

- 88 (a) to the Welsh Ministers<sup>18</sup>, if the matter relates to a relevant undertaker whose area is wholly or mainly in Wales<sup>19</sup> or to services provided by a licensed water supplier using the supply system of a water undertaker whose area is wholly or mainly in Wales<sup>20</sup>; or
- 89 (b) to the Secretary of State<sup>21</sup>, in any other case<sup>22</sup>.

Where it appears to the Council that the complaint relates to a matter which constitutes a dispute of a kind which can be referred to the Water Services Regulation Authority for determination under any provision of the Water Industry Act 1991, the Council must, if the complainant consents, refer the matter to the Authority<sup>23</sup>.

Where it appears to the Council to be appropriate to do so with a view to assisting in reaching a satisfactory resolution of a complaint referred to it under the above provisions, the Council must make representations on behalf of the complainant to the relevant undertaker or the licensed water supplier about anything to which the complaint relates<sup>24</sup>. After investigating a complaint the Council may make a report to the Water Services Regulation Authority, the Secretary of State or the Welsh Ministers<sup>25</sup>. Such a report may include information<sup>26</sup> about any representations so made by the Council<sup>27</sup> and the response of the relevant undertaker or the

licensed water supplier to the complaint or any such representations<sup>28</sup>. No such report or information about a complaint referred to the Council under these provisions, from which the complainant may be identified, may, however, be published or disclosed by the Council, the Authority, the Secretary of State or the Welsh Ministers in the exercise of any power under the Water Industry Act 1991 without the consent of the complainant<sup>29</sup>.

Where a representation made to the Water Services Regulation Authority, the Secretary of State or the Welsh Ministers about any matter, other than a representation appearing to the person to whom it is made to be frivolous or vexatious, appears to that person to be about a matter which is or amounts to a complaint to which the above provisions apply (other than one which, in the case of the Authority, it is its duty<sup>30</sup> to investigate)<sup>31</sup>, and to have been made by or on behalf of the complainant<sup>32</sup>, that person must refer the matter to the Council<sup>33</sup>.

It is to be the duty of the Council to publish, in such form and manner and with such frequency as it thinks appropriate, such statistical information as it considers appropriate relating to complaints<sup>34</sup> made by consumers<sup>35</sup> about any matter relating to the activities of water undertakers or licensed water suppliers and the handling of such complaints<sup>36</sup>.

1    le the provisions of the Water Industry Act 1991 s 29: see the text to notes 6-33.

2    As to the meaning of 'person' see PARA 13 note 29.

3    As to the meaning of 'relevant undertaker' see PARA 137 note 8.

4    As to the meaning of 'licensed water supplier' see PARA 152.

5    Water Industry Act 1991 s 29(1) (s 29 substituted by the Water Act 2003 s 46).

6    As to the Consumer Council for Water see PARA 115.

7    le subject to the Water Industry Act 1991 s 29(3), (8): see the text to notes 10-15.

8    le under the Water Industry Act 1991 s 29(9): see the text to note 24.

9    Water Industry Act 1991 s 29(2) (as substituted: see note 5).

10   Water Industry Act 1991 s 29(8)(a) (as substituted: see note 5).

11   Water Industry Act 1991 s 29(8)(b) (as substituted: see note 5).

12   le in a case mentioned in the Water Industry Act 1991 s 29(4) or (5) (see the text to notes 16-22) or, where the complainant does not consent to the matter being referred to the Water Services Regulation Authority, s 29(6) (see the text to note 23). As to the Water Services Regulation Authority see PARA 109.

13   Water Industry Act 1991 s 29(8)(c) (as substituted: see note 5).

14   le under the Water Industry Act 1991 s 181: see PARA 474.

15   Water Industry Act 1991 s 29(3) (as substituted: see note 5).

16   le a function under the Water Industry Act 1991 s 18 (see PARA 163) or s 22A (see PARA 170).

17   Water Industry Act 1991 s 29(4) (as substituted: see note 5).

18   Functions under the Water Industry Act 1991 s 29 and s 38B (see the text to notes 34-36) which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

19   As to the meaning of 'Wales' see PARA 16 note 2. As to water undertakers' areas see PARA 318.

20 Water Industry Act 1991 s 29(5)(a) (as substituted: see note 5); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

21 As to the Secretary of State see PARA 15 note 1.

22 Water Industry Act 1991 s 29(5)(b) (as substituted: see note 5).

23 Water Industry Act 1991 s 29(6) (as substituted: see note 5). Such a referral has effect for the purposes of s 30A (see PARA 131) as if it were a referral by the complainant of a dispute for determination by the Authority: s 29(7) (as so substituted).

24 Water Industry Act 1991 s 29(9) (as substituted: see note 5).

25 Water Industry Act 1991 s 29(10) (as substituted: see note 5); Government of Wales Act 2006 Sch 11 para 32.

26 As to the meaning of 'information' see PARA 117 note 13.

27 Water Industry Act 1991 s 29(11)(a) (as substituted: see note 5).

28 Water Industry Act 1991 s 29(11)(b) (as substituted: see note 5).

29 Water Industry Act 1991 s 29(12) (as substituted: see note 5); Government of Wales Act 2006 Sch 11 para 32.

30 le under the Water Industry Act 1991 s 181: see PARA 474.

31 Water Industry Act 1991 s 29(13)(a) (as substituted: see note 5).

32 Water Industry Act 1991 s 29(13)(b) (as substituted: see note 5).

33 Water Industry Act 1991 s 29(13) (as substituted: see note 5).

34 For these purposes, 'complaints' includes complaints made directly to water undertakers or licensed water suppliers (or anyone carrying on activities on their behalf) and complaints to the Water Services Regulation Authority, the Council, the Welsh Ministers or the Secretary of State: Water Industry Act 1991 s 38B(2) (s 38B added by the Water Act 2003 s 45(1)); Government of Wales Act 2006 Sch 11 para 32.

35 In the Water Industry Act 1991 Pt III (ss 37-93), 'consumer', in relation to a supply of water provided by a water undertaker to any premises, means (except in Pt III Ch IV (ss 87-91)) a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of that supply of water would fall: s 93(1). As to the duty of a water undertaker to maintain a water supply see PARA 319. As to water charges see PARA 417 et seq.

36 Water Industry Act 1991 s 38B(1) (as added: see note 34). Information about complaints is available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).

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### **123. Council's power to investigate other matters.**

The Consumer Council for Water<sup>1</sup> may investigate any matter, not being a matter which it is its duty to investigate<sup>2</sup>, which appears to it to be a matter relating to the interests of consumers<sup>3</sup>. Before undertaking such an investigation the Council must consult the Water Services Regulation Authority<sup>4</sup>, the Secretary of State<sup>5</sup> and the Welsh Ministers<sup>6</sup>.

Where the Council has investigated a matter under this power it may make a report on that matter to the Water Services Regulation Authority, the Secretary of State, the Office of Fair Trading<sup>7</sup>, the Welsh Ministers, or any other public authority<sup>8</sup> whose functions appear to the Council to be exercisable in relation to that matter<sup>9</sup>. The Council may<sup>10</sup> also: (1) send a report on any matter so investigated to any person who appears to the Council to have an interest in that matter<sup>11</sup>; and (2) publish any such report in such manner as the Council thinks appropriate<sup>12</sup>.

1 As to the Consumer Council for Water see PARA 115.

2 le under the Water Industry Act 1991 Pt II (ss 6-36). As to the duty to investigate consumer complaints see s 29; and PARA 122.

3 Water Industry Act 1991 s 29A(1) (s 29A added by the Water Act 2003 s 47). As to the meaning of 'consumers' see PARA 117 note 14. As to the power of the Council to require information see PARA 121.

4 As to the Water Services Regulation Authority see PARA 109. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

5 As to the Secretary of State see PARA 15 note 1.

6 Water Industry Act 1991 s 29A(2) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 29A which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

8 As to the meaning of 'public authority' see PARA 118 note 17.

9 Water Industry Act 1991 s 29A(3) (as added: see note 3).

10 Information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate): (1) must not be included in a report which is to be sent to any person under head (1) in the text, unless one or more of the Water Industry Act 1991 s 29A(6)(a)-(c) applies (s 29A(5)(a) (as added: see note 3)); and (2) must be excluded from any such report which is to be published under head (2) in the text, unless one or more of s 29A(7)(a)-(c) applies (s 29A(5)(b) (as so added)). Information relating to a particular individual or body may be included in a report to be sent under head (1) in the text if: (a) that individual or body has consented to the disclosure (s 29A(6)(a) (as so added)); (b) it is information that is available to the public from some other source (s 29A(6)(b) (as so added)); or (c) it is not information the disclosure of which would or might, in the opinion of the Council, seriously and prejudicially affect the interests of that individual or body (s 29A(6)(c) (as so added)). Information relating to a particular individual or body may be included in a report to be published under head (2) in the text if: (i) that individual or body has consented to the publication (s 29A(7)(a) (as so added)); (ii) it is information that is available to the public from some other source (s 29A(7)(b) (as so added)); or (iii) it is not information the publication of which would or might, in the opinion of the Council, seriously and prejudicially affect the interests of that individual or body (s 29A(7)(c) (as so added)). Before

deciding to include in such a report any information relating to a particular individual or body in pursuance of s 29A(6)(c) or (7)(c) (see heads (c), (iii) above), the Council must: (A) consult that individual or body (s 29A(8)(a) (as so added)); and (B) have regard to any opinion expressed by the Water Services Regulation Authority as to the application of that head to the information or as to the desirability or otherwise of its inclusion in the report (s 29A(8)(b) (as so added)); and head (B) applies whether the opinion is given in relation to the information itself or to information of a description which applies to that information (s 29A(8) (as so added)). Further, the Council must not include in any report to be sent under head (1) in the text or published under head (2) in the text any information which it considers relates to any matter which is, or is likely to be, the subject of criminal proceedings (s 29A(9) (as so added)); and in considering whether information relates to any such matter, the Council must have regard to any opinion expressed (whether in relation to the information itself or to information of a description which applies to that information) by the Secretary of State, the Welsh Ministers, or the Director of Public Prosecutions (s 29A(10) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to the meaning of 'information' see PARA 117 note 13. As to the meaning of 'person' see PARA 13 note 29. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

11 Water Industry Act 1991 s 29A(4)(a) (as added: see note 3).

12 Water Industry Act 1991 s 29A(4)(b) (as added: see note 3). Reports are available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).

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## **124. Annual report.**

The Consumer Council for Water<sup>1</sup> must, as soon as practicable after the end of each financial year<sup>2</sup>, report to the Secretary of State<sup>3</sup> on its activities during the year<sup>4</sup>. The annual report for each year must include a report on the progress of the projects described in the Council's forward work programme<sup>5</sup> for that year<sup>6</sup>.

In making any such report the Council is not to include any information<sup>7</sup> which relates to the affairs of a particular individual or body of persons<sup>8</sup>, corporate or unincorporate, unless one or more of the following conditions is satisfied<sup>9</sup>. The conditions are that: (1) that individual or body has consented to its inclusion<sup>10</sup>; (2) it is information that is available to the public from some other source<sup>11</sup>; or (3) it is not information the publication of which would or might, in the opinion of the Council, seriously and prejudicially affect the interests of that individual or body<sup>12</sup>. Further, in making any such report the Council must not include any information which it considers relates to any matter which is, or is likely to be, the subject of criminal proceedings<sup>13</sup>.

The Secretary of State must lay a copy of each annual report of the Council before each House of Parliament<sup>14</sup>. The Council must send a copy of each annual report to the Water Services Regulation Authority and to the Welsh Ministers, and must arrange for the report to be published in such further manner as it considers appropriate<sup>15</sup>.

1 As to the Consumer Council for Water see PARA 115.

2 As to the meaning of 'financial year' see PARA 111 note 2.

3 As to the Secretary of State see PARA 15 note 1.

4 Water Industry Act 1991 Sch 3A para 7(1) (Sch 3A added by the Water Act 2003 s 35(2), Sch 2).

5 As to the forward work programme see PARA 120.

6 Water Industry Act 1991 Sch 3A para 7(2) (as added: see note 4).

7 As to the meaning of 'information' see PARA 117 note 13.

8 As to the meaning of 'person' see PARA 13 note 29.

9 Water Industry Act 1991 Sch 3A para 7(3) (as added: see note 4).

10 Water Industry Act 1991 Sch 3A para 7(4)(a) (as added: see note 4).

11 Water Industry Act 1991 Sch 3A para 7(4)(b) (as added: see note 4).

12 Water Industry Act 1991 Sch 3A para 7(4)(c) (as added: see note 4). Before deciding to include any information relating to a particular individual or body in pursuance of Sch 3A para 7(4)(c), the Council must: (1) consult that person or body (Sch 3A para 7(5)(a) (as so added)); and (2) have regard to any opinion expressed by the Water Services Regulation Authority as to the application of that head to the information or as to the desirability or otherwise of its publication (Sch 3A para 7(5)(b) (as so added)); and head (2) above applies whether the opinion is given in relation to information itself or to information of a description which applies to that information (Sch 3A para 7(5) (as so added)). As to the Water Services Regulation Authority see PARA 109. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

13 Water Industry Act 1991 Sch 3A para 7(6) (as added: see note 4). In considering whether information relates to any such matter, the Council must have regard to any opinion expressed (whether in relation to the

information itself or to information of a description which applies to that information) by the Secretary of State, the Welsh Ministers or the Director of Public Prosecutions: Sch 3A para 7(7) (as so added); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 Sch 3A which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

14 Water Industry Act 1991 Sch 3A para 7(8) (as added: see note 4). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

15 Water Industry Act 1991 Sch 3A para 7(9) (as added: see note 4); Government of Wales Act 2006 Sch 11 para 32. Annual reports are available on the Council's website at [www.ccwater.org.uk](http://www.ccwater.org.uk).



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## **125. Finance and accounts.**

The Secretary of State<sup>1</sup> and the Welsh Ministers<sup>2</sup> must pay to the Consumer Council for Water<sup>3</sup> such sums as he or they think fit to enable it to meet its expenses<sup>4</sup>.

It is the duty of the Consumer Council for Water to comply with any notice<sup>5</sup> given by the Secretary of State requiring it to perform duties of a financial nature specified in the notice<sup>6</sup>. The Secretary of State must consult the Welsh Ministers before giving any such notice to the Council<sup>7</sup>.

The Council must prepare, in respect of each financial year<sup>8</sup>, a statement of accounts giving a true and fair view of the state of affairs and the income and expenditure of the Council<sup>9</sup>. The statement of accounts must comply with any requirement which the Secretary of State has notified to the Council<sup>10</sup>. The Council must, within such period after the end of the financial year to which it relates as the Secretary of State may specify by notice given to the Council, send copies of each statement of its accounts to the Secretary of State and the Welsh Ministers<sup>11</sup>, and to the Comptroller and Auditor General<sup>12</sup>. The Comptroller and Auditor General must examine, certify and report on every such statement sent to him<sup>13</sup>, and lay a copy of the statement and of his report before each House of Parliament<sup>14</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Functions under the Water Industry Act 1991 Sch 3A which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the Consumer Council for Water see PARA 115.

4 Water Industry Act 1991 Sch 3A para 10 (Sch 3A added by the Water Act 2003 s 35(2), Sch 2); Government of Wales Act 2006 Sch 11 para 32.

5 As to the meaning of 'notice' see PARA 22 note 1.

6 Water Industry Act 1991 Sch 3A para 8(1) (as added: see note 4).

7 Water Industry Act 1991 Sch 3A para 8(2) (as added: see note 4). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

8 As to the meaning of 'financial year' see PARA 111 note 2.

9 Water Industry Act 1991 Sch 3A para 9(1) (as added: see note 4). As to the power of the Council to make charges for facilities or services provided by it at the request of any person see PARA 119.

10 Water Industry Act 1991 Sch 3A para 9(2) (as added: see note 4).

11 Water Industry Act 1991 Sch 3A para 9(3)(a) (as added: see note 4); Government of Wales Act 2006 Sch 11 para 32.

12 Water Industry Act 1991 Sch 3A para 9(3)(b) (as added: see note 4). As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 724-726.

13 Water Industry Act 1991 Sch 3A para 9(4)(a) (as added: see note 4).

14 Water Industry Act 1991 Sch 3A para 9(4)(b) (as added: see note 4). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

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### **(iii) The Drinking Water Inspectorate**

#### **126. The Drinking Water Inspectorate.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may appoint persons<sup>3</sup> to act on his or their behalf in relation to some or all of<sup>4</sup>:

- 90 (1) the powers and duties conferred or imposed on him or them in respect of the wholesomeness of water supplies<sup>5</sup>, the offence of supplying water unfit for human consumption<sup>6</sup>, local authority functions in relation to water supplies and quality<sup>7</sup> and private supplies<sup>8</sup>; and
- 91 (2) such other powers and duties in relation to the quality and sufficiency of water supplied using a water undertaker's supply system<sup>9</sup> as are conferred or imposed on him or them by or under any other enactments<sup>10</sup>.

The Secretary of State must designate one such person as the Chief Inspector of Drinking Water<sup>11</sup>; and the Welsh Ministers may designate one such person appointed by them as the Chief Inspector of Drinking Water for Wales<sup>12</sup>. If the person designated by the Welsh Ministers is the same as the person designated by the Secretary of State as the Chief Inspector of Drinking Water, he is to be known as such in both capacities<sup>13</sup>.

An inspector<sup>14</sup> appointed under these provisions must<sup>15</sup> carry out such investigations as the Secretary of State or, as the case may be, the Welsh Ministers may require him to carry out for the purpose of: (a) ascertaining whether any duty or other requirement as to water quality imposed on that undertaker or a licensed water supplier<sup>16</sup> or imposed on a relevant person<sup>17</sup> is being, has been or is likely to be contravened<sup>18</sup>; or (b) advising the Secretary of State or the Welsh Ministers as to whether, and if so in what manner, any of the powers of the Secretary of State or the Welsh Ministers in relation to such a contravention, or any of the powers which are conferred on him or them by or under the specified statutory provisions relating to water quality<sup>19</sup> (including the powers to make regulations) should be exercised<sup>20</sup>. An inspector so appointed must also make such reports to the Secretary of State or the Welsh Ministers with respect to any such investigations as he or they may require<sup>21</sup>.

It is the duty of a water undertaker, licensed water supplier or other relevant person to give an inspector so appointed all such assistance<sup>22</sup>, and provide him with all such information<sup>23</sup>, as he may reasonably require for the purpose of carrying out any of his investigations<sup>24</sup>. Any water undertaker, licensed water supplier or other relevant person which fails to comply with this duty is guilty of an offence<sup>25</sup>.

Any inspector appointed under these provisions who is designated in writing<sup>26</sup> for the purpose by the Secretary of State or the Welsh Ministers may<sup>27</sup>:

- 92 (i) enter any premises for the purpose of carrying out any investigation under these provisions<sup>28</sup>;
- 93 (ii) carry out such inspections, measurements and tests on premises entered by him, or of articles or records<sup>29</sup> found on any such premises, and take away such samples of water or of any land<sup>30</sup> or articles, as he considers appropriate to enable him to carry out any such investigation<sup>31</sup>; or

- 94 (iii) at any reasonable time require;
- 9
11. (A) any water undertaker or licensed water supplier to supply him with copies of, or extracts from, the contents of any records kept for the purpose of complying with any duty or other requirement imposed<sup>32</sup> on that undertaker or supplier<sup>33</sup>; or
12. (B) any relevant person to supply him with copies of, or extracts from, the contents of any records kept for the purpose of complying with any duty or other requirement imposed<sup>34</sup> on that person<sup>35</sup>.

10

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 86 (except s 86(1A): see the text to note 11), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, and those functions were exercisable by the Assembly to the same extent as the powers, duties and other provisions to which that section (except s 86(1A)) applies were exercisable by the Assembly: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; Water Act 2003 s 100(2)(a)(iv), (f)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the meaning of 'person' see PARA 13 note 29. Any appointment as a technical assessor under the Water Industry Act 1991 s 86 or designation under s 86(4) (see the text to notes 26-27), which: (1) was made before the coming into force of the Water Act 2003 s 57 (ie before 1 April 2004); and (2) was still current at that time, has effect as if it were an appointment as, or (as the case may be) a designation of, an inspector under the Water Resources Act 1991 s 86 as amended by the Water Act 2003 s 57: Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, arts 3(m), 6, Sch 3 para 5. Technical assessors (now known as 'inspectors') were appointed for the first time under the Water Act 1989: see s 60 (repealed). This legislation followed an incident in July 1988 at Camelford in Cornwall where drinking water was accidentally contaminated with aluminium sulphate: for subsequent litigation see *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA (overruled by *Kuddus v Leicestershire Chief Constable* [2001] UKHL 29, [2002] 2 AC 122, [2001] 3 All ER 193).

4 Water Industry Act 1991 s 86(1) (amended by the Water Act 2003 ss 57(1), (2), 101(2), Sch 9 Pt 3). The persons appointed are known as the Drinking Water Inspectorate. Information as to the Inspectorate and its work is available on the Inspectorate's website at [www.dwi.gov.uk](http://www.dwi.gov.uk).

5 Ie the powers and duties conferred or imposed under the Water Industry Act 1991 ss 67-69: see PARAS 373-375.

6 Ie the powers and duties conferred or imposed under the Water Industry Act 1991 s 70: see PARA 388.

7 Ie the powers and duties conferred or imposed under the Water Industry Act 1991 ss 77-79: see PARAS 395-397.

8 Water Industry Act 1991 s 86(1)(a). The powers and duties in respect of local authority functions in relation to private supplies referred to are those conferred or imposed under ss 80-82: see PARAS 404-406.

9 As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

10 Water Industry Act 1991 s 86(1)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (2)). As to the meaning of 'enactment' see PARA 14 note 31.

11 Water Industry Act 1991 s 86(1A) (s 86(1A), (1B) added by the Water Act 2003 s 57(1), (3)).

12 Water Industry Act 1991 s 86(1B)(a) (as added: see note 11); Government of Wales Act 2006 Sch 11 para 32. The function under the Water Industry Act 1991 s 86(1B) is exercisable by the Welsh Ministers if the function of the Secretary of State under s 86(1) is transferred (see note 2) to any extent to the Welsh Ministers: see s 86(1B) (as so added). Functions under the Water Industry Act 1991 s 86(1B) were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

- 13 Water Industry Act 1991 s 86(1B)(b) (as added: see note 11); Government of Wales Act 2006 Sch 11 para 32.
- 14 'Inspector' means the Chief Inspector of Drinking Water or any other person appointed under the Water Industry Act 1991 s 86(1) (see the text to notes 1-10): s 86(9) (s 86(7)-(9) added by the Water Act 2003 s 57(1), (8)).
- 15 Water Industry Act 1991 s 86(2) (amended by the Water Act 2003 s 57(1), (4)).
- 16 Ie by or under any of the Water Industry Act 1991 ss 68, 69 (see PARAS 374-375) and s 79 (see PARA 397). As to the meaning of 'licensed water supplier' see PARA 152.
- 17 Ie by or under the Water Industry Act 1991 s 70: see PARA 388. As to the meaning of 'relevant person' see PARA 388 note 3.
- 18 Water Industry Act 1991 s 86(2)(a)(i) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (3)). As to the meaning of 'contravene' see PARA 20 note 5.
- 19 Ie by or under the Water Industry Act 1991 ss 67-69 (see PARAS 373-375), s 70 (see PARA 388), ss 77-79 (see PARAS 395-397), ss 80-82 (see PARAS 404-406).
- 20 Water Industry Act 1991 s 86(2)(a)(ii). The Drinking Water Inspectorate may recommend to the Secretary of State or the Welsh Ministers that a prosecution be brought for an alleged offence under s 70 (see PARA 388). The Inspectorate's prosecution policy is available on the Inspectorate's website at [www.dwi.gov.uk](http://www.dwi.gov.uk).
- 21 Water Industry Act 1991 s 86(2)(b).
- 22 Water Industry Act 1991 s 86(3)(a) (s 86(3)(a), (b) amended by the Water Act 2003 s 57(1), (5)).
- 23 Water Industry Act 1991 s 86(3)(b) (as amended: see note 22). As to the meaning of 'information' see PARA 117 note 13.
- 24 See the Water Industry Act 1991 s 86(3) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (4)). This duty is without prejudice to the inspector's powers under s 86(4) (see the text to notes 26-35): s 86(3) (as so amended).
- 25 Water Industry Act 1991 s 86(6) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (6)). The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000; or on conviction on indictment, a fine: s 86(6)(a), (b) (both substituted by the Water Act 2003 s 57(1), (7)). As to offences by bodies corporate see PARA 185.  
Proceedings by the Secretary of State for such an offence or in relation to the quality and sufficiency of water supplied using a water undertaker's supply system may be instituted and carried on in the name of the Chief Inspector of Drinking Water: Water Industry Act 1991 s 86(7) (as added: see note 14). Any such proceedings by the Welsh Ministers may be instituted and carried on in the name of the Chief Inspector of Drinking Water for Wales, if there is one (or, if s 86(1B)(b) (see the text to note 13) applies, in the name of the Chief Inspector of Drinking Water): s 86(8) (as so added); Government of Wales Act 2006 Sch 11 para 32.
- 26 As to the meaning of 'writing' see PARA 22 note 1.
- 27 Water Industry Act 1991 s 86(4) (s 86(4) amended by the Water Act 2003 s 57(1), (6)). The Water Industry Act 1991 Sch 6 Pt II (paras 6-13) (see PARAS 482-485) applies to the rights and powers conferred by s 86(4): s 86(5).
- 28 See the Water Industry Act 1991 s 86(4)(a).
- 29 As to the meaning of 'records' see PARA 117 note 13.
- 30 As to the meaning of 'land' see PARA 14 note 21.
- 31 Water Industry Act 1991 s 86(4)(b) (as amended: see note 27).
- 32 Ie by or under any of the Water Industry Act 1991 ss 68, 69 (see PARAS 374-375) and s 79 (see PARA 397).
- 33 Water Industry Act 1991 s 86(4)(c)(i) (s 86(4)(c) substituted by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (5)).
- 34 Ie by or under the Water Industry Act 1991 s 70: see PARA 388.

35 Water Industry Act 1991 s 86(4)(c)(ii) (as substituted: see note 33).

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#### **(iv) Co-operation between Regulatory Bodies**

##### **127. Co-operation between the Consumer Council for Water and other authorities.**

It is the duty of the bodies mentioned in each of heads (1) to (3) below to make arrangements with a view to securing co-operation and the exchange of information<sup>1</sup> between them<sup>2</sup>, and the consistent treatment of matters which affect both of them<sup>3</sup>. The bodies are:

- 95 (1) the Water Services Regulation Authority<sup>4</sup> and the Consumer Council for Water<sup>5</sup>;
- 96 (2) the Consumer Council for Water and the Secretary of State<sup>6</sup>; and
- 97 (3) the Consumer Council for Water and the Welsh Ministers<sup>7</sup>.

As soon as practicable after agreement is reached on any arrangements so required, the parties must prepare a memorandum setting them out<sup>8</sup>. The arrangements must be kept under review by the parties<sup>9</sup>; and as soon as practicable after agreement is reached on any changes to such arrangements, the parties must revise their memorandum<sup>10</sup>.

Parties to arrangements so required must send a copy of their memorandum, and any revised memorandum, to each other person<sup>11</sup> mentioned in heads (1) to (3) above who is not a party to the arrangements set out in the memorandum or revised memorandum<sup>12</sup>. The Secretary of State must lay a copy of every memorandum or revised memorandum under the above provisions before each House of Parliament<sup>13</sup>.

1 As to the meaning of 'information' see PARA 117 note 13.

2 Water Industry Act 1991 s 27B(2)(a) (s 27B added by the Water Act 2003 s 35(1)).

3 Water Industry Act 1991 s 27B(2)(b) (as added: see note 2).

4 As to the Water Services Regulation Authority see PARA 109.

5 Water Industry Act 1991 s 27B(1)(a) (as added: see note 2). As to the Consumer Council for Water see PARA 115.

6 Water Industry Act 1991 s 27B(1)(b) (as added: see note 2). As to the Secretary of State see PARA 15 note 1.

7 Water Industry Act 1991 s 27B(1)(c) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 27B which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

8 Water Industry Act 1991 s 27B(3) (as added: see note 2).

9 Water Industry Act 1991 s 27B(4) (as added: see note 2).

10 Water Industry Act 1991 s 27B(5) (as added: see note 2).

11 As to the meaning of 'person' see PARA 13 note 29.

12 Water Industry Act 1991 s 27B(6) (as added: see note 2).

13 Water Industry Act 1991 s 27B(7) (as added: see note 2). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.



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## **128. Co-operation between water regulators.**

It is the duty of each of the Secretary of State<sup>1</sup>, the Welsh Ministers<sup>2</sup>, the Environment Agency<sup>3</sup>, and the Water Services Regulation Authority<sup>4</sup>, to make arrangements with each of the others with a view to promoting, in the case of each pair of them, co-operation and the exchange of information between them<sup>5</sup>, and consistency of treatment of matters which affect both of them<sup>6</sup>. That duty, however, relates only:

- 98 (1) in the case of the Water Services Regulation Authority, to its functions under the Water Industry Act 1991 relating to the regulation of water and sewerage undertakers<sup>7</sup> and licensed water suppliers<sup>8</sup>;
- 99 (2) in the case of the Secretary of State and the Welsh Ministers, to their functions of the description referred to in head (1) above, and to their functions under the Water Industry Act 1991 relating to the quality of water supplied by water undertakers and licensed water suppliers<sup>9</sup>;
- 100 (3) in the case of the Environment Agency, to its functions concerning water resources and water pollution so far as they relate to water and sewerage undertakers and licensed water suppliers<sup>10</sup>.

As soon as practicable after agreement is reached on any arrangements so required, the parties must prepare a memorandum setting them out<sup>11</sup>. The parties to any such arrangements must keep them under review<sup>12</sup>; and as soon as practicable after agreement is reached on any changes to such arrangements, the parties must revise their memorandum<sup>13</sup>.

Parties to arrangements so required must send a copy of their memorandum, and any revised memorandum, to each person mentioned above<sup>14</sup> who is not a party to the arrangements set out in it<sup>15</sup>. The Secretary of State must lay before each House of Parliament a copy of every memorandum and revised memorandum under the above provisions<sup>16</sup>.

1 See the Water Act 2003 s 52(1)(a). As to the Secretary of State see PARA 15 note 1.

2 See the Water Act 2003 s 52(1)(b); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Act 2003 s 52 which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 See the Water Act 2003 s 52(1)(c). As to the Environment Agency see PARA 17.

4 See the Water Act 2003 s 52(1)(d). As to the Water Services Regulation Authority see PARA 109.

5 Water Act 2003 s 52(2)(a).

6 Water Act 2003 s 52(2)(b).

7 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

8 Water Act 2003 s 52(3)(a). As to the licensed water suppliers see PARA 152 et seq.

9 Water Act 2003 s 52(3)(b). As to water quality see PARA 371 et seq.

10 Water Act 2003 s 52(3)(c). As to water resources see **PARA** 187 et seq. As to water pollution see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) **PARA** 270 et seq.

11 Water Act 2003 s 52(4).

12 Water Act 2003 s 52(5).

13 Water Act 2003 s 52(6).

14 le mentioned in the Water Act 2003 s 52(1): see the text to notes 1-4.

15 Water Act 2003 s 52(7).

16 Water Act 2003 s 52(8). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) **PARA** 941.

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### **(3) GENERAL REGULATORY POWERS AND DUTIES**

#### **129. Directions in the interests of national security etc.**

After consultation<sup>1</sup> with a relevant undertaker<sup>2</sup> or licensed water supplier<sup>3</sup>, or with the Environment Agency<sup>4</sup>, the Secretary of State<sup>5</sup> may give that body such directions<sup>6</sup> of a general character as appear to him to be requisite or expedient in the interests of national security or for the purpose of mitigating the effects of any civil emergency<sup>7</sup> which may occur<sup>8</sup>. If it appears to the Secretary of State to be requisite or expedient to do so in the interests of national security or for the purpose of mitigating the effects of any civil emergency which has occurred or may occur, he may after the like consultation give to a relevant undertaker, licensed water supplier or the Agency a direction requiring it to do, or not to do, a particular thing specified in the direction<sup>9</sup>. It is the duty of the body to whom a direction is given by the Secretary of State, notwithstanding any other duty imposed on it<sup>10</sup>, to comply with the direction<sup>11</sup>.

The Secretary of State may also, after consultation with the Consumer Council for Water<sup>12</sup>, give to the Council such directions of a general character as appear to him to be requisite or expedient in the interests of national security<sup>13</sup>, or in connection with any civil emergency which may occur<sup>14</sup>. If it appears to the Secretary of State to be requisite or expedient to do so in the interests of national security<sup>15</sup>, or in connection with any civil emergency which has occurred or may occur<sup>16</sup>, he may, after consultation with the Council, give to it a direction requiring it to do, or not to do, a particular thing specified in the direction<sup>17</sup>. The Council must comply with any direction so given to it by the Secretary of State<sup>18</sup>.

The Secretary of State must lay before each House of Parliament<sup>19</sup> a copy of every direction given under the above provisions unless he is of the opinion that disclosure of the direction is against the interests of national security<sup>20</sup>. A person<sup>21</sup> must not disclose, or be required by any enactment<sup>22</sup> or otherwise to disclose, anything done by virtue of these provisions if the Secretary of State has notified him of the Secretary of State's opinion that disclosure of that thing is against the interests of national security<sup>23</sup>; and any person who discloses any matter in contravention<sup>24</sup> of this prohibition is guilty of an offence<sup>25</sup>.

In so far as they are exercisable in relation to Wales<sup>26</sup>, the above functions<sup>27</sup> of giving directions to the Environment Agency for the purpose of mitigating the effects of any civil emergency, are transferred to the Welsh Ministers<sup>28</sup>; and the other functions under the above provisions relating to the Agency are exercisable by the Welsh Ministers concurrently with the Secretary of State<sup>29</sup>. In respect of relevant undertakers, licensed water suppliers, and the Consumer Council for Water, the functions<sup>30</sup> of giving directions for the purpose of mitigating the effects of any civil emergency and the function, in the case of heads (1) and (2) below, of enforcing such directions are, so far as exercisable in relation to Wales, transferred to the Welsh Ministers:

- 101 (1) in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales;
- 102 (2) in relation to any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker; and
- 103 (3) in relation to the Consumer Council for Water so far as relating to its functions in connection with any such water undertaker;

and the other functions under the above provisions in respect of those bodies, so far as exercisable in relation to Wales, are exercisable by the Welsh Ministers concurrently with the Secretary of State so far as mentioned in heads (1) to (3) above<sup>31</sup>.

The Secretary of State may, with Treasury approval<sup>32</sup> and out of money provided by Parliament, make grants to relevant undertakers and licensed water suppliers for the purpose of defraying or contributing towards any losses they may sustain by reason of compliance with any directions<sup>33</sup> given under the above provisions<sup>34</sup>. This function, so far as exercisable in relation to Wales, is exercisable by the Welsh Ministers concurrently with the Secretary of State in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales or, so far as relating to licensed activities using the supply system of any such water undertaker, in relation to any licensed water supplier; and it is so exercisable free from the requirement for Treasury approval<sup>35</sup>.

1 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8. The Water Industry Act 1991 s 208 applies where, by an appointment or variation, one company (the 'new undertaker') is to replace another company as a relevant undertaker but the appointment or variation has not come into force, in relation to the new undertaker as if the appointment or variation had come into force: see s 10(3)(h); and PARA 141.

3 As to the meaning of 'licensed water supplier' see PARA 152.

4 As to the Environment Agency see PARA 17.

5 As to the Secretary of State see PARA 15 note 1. As to the transfer of functions to the Welsh Ministers see the text to notes 26-31. As to the Welsh Ministers see PARA 16 note 5.

6 As to the general power under the Environment Act 1995 of the Secretary of State and the Welsh Ministers to give directions to the Environment Agency in relation to the carrying out of any of its functions see s 40; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 74.

7 'Civil emergency' means any natural disaster or other emergency which, in the opinion of the Secretary of State, is or may be likely, in relation to any area, so to disrupt water supplies or sewerage services, or to involve such destruction of or damage to life or property in that area, as seriously and adversely to affect all the inhabitants of that area, or a substantial number of them, whether by depriving them of any of the essentials of life or otherwise: Water Industry Act 1991 s 208(7); Water Resources Act 1991 s 207(7). 'Sewerage services' includes the disposal of sewage and any other services which are required to be provided by a sewerage undertaker for the purpose of carrying out its functions: Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 207(8). 'Services' includes facilities: Water Industry Act 1991 s 219(1). As to the meaning of 'sewerage undertaker' see PARA 137 note 4. 'Damage', in relation to individuals, includes death and any personal injury, including any disease or impairment of physical or mental condition: s 219(1); Water Resources Act 1991 s 221(1).

8 Water Industry Act 1991 s 208(1) (s 208(1)-(3) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 48); Water Resources Act 1991 s 207(1) (s 207(1)-(3) amended by the Environment Act 1995 s 120, Sch 22 para 128).

9 Water Industry Act 1991 s 208(2); Water Resources Act 1991 s 207(2) (both as amended: see note 8).

10 I.e., in the case of a relevant undertaker or licensed water supplier whether or not it is imposed by or under the Water Industry Act 1991, or in the case of the Environment Agency whether or not by or under the Water Resources Act 1991.

11 See the Water Industry Act 1991 s 208(3); the Water Resources Act 1991 s 207(3) (both as amended: see note 8). The duty of a relevant undertaker or licensed water supplier to comply with any such direction is enforceable under the Water Industry Act 1991 s 18 (see PARA 163) by the Secretary of State: s 208(3) (as so amended).

12 As to the Consumer Council for Water see PARA 115.

13 Water Industry Act 1991 s 208(3A)(a) (s 208(3A)-(3C) added by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 27(1), (6)).

- 14 Water Industry Act 1991 s 208(3A)(b) (as added: see note 13).
- 15 Water Industry Act 1991 s 208(3B)(a) (as added: see note 13).
- 16 Water Industry Act 1991 s 208(3B)(b) (as added: see note 13).
- 17 Water Industry Act 1991 s 208(3B) (as added: see note 13).
- 18 Water Industry Act 1991 s 208(3C) (as added: see note 13).
- 19 As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.
- 20 Water Industry Act 1991 s 208(4); Water Resources Act 1991 s 207(4).
- 21 As to the meaning of 'person' see PARA 13 note 29.
- 22 As to the meaning of 'enactment' see PARA 14 note 31.
- 23 Water Industry Act 1991 s 208(5); Water Resources Act 1991 s 207(5).
- 24 As to the meaning of 'contravention' see PARA 20 note 5.
- 25 Water Industry Act 1991 s 208(6); Water Resources Act 1991 s 207(6). The penalty for such an offence is, on conviction on indictment, imprisonment for a term not exceeding two years or a fine, or both: see the Water Industry Act 1991 s 208(6); Water Resources Act 1991 s 207(6). As to offences by bodies corporate see PARA 185. As to fines see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 139 et seq.
- 26 As to the meaning of 'Wales' see PARA 16 note 2.
- 27 *Ie* under the Water Resources Act 1991 s 207.
- 28 The functions of the Secretary of State under the Water Resources Act 1991 s 207 and the Water Industry Act 1991 s 208, so far as exercisable in relation to Wales, were transferred as set out in the text to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 29 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.
- 30 *Ie* under the Water Industry Act 1991 s 208.
- 31 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(i)).
- 32 See the Water Industry Act 1991 s 152(2). As to the meaning of 'Treasury' see PARA 108 note 6.
- 33 *Ie* under the Water Industry Act 1991 s 208.
- 34 Water Industry Act 1991 s 152(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 35). Note that there is no similarly specific provision for payment of grants to the Environment Agency. As to grants to the Agency generally see the Environment Act 1995 s 47; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 93.
- 35 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; Water Act 2003 s 100(2)).

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### **130. General duties of the Secretary of State, the Welsh Ministers and the Water Services Regulation Authority.**

The following provisions have effect for imposing duties on the Secretary of State<sup>1</sup> (or, in certain cases, on the Welsh Ministers<sup>2</sup>) and on the Water Services Regulation Authority<sup>3</sup> as to when and how they should exercise and perform the following powers and duties, that is to say:

- 104 (1) in the case of the Secretary of State or the Welsh Ministers, the powers and duties conferred or imposed on them by virtue of the provisions of the Water Industry Act 1991 relating to the regulation of relevant undertakers<sup>4</sup> and of licensed water suppliers<sup>5</sup>; and
- 105 (2) in the case of the Water Services Regulation Authority, the powers and duties conferred or imposed on the Authority by virtue of any of those provisions, by the provisions relating to the financial conditions of requisitions<sup>6</sup> or by the provisions relating to the movement of certain pipes<sup>7</sup>.

The Secretary of State or the Welsh Ministers, or, as the case may be, the Water Services Regulation Authority must exercise and perform these powers and duties in the manner which they consider is best calculated:

- 106 (a) to further the consumer objective<sup>8</sup>;
- 107 (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales<sup>9</sup>;
- 108 (c) to secure that companies holding appointments<sup>10</sup> as relevant undertakers are able, in particular, by securing reasonable returns on their capital, to finance the proper carrying out of those functions<sup>11</sup>; and
- 109 (d) to secure that the activities authorised by the licence of a licensed water supplier and any statutory functions imposed on it in consequence of the licence are properly carried out<sup>12</sup>.

The Secretary of State or the Welsh Ministers, and the Authority may, in exercising any of the powers and performing any of the duties mentioned in heads (1) and (2) above, have regard to:

- 110 (i) any interests of consumers in relation to electricity conveyed by distribution systems<sup>13</sup>;
- 111 (ii) any interests of consumers in relation to gas conveyed through pipes<sup>14</sup>;
- 112 (iii) any interests of consumers in relation to communications services and electronic communications apparatus<sup>15</sup>,

which are affected by the exercise of that power or the performance of that duty<sup>16</sup>. Subject to heads (a) to (d) above, the Secretary of State or the Welsh Ministers, or, as the case may be, the Authority must exercise and perform the powers and duties mentioned in heads (1) and (2) above in the manner which they consider is best calculated:

- 113 (A) to promote economy and efficiency on the part of companies holding a relevant appointment<sup>17</sup> in the carrying out of the functions of a relevant undertaker<sup>18</sup>;
- 114 (B) to secure that no undue preference is shown, and that there is no undue discrimination in the fixing by such companies of water and drainage charges<sup>19</sup>;
- 115 (C) to secure that consumers are protected as respects benefits that could be secured for them by the application in a particular manner of any of the proceeds of any disposal<sup>20</sup>, whenever made, of any of such a company's protected land<sup>21</sup> or of an interest or right in or over any of that land<sup>22</sup>;
- 116 (D) to ensure that consumers are also protected as respects any activities of such a company which are not attributable to the exercise of functions of a relevant undertaker, or as respects any activities of any person appearing to the Secretary of State or the Welsh Ministers or, as the case may be, the Authority to be connected with the company, and in particular by ensuring that any transactions are carried out at arm's length<sup>23</sup>, that the company, in relation to the exercise of its functions as a relevant undertaker, maintains and presents accounts in a suitable form and manner<sup>24</sup> and that, if the person is a licensed water supplier, its licence does not authorise it to carry on any activities in the area of the company<sup>25</sup>;
- 117 (E) to contribute to the achievement of sustainable development<sup>26</sup>.

In exercising any of the powers or performing any of the duties mentioned in heads (1) and (2) above in accordance with the above provisions<sup>27</sup>, the Secretary of State or the Welsh Ministers, and the Authority must have regard to the principles of best regulatory practice, including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed<sup>28</sup>.

The above provisions<sup>29</sup> do not apply in relation to anything done by the Water Services Regulation Authority in the exercise of Competition Act functions<sup>30</sup>; but the Authority may nevertheless, when exercising any Competition Act function, have regard to any matter in respect of which a duty is imposed by any of those provisions if it is a matter to which the Office of Fair Trading<sup>31</sup> could have regard when exercising that function<sup>32</sup>. Further, the duties imposed by those provisions do not affect the obligation of the Authority or, as the case may be, the Secretary of State or the Welsh Ministers to perform or comply with any other duty or requirement, whether arising under the Water Industry Act 1991 or another enactment, by virtue of any Community obligation or otherwise<sup>33</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Functions of the Secretary of State under the Water Industry Act 1991 s 2 were so far as exercisable in relation to (1) any water or sewerage undertaker whose area is wholly or mainly in Wales; and (2) any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker, transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(1), (2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

3 As to the Water Services Regulation Authority see PARA 109.

4 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

5 Water Industry Act 1991 s 2(1)(a) (amended by the Water Act 2003 s 39(1), (2)). For these purposes, subject to the Water Industry Act 1991 s 2(6A) (see the text to notes 29-30), the reference in s 2(1) to 'the provisions of the Act relating to the regulation of relevant undertakers and of licensed water suppliers' is a

reference to the provisions contained in Pt 2 (ss 6-36) (except s 27A and Sch 3A: see PARAS 115, 117, 119, 124, 125), or in any of ss 37A-37D (see PARAS 321, 322), ss 38, 39 (see PARA 325), ss 39B, 39C (see PARA 323), ss 66B, 66D, 66F-66H (see PARAS 342-345), ss 66K, 66L (see PARA 346), ss 95, 96 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARAS 1014-1015), s 153 (see PARA 176), ss 181, 182 (see PARAS 474, 475), s 192A (see PARA 111), s 192B (see PARA 112), s 195 (see PARA 178), s 195A (see PARA 181) and ss 201-203 (see PARAS 169, 180, 182): s 2(6)(a) (substituted by the Water Act 2003 s 39(1), (6)).

6 The reference in the Water Industry Act 1991 s 2(1) to the 'provisions relating to the financial conditions of requisitions' is a reference to the provisions contained in ss 42, 43, 43A (see PARA 333), s 48 (see PARA 337), s 51C (see PARA 338), ss 99, 100, 100A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARAS 1019-1020): s 2(6)(b) (substituted by the Water Act 2003 s 39(1), (6)).

7 Water Industry Act 1991 s 2(1)(b) (amended by the Water Act 2003 s 36(2)). The reference in the Water Industry Act 1991 s 2(1) to the 'provisions relating to the movement of certain pipes' is a reference to the provisions of s 185 (see PARA 489): s 2(6)(c).

8 Water Industry Act 1991 s 2(2A)(a) (s 2(2A)-(2E) added by the Water Act 2003). The 'consumer objective' is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services: Water Industry Act 1991 s 2(2B) (as so added). For these purposes the Secretary of State or the Welsh Ministers or, as the case may be, the Authority must have regard to the interests of: (1) individuals who are disabled or chronically sick (s 2(2C)(a) (as so added)); (2) individuals of pensionable age (s 2(2C)(b) (as so added)); (3) individuals with low incomes (s 2(2C)(c) (as so added)); (4) individuals residing in rural areas (s 2(2C)(d) (as so added)); and (5) customers of companies holding an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17) (see PARA 137 et seq), whose premises are not eligible to be supplied by a licensed water supplier (s 2(2C)(e) (as so added)); but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer (s 2(2C)(a) (as so added)). For these purposes, premises are not eligible to be supplied by a licensed water supplier if: (a) they are household premises (as defined in s 17C: see PARA 152) (s 2(2D)(a) (as so added)); or (b) the total quantity of water estimated to be supplied to the premises annually for the purposes of s 17D(2) (see PARA 152) is less than the quantity specified therein (s 2(2D)(b) (as so added)). 'Consumers' includes both existing and future consumers; and 'the interests of consumers' means the interests of consumers in relation to: (i) the supply of water by means of a water undertaker's supply system to premises either by water undertakers or by licensed water suppliers acting in their capacity as such; and (ii) the provision of sewerage services by sewerage undertakers: s 2(5A) (added by the Water Act 2003 s 39(1), (5)). As to the meaning of 'person' see PARA 13 note 29. 'Disabled' is not defined for these purposes; as to the definitions of 'disability' and 'disabled person' in the Disability Discrimination Act 1995 see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 511.

9 Water Industry Act 1991 s 2(2A)(b) (as added: see note 8). As to water undertakers' areas see PARA 318.

10 le appointments under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

11 Water Industry Act 1991 s 2(2A)(c) (as added: see note 8).

12 Water Industry Act 1991 s 2(2A)(d) (as added: see note 8).

13 Water Industry Act 1991 s 2(2E)(a) (as added: see note 8). 'Distribution system' means such a system within the meaning of the Electricity Act 1989: see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1041.

14 Water Industry Act 1991 s 2(2E)(b) (as added: see note 8). 'Pipes' means pipes within the meaning of the Gas Act 1986: see **FUEL AND ENERGY**.

15 Water Industry Act 1991 s 2(2E)(c) (as added: see note 8). 'Communications services' and 'electronic communications apparatus' means such systems and apparatus within the meaning of the Communications Act 2003: see **TELECOMMUNICATIONS** vol 97 (2010) PARA 192 et seq.

16 Water Industry Act 1991 s 2(2E) (as added: see note 8).

17 le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

18 Water Industry Act 1991 s 2(3)(a) (s 2(3), (4) substituted by the Water Act 2003 s 39(1), (4)).

19 Water Industry Act 1991 s 2(3)(b) (as substituted: see note 18). For these purposes, references to water and drainage charges are references to any charges in respect of any services provided in the course of the carrying out of the functions of a relevant undertaker (s 2(5)(a)), and amounts of any other description which such an undertaker is authorised by or under any enactment to require any of its customers or potential customers to pay (s 2(5)(b)). As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'customers or potential customers' see PARA 118 note 7. As to water charges see PARA 417 et seq.



20 'Disposal', in relation to land or any interest in or right in or over land, includes the creation of such an interest or right and a disposal effected by means of the surrender or other termination of any such interest or right; and cognate expressions are to be construed accordingly: see the Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1). As to the meaning of 'land' see PARA 14 note 21.

21 'Protected land', in relation to a company holding an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17) (see PARA 137 et seq), means any land which, or any interest or right in or over which: (1) was transferred to that company in accordance with a scheme under the Water Act 1989 Sch 2 (see PARA 108) or, where that company is a statutory water company, was held by that company at any time during the financial year ending with 31 March 1990; (2) is or has at any time on or after 1 September 1989 been held by that company for purposes connected with the carrying out of its functions as a water undertaker or sewerage undertaker, including any functions which for the purposes for which the Water Industry Act 1991 s 217 has effect (see PARA 133 note 5) are taken to be such functions by virtue of s 217(6) or (7); or (3) has been transferred to that company in accordance with a scheme under Sch 2 (see PARA 141) from another company in relation to which that land was protected land when the other company held an appointment under Pt II Ch I: s 219(1). As to the meaning of 'statutory water company' see PARA 134 note 1.

22 Water Industry Act 1991 s 2(3)(c) (as substituted: see note 18).

23 Water Industry Act 1991 s 2(3)(d)(i) (as substituted: see note 18).

24 Water Industry Act 1991 s 2(3)(d)(ii) (as substituted: see note 18).

25 Water Industry Act 1991 s 2(3)(d)(iii) (as substituted: see note 18).

26 Water Industry Act 1991 s 2(3)(e) (as substituted: see note 18).

27 Ie in accordance with the provisions of the Water Industry Act 1991 s 2(1)-(3).

28 Water Industry Act 1991 s 2(4) (as substituted: see note 18).

29 Ie the Water Industry Act 1991 s 2(2A)-(4): see the text to notes 8-28. The provisions of s 2(6A), (6B), (7) (see the text to notes 30-33) also apply to the duties imposed by s 2A: see PARA 113.

30 Water Industry Act 1991 s 2(6A) (added by the Competition Act 1998 s 54(2), Sch 10 para 5(4); and amended by the Water Act 2003 ss 36(2), 39(1), (7)). 'Competition Act functions' are those functions assigned to the Authority by the Water Industry Act 1991 s 31(3) (see PARA 132): s 2(6A) (as so added).

31 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

32 Water Industry Act 1991 s 2(6B) (added by the Competition Act 1998 s 54(2), Sch 10 para 5; and amended by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (2), Water Act 2003 ss 36(2), 39(1), (7), (8)).

33 Water Industry Act 1991 s 2(7) (added by the Water Act 2003 s 39(1), (9)). As to the meaning of 'Community obligation' see the European Communities Act 1972 s 1, Sch 1 Pt II; Interpretation Act 1978 s 5, Sch 1.

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### **131. Determination of disputes by the Water Services Regulation Authority.**

In respect of any dispute which, by virtue of any provision of the Water Industry Act 1991, may be referred to the Water Services Regulation Authority<sup>1</sup> for determination<sup>2</sup>, the practice and procedure to be followed in connection with such reference is such as the Authority considers appropriate<sup>3</sup>. However, the Authority must not determine any such dispute which is the subject of proceedings before, or with respect to which judgment has been given by, any court<sup>4</sup>.

Where the Authority determines any dispute under these provisions it must give reasons for reaching its decision with respect to the dispute<sup>5</sup>. On making such a determination the Authority may include such incidental, supplemental and consequential provision as it considers appropriate, including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the Authority<sup>6</sup>; but in including any provision as to costs or expenses, the Authority must have regard to the conduct and means of the parties and any other relevant circumstances<sup>7</sup>.

A determination by the Authority under these provisions is final<sup>8</sup>. In so far as it includes provision as to costs and expenses<sup>9</sup> it is enforceable as if it were a judgment of a county court<sup>10</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 See the Water Industry Act 1991 s 30A(1) (s 30A added by the Competition and Service (Utilities) Act 1992 s 34; Water Industry Act 1991 s 30A(1)-(4), (6), (7) amended by the Water Act 2003 s 36(2)). The determination referred to is a determination under the Water Industry Act 1991 s 30A: see s 30A(1) (as so added and amended).

3 See the Water Industry Act 1991 s 30A(2) (as added and amended: see note 2).

4 Water Industry Act 1991 s 30A(6) (as added and amended: see note 2).

5 Water Industry Act 1991 s 30A(3) (as added and amended: see note 2).

6 Water Industry Act 1991 s 30A(4) (as added and amended: see note 2). For the purposes of any provision of the Water Industry Act 1991 by or under which power is or may be conferred on any person to recover the expenses incurred by that person in doing anything, those expenses must be assumed to include such sum as may be reasonable in respect of establishment charges or overheads: s 219(6). The Water Resources Act 1991 contains a similar provision: see s 221(5). As to the meaning of 'person' see PARA 13 note 29.

7 Water Industry Act 1991 s 30A(7) (as added and amended: see note 2).

8 See the Water Industry Act 1991 s 30A(5)(a) (as added: see note 2). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

9 In such provision as is mentioned in the Water Industry Act 1991 s 30A(4): see the text to note 6.

10 Water Industry Act 1991 s 30A(5)(b) (as added: see note 2). As to the enforcement of judgements **CIVIL PROCEDURE** vol 12 (2009) PARA 1223 et seq.

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### **132. Water Services Regulation Authority's functions with respect to competition.**

Certain functions of the Office of Fair Trading (the 'OFT') under the Enterprise Act 2002<sup>1</sup> so far as relating to commercial activities connected with the supply of water or the provision of sewerage services<sup>2</sup> are concurrent functions of the Water Services Regulation Authority<sup>3</sup> and the OFT<sup>4</sup>. Before the OFT or the Authority first exercises, in relation to any matter, functions which are so exercisable concurrently, that person<sup>5</sup> must consult the other<sup>6</sup>; and neither the OFT nor the Authority may exercise, in relation to any matter, functions which are exercisable concurrently if functions which are so exercisable have been exercised in relation to that matter by the other<sup>7</sup>. It is the duty of the Authority, for the purpose of assisting the Competition Commission<sup>8</sup> in carrying out an investigation on a reference made to it by the Authority by virtue of the above provisions<sup>9</sup>, to give to the Commission<sup>10</sup>:

- 118 (1) any information<sup>11</sup> which is in the Authority's possession and which relates to matters falling within the scope of the investigation, and which is either requested by the Commission for that purpose or is information which in the Authority's opinion it would be appropriate for that purpose to give to the Commission without any such request<sup>12</sup>; and
- 119 (2) any other assistance which the Commission may require, and which it is within the Authority's power to give, in relation to any such matters<sup>13</sup>;

and the Commission must, for the purposes of carrying out any such investigation, take into account any information so given to it for that purpose<sup>14</sup>.

The Authority is also entitled to exercise, concurrently with the OFT, the functions of the OFT under certain provisions of the Competition Act 1998<sup>15</sup> so far as relating to certain anti-competitive agreements, decisions or concerted practices<sup>16</sup>, and certain conduct which amounts to the abuse of a dominant position in a market<sup>17</sup>, and which relate to commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services<sup>18</sup>.

If any question arises as to whether the above provisions<sup>19</sup> apply to any particular case, that question must be referred to and determined by the Secretary of State<sup>20</sup> or, in relation to Wales, the Welsh Ministers<sup>21</sup>; and no objection is to be taken to anything done under the relevant provisions of the Enterprise Act 2002<sup>22</sup> or of the Competition Act 1998<sup>23</sup> by or in relation to the Authority on the ground that it should have been done by or in relation to the OFT<sup>24</sup>.

Separate provision is made with respect to merger references relating to water enterprises<sup>25</sup>.

<sup>1</sup> The functions under the Enterprise Act 2002 Pt 4 (ss 131-184) (other than ss 166 and 171): see **COMPETITION** vol 18 (2009) PARAS 276-318. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

<sup>2</sup> As to the meaning of 'sewerage services' see PARA 129 note 7.

<sup>3</sup> As to the Water Services Regulation Authority see PARA 109.

<sup>4</sup> Water Industry Act 1991 s 31(2), (2A) (s 31(2), (4) substituted, (2A), (8A) added, by the Enterprise Act 2002 s 168(9) Sch 9 Pt 2 para 19; Water Industry Act 1991 s 31(2), (4), (8A) amended by the Water Act 2003 s

36(2)). So far as necessary for the purposes of, or in connection with, the Water Industry Act 1991 s 31(2), (2A), references in the Enterprise Act 2002 Pt 4 (ss 131-184) to the OFT (including references in provisions of that Act applied by that Part) are to be construed as including references to the Authority (except in ss 166 and 171 and in any other provision of that Act where the context otherwise requires): Water Industry Act 1991 s 31(4) (as so substituted and amended). The Enterprise Act 2002 s 117 (offences of supplying false or misleading information) as applied by s 180 has effect so far as relating to functions exercisable by the Authority by virtue of the Water Industry Act 1991 s 31(2) as if the references in the Enterprise Act 2002 s 117(1)(a) and (2) to the OFT included references to the Authority: Water Industry Act 1991 s 31(8A) (as so added and amended).

5 As to the meaning of 'person' see PARA 13 note 29.

6 Water Industry Act 1991 s 31(5) (s 31(5), (6) substituted by the Enterprise Act 2002 s 168(9), Sch 9 Pt 2 para 19(1), (4); and amended by the Water Act 2003 s 36(2)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

7 Water Industry Act 1991 s 31(6) (as substituted and amended: see note 6).

8 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

9 Ie by virtue of the Water Industry Act 1991 s 31(2): see the text to notes 1-4.

10 Water Industry Act 1991 s 31(7) (amended by the Competition Act 1998 ss 54(2), 74(3), Sch 10 para 5(11), Sch 14 Pt I; SI 1999/506; Water Act 2003 s 36(2)).

11 As to the meaning of 'information' see PARA 117 note 13.

12 Water Industry Act 1991 s 31(7)(a) (s 31(7)(a), (b) amended by the Water Act 2003 s 36(2)).

13 Water Industry Act 1991 s 31(7)(b) (as amended: see note 12).

14 Water Industry Act 1991 s 31(7).

15 Ie functions under the Competition Act 1998 Pt 1 (ss 1-60) (other than ss 31D(1)-(6), 38(1)-(6) and 51): see **COMPETITION** vol 18 (2009) PARA 115 et seq.

16 See the Water Industry Act 1991 s 31(3)(a), (c) (s 31(3) substituted by SI 2004/1261). The agreements, decisions or concerted practices referred to are those of the kind mentioned in the Competition Act 1998 s 2(1) or in the EC Treaty (ie Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973)) art 81(1): see **COMPETITION** vol 18 (2009) PARAS 61 et seq, 116.

17 See the Water Industry Act 1991 s 31(3)(b), (d) (as substituted: see note 16). The conduct referred to is conduct of the kind mentioned in the Competition Act 1998 s 18(1) or in the EC Treaty (ie Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973)) art 82: see **COMPETITION** vol 18 (2009) PARAS 82 et seq, 125. As to the these powers see *Albion Water Ltd v Dwr Cymru Cyfyngedig (Water Services Regulation Authority intervening)* [2008] EWCA Civ 536, [2008] All ER (D) 314 (May).

18 Water Industry Act 1991 s 31(3) (as substituted (see note 16); and amended by the Water Act 2003 s 36(2)). So far as necessary for the purposes of, or in connection with, the provisions of the Water Industry Act 1991 s 31(3), references in the Competition Act 1998 Pt I (ss 1-60) to the OFT are to be read as including a reference to the Authority (except in ss 31D(1)-(6), 38(1)-(6), 51, 52(6), (8) and 54 and in any other provision of that Act where the context otherwise requires): Water Industry Act 1991 s 31(4A) (added by the Competition Act 1998 s 54(2), Sch 10 para 5(8); and amended by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (8)(c); SI 2004/1261; Water Act 2003 s 36(2)).

19 Ie the Water Industry Act 1991 s 31(2) or (3): see the text to notes 1-4, 15-18.

20 As to the Secretary of State see PARA 15 note 1.

21 The functions of the Secretary of State under the Water Industry Act 1991 s 31, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

22     le under the Enterprise Act 2002 Pt 4 (ss 131-184): Water Industry Act 1991 s 31(8)(a) (amended by the Enterprise Act 2002 s 168(9), Sch 9 Pt 2 para 19(1), (5)(b)).

23     le under the Competition Act 1998 Pt I (ss 1-60) (other than ss 31D(1)-(6), 38(1)-(6) and 51): Water Industry Act 1991 s 31(8)(b) (substituted by the Competition Act 1998 s 54(2), Sch 10 para 5(12)).

24     Water Industry Act 1991 s 31(8) (amended by the Deregulation and Contracting Out Act 1994 s 7(2), Sch 2 para 10(4); the Enterprise Act 2002 ss 168(9), 278(1), (2), Sch 9 Pt 2 para 19(1), (5)(a), Sch 25, para 25(1), (8)(d), Sch 26; and the Water Act 2003 s 36(2)).

25     See the Water Industry Act 1991 ss 32-35; and PARAS 150-151.

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### **133. Water Services Regulation Authority's general duty to keep matters under review.**

It is the duty of the Water Services Regulation Authority<sup>1</sup>, so far as it appears to it practicable from time to time to do so, to keep under review the carrying on both in England and Wales<sup>2</sup> and elsewhere of activities connected with the matters in relation to which<sup>3</sup> water undertakers or sewerage undertakers<sup>4</sup> carry out functions<sup>5</sup>, and licensed water suppliers carry on activities authorised by their licences<sup>6</sup>. It is also the duty of the Authority, so far as it appears to it practicable from time to time to do so, to collect information<sup>7</sup> with respect to: (1) the carrying out by appointed companies<sup>8</sup> of the functions of relevant undertakers<sup>9</sup>; or (2) the carrying on by companies holding licences<sup>10</sup> of the activities authorised by their licences<sup>11</sup>; or (3) any company mentioned in head (1) or (2) above<sup>12</sup>, with a view to its becoming aware of, and ascertaining the circumstances relating to, matters with respect to which any power or duty is conferred or imposed on it by or under any enactment<sup>13</sup>.

The Secretary of State<sup>14</sup> may give general directions indicating: (a) considerations to which the Authority should have particular regard in determining the order of priority in which matters are to be brought under review in performing its duty under the above provisions<sup>15</sup>; and (b) considerations to which, in cases where it appears to the Authority that any of its powers<sup>16</sup> are exercisable, it should have particular regard in determining whether to exercise those powers<sup>17</sup>. It is the duty of the Authority to comply with any such directions<sup>18</sup>.

It is also the duty of the Authority, where either it considers it expedient or it is requested by the Secretary of State, or in relation to Wales, the Welsh Ministers acting concurrently with the Secretary of State<sup>19</sup>, or by the Office of Fair Trading<sup>20</sup> to do so, to give information, advice and assistance to the Secretary of State, the Welsh Ministers or the Office of Fair Trading with respect to any matter relating to<sup>21</sup>: (i) the functions of either description of relevant undertaker<sup>22</sup>; or (ii) the carrying out of any such functions by a company holding an appointment as a relevant undertaker<sup>23</sup>; (iii) the activities authorised by retail licences or combined licences<sup>24</sup>; or (iv) the carrying on of any such activities by a company holding any such licence<sup>25</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

3 Water Industry Act 1991 s 27(1) (amended by the Water Act 2003 s 36(2)).

4 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

5 Water Industry Act 1991 s 27(1)(a) (s 27(1)(a), (b) substituted by the Water Act 2003 s 101(1), Sch 8 paras 2, 12(1), (2)). 'Functions', in relation to a relevant undertaker, means the functions of the undertaker under or by virtue of any enactment, and is to be construed subject to the Water Industry Act 1991 s 217: s 219(1). For the purposes of the construction of any enactment which, by reference to the functions of a relevant undertaker, confers any power on or in relation to that undertaker:

12 (1) the functions of every relevant undertaker are to be taken to include joining with or acting on behalf of the Environment Agency, one or more relevant undertakers, or the Agency and one or more other such undertakers, for the purpose of carrying out any works or acquiring any land which at least one of the bodies with which it joins, or on whose behalf it acts, is authorised to carry out or acquire for the purposes of that body's functions under any enactment or of any

function which is taken to be a function of that body for the purposes to which s 217 or the Water Resources Act 1991 s 3 (repealed: see now the Environment Act 1995 s 10; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 80) applies (Water Industry Act 1991 s 217(1), (2) (s 217(2)-(4), (7) amended by the Environment Act 1995 s 120(1), Sch 22 para 124));

- 13 (2) the functions of every relevant undertaker are to be taken to include the protection against pollution: (a) of any waters, whether on the surface or underground, which belong to the Agency or any water undertaker or from which the Agency or any water undertaker is authorised to take water; (b) without prejudice to head (a), of any reservoir which belongs to or is operated by the Agency or any water undertaker or which the Agency or any water undertaker is proposing to acquire or construct for the purpose of being so operated; and (c) of any underground strata from which the Agency or any water undertaker is for the time being authorised to abstract water in pursuance of a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 229 et seq) (Water Industry Act 1991 s 217(1), (3) (as so amended));
- 14 (3) the functions of every relevant undertaker are to be taken to include the furtherance of research into matters in respect of which functions are conferred by or under the Water Industry Act 1991, the other consolidation Acts or the Water Act 1989 on the Agency, on water undertakers or on sewerage undertakers (Water Industry Act 1991 s 217(1), (4) (as so amended));
- 15 (4) the functions of every relevant undertaker are to be taken to include the provision of houses and other buildings for the use of persons employed by that undertaker and the provision of recreation grounds for persons so employed (s 217(1), (5));
- 16 (5) the functions of every water undertaker are to be taken to include the provision of supplies of water in bulk, whether or not such supplies are provided for the purposes of, or in connection with, the carrying out of any other function of that undertaker (s 217(1), (6)); and
- 17 (6) the functions of every water undertaker are to be taken to include the doing of anything in pursuance of any arrangements under the Water Resources Act 1991 s 20 (see PARA 196) between that undertaker and the Agency (Water Industry Act 1991 s 217(1), (7) (as so amended)).

For these purposes, 'the other consolidation Acts' means the Water Resources Act 1991, the Statutory Water Companies Act 1991, the Land Drainage Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991: Water Industry Act 1991 s 206(10) (applied by s 217(8)). Section 217 applies in relation to a new undertaker where the appointment or variation of appointment has not come into force, as if it had done so: see s 10(2)-(4); and PARA 141. As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the Environment Agency see PARA 17. As to the meaning of 'underground strata' see PARA 187 note 5. As to the meaning of 'enactment' see PARA 14 note 31. 'House' means any building or part of a building which is occupied as a dwelling-house, whether or not a private dwelling-house, or which, if unoccupied, is likely to be so occupied: Water Industry Act 1991 s 219(1). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'supply of water in bulk' see PARA 138 note 11. As to compulsory purchase of land by relevant undertakers see PARA 453.

6 Water Industry Act 1991 s 27(1)(b) (as substituted: see note 5). As to the meaning of 'licensed water supplier' see PARA 152. As to licences see PARA 152 et seq.

7 As to the meaning of 'information' see PARA 117 note 13.

8 le appointed under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

9 Water Industry Act 1991 s 27(2)(a).

10 le under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.

11 Water Industry Act 1991 s 27(2)(aa) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 12(1), (3)(a)).

12 Water Industry Act 1991 s 27(2)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 12(1), (3)(b)).

13 Water Industry Act 1991 s 27(2) (amended by the Water Act 2003 s 36(2)).

14 As to the Secretary of State see PARA 15 note 1.

15 Water Industry Act 1991 s 27(3)(a) (s 27(3) amended by the Water Act 2003 s 36(2)).

16 le its powers under the Water Industry Act 1991 Pts II-V (ss 6-154) and Pt VII (ss 192A-207).

17 Water Industry Act 1991 s 27(3)(b) (as amended: see note 15).

18 Water Industry Act 1991 s 27(3) (as amended: see note 15). The Authority's annual report for each year must set out any general directions given by the Secretary of State under s 27(3): see s 192B(3); and PARA 112.

19 This function was originally vested in the National Assembly for Wales but is now exercisable by the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

20 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

21 Water Industry Act 1991 s 27(4) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (7); and the Water Act 2003 s 36(2)). As to the Authority's exercise of certain powers concurrently with the Office of Fair Trading see PARA 132.

22 Water Industry Act 1991 s 27(4)(a).

23 Water Industry Act 1991 s 27(4)(b).

24 Water Industry Act 1991 s 27(4)(c) (s 27(4)(c), (d) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 12(1), (4)). As to the meanings of 'retail licence' and 'combined licence' see PARA 152.

25 Water Industry Act 1991 s 27(4)(d) (as added: see note 24).



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## **(4) WATER UNDERTAKERS**

### **(i) Statutory Water Companies**

#### **134. In general.**

A statutory water company<sup>1</sup> may be appointed as a water undertaker under the Water Industry Act 1991<sup>2</sup>. A statutory water company holding such an appointment as a water undertaker for any area has power to do anything (whether in its area or elsewhere) calculated to facilitate, or conducive or incidental to, the carrying out of its functions<sup>3</sup>. This includes power to acquire and dispose of land<sup>4</sup> and other property, to carry out engineering or building operations<sup>5</sup> whether within its area or elsewhere, and to supply, install, repair and alter water fittings<sup>6</sup>. Any constitutional limitations are thus removed which might otherwise constrain it from carrying out its functions as a water undertaker under the Water Industry Act 1991. Any limits existing before the transfer date<sup>7</sup> on capital, borrowing and dividends, payment of interest, sale of shares or stock, are relaxed<sup>8</sup>. A statutory company may register under the Companies Act 1985 and adopt a memorandum or articles in place of the statutory constitution, but provision is made for cancellation of any resolution for substituting a memorandum and articles on application to the High Court by groups of shareholders or debenture holders<sup>9</sup>. The statutory provisions relating to confidentiality of information and the offence of providing false information<sup>10</sup> have effect in relation to the provisions relating to statutory water companies<sup>11</sup>. Particular provision is made with regard to those companies' powers to issue redeemable stock<sup>12</sup>, the relaxation of restrictions affecting the raising of capital<sup>13</sup>, arrangements and reconstructions<sup>14</sup> and the appointment of directors<sup>15</sup>.

All water undertakers appointed under the Water Industry Act 1991 must be companies and as such have powers and are subject to the duties applicable to all companies<sup>16</sup>.

1 'Statutory water company' means any company which was a statutory water company for the purposes of the Water Act 1973 (repealed) immediately before 1 September 1989: Statutory Water Companies Act 1991 s 15(1); Water Industry Act 1991 s 219(1). See also PARA 108.

2 See the Water Industry Act 1991 ss 6-8; and PARAS 137-139. See also PARA 108 note 4. As to the meaning of 'water undertaker' see PARA 137 note 4.

3 See the Statutory Water Companies Act 1991 s 1(1)(a). Without prejudice to the generality of this power, such a company has power: (1) to provide for any person outside the United Kingdom advice or assistance, including training facilities, as respects any matter in which the company has skill or experience (s 1(2)(a)); (2) to become a member of any body formed for the purpose of promoting the interests of water undertakers or any description of water undertakers (s 1(2)(b)); and (3) to make donations and incur expenditure for the benefit of its officers and employees and in particular to pay, or make provision, whether by contributory or non-contributory schemes or otherwise, for the payment of, pensions, allowances or gratuities to or in respect of any persons who have been or are officers or employees of the company (s 1(2)(c)). 'Functions', in relation to a water undertaker, means the functions of the undertaker under or by virtue of any enactment, and must be construed subject to the Water Industry Act 1991 s 217 (extension of meaning of 'functions' in relation to undertakers: see PARA 133 note 5); Statutory Water Companies Act 1991 s 15(1). 'Enactment' includes an enactment contained in the Statutory Water Companies Act 1991 or in any Act passed after that Act: s 15(1). As to the meaning of 'enactment' generally see PARA 14 note 31.

4 'Disposal', in relation to any land or any interest in or right in or over land, includes the creation of such an interest or right and a disposal effected by means of the surrender or other termination of any such interest or right: Statutory Water Companies Act 1991 s 15(1). As to the meaning of 'land' see PARA 14 note 21.

5 'Engineering or building operations', without prejudice to the generality of that expression, includes: (1) the construction, alteration, improvement, maintenance or demolition of any building or structure or of any reservoir, watercourse, dam, weir, well, borehole or other works; and (2) the installation, modification or removal of any machinery or apparatus: Statutory Water Companies Act 1991 s 15(1). Nothing in s 1 with respect to the carrying out of works is to be construed as conferring any power otherwise than for the purpose of removing such a limitation on the capacity of a statutory water company as would otherwise exist by virtue of the company's constitution: s 1(3). Accordingly, without prejudice to the Water Industry Act 1991 Pt IV (ss 94-141) (sewerage services: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 999 et seq), the Statutory Water Companies Act 1991 s 1 is to be disregarded for the purpose of determining whether a statutory water company is liable, on grounds other than such a limitation as is mentioned in s 1(3), for any act or omission in exercise of a power to carry out works conferred by s 1: s 1(4).

6 See the Statutory Water Companies Act 1991 s 1(1)(b). Water fittings may be supplied to any person to whom the company supplies water, and may be installed, repaired or altered whether or not the fittings were supplied by the company: see s 1(1)(b)(iii). For these purposes, 'supply', in relation to water fittings, has the same meaning as it has in the Consumer Protection Act 1987 Pt II (ss 10-19) by virtue of s 46 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 523): Statutory Water Companies Act 1991 s 1(6). Nothing in s 1 is to be construed as authorising a statutory water company to carry on the business of a manufacturer of water fittings: s 1(5). 'Water fittings' includes pipes (other than water mains), taps, cocks, valves, ferrules, meters, cisterns, baths, water closets, soil pans and other similar apparatus used in connection with the supply and use of water: Water Industry Act 1991 s 93(1); definition applied by the Statutory Water Companies Act 1991 s 15(1). As to the meanings of 'pipe' and 'water main' see PARA 138 note 11. As to the meaning of 'meter' see PARA 337 note 11.

7 1e 1 September 1989: see PARA 108.

8 See the Statutory Water Companies Act 1991 ss 4-8; and note 13.

9 See the Statutory Water Companies Act 1991 ss 11-14; and PARA 135.

10 1e the Water Industry Act 1991 ss 206, 207: see PARAS 183-184.

11 See the Statutory Water Companies Act 1991 s 16.

12 Every statutory water company which has created or issued any redeemable stock or has authority to create and issue any stock may from time to time issue, so as to be redeemable, any stock created by it or any redeemed stock: Statutory Water Companies Act 1991 s 2(1), (2). No redeemed stock may, however, be so issued except for the purpose of effecting the redemption of redeemable stock under s 3 unless the issue is authorised by a resolution of a general meeting of the company: s 2(3). No new stock may be created, nor may any redeemed stock be issued by a statutory water company, so as to make the total amount of any particular class of stock exceed the amount of stock of that class which the company is for the time being authorised to create except during an interval of three months between the creation or, in the case of redeemed stock, the issue of the stock, and the completion of the redemption of redeemable stock for the purpose of redeeming which the stock of that particular class is proposed to be created or issued: s 2(4). Where any preference stock is created or issued by a statutory water company as mentioned in s 2(4), the amount raised by means of that stock is deemed, for the purposes of any enactment, statutory order or resolution regulating the borrowing powers of the company, not to have been raised during any such interval as is so mentioned: s 2(5). 'Redeemable stock' means stock issued so as to be redeemable; and 'stock' means preference stock or debenture stock; 'preference stock' includes preference shares; 'issue' includes reissue; and 'redeemed stock' means redeemable stock which has been redeemed and is available for issue under the provisions of s 2 or s 3: s 2(6).

Redeemable stock issued by such a company bears such rate of dividend or interest, and is redeemable at such time, in such manner and subject otherwise to such terms and conditions, as the company may have determined before issuing the stock: s 3(1). The terms and conditions of redemption upon which any redeemable stock is issued by such a company must be stated in any offer by the company of any of the stock for sale and in every certificate of the stock, and a term or condition which is not so stated is not binding upon the holder of the stock: s 3(2). Redeemable stock may be redeemed either by paying off the stocks or by issuing, to an assenting holder of the stock, other stock in substitution for the redeemable stock, and for the purpose of raising money to pay off, or of providing stock in substitution for, any redeemable stock, a company to which these provisions apply may create new stock or issue redeemed stock, in either case so as to be redeemable or irredeemable as the company thinks fit; these powers are, however, subject to s 2(4), (5) (see above): s 3(3). Such a company may not redeem any redeemable stock out of revenue but any discount allowed on the issue of redeemable stock, or any premium payable on redemption, may be written off out of revenue: s 3(4). The redemption by such a company of any preference stock issued so as to be redeemable does not affect the validity of any mortgage or of any debenture stock if the grant or issue of the mortgage or debenture stock by the company was lawful in the circumstances existing at the date of the grant or issue: s 3(5).

13 Subject to the Statutory Water Companies Act 1991 ss 4(2)-(8), 5, so much of any provision contained in any local statutory provision, or having effect by virtue of anything done under any relevant provision, as imposes any specified limit or otherwise relates to any such limit has effect subject to such modifications as may be approved by special resolution of the company: s 4(1). 'Local statutory provision' means: (1) a provision of a local Act, including an Act confirming a provisional order; (2) a provision of so much of any public general Act as has effect with respect to a particular area, with respect to particular persons or works or with respect to particular provisions falling within any of the heads in this definition; (3) a provision of an instrument made under any provision falling within head (1) or (2) above; and (4) a provision of any other instrument which is in the nature of a local enactment: s 15(1). 'Relevant provision' means s 3(1) (see note 12), the Water Act 1945 s 41(5) (repealed), the provisions of the Statutory Companies (Redeemable Stock) Act 1915 (see **COMPANIES** vol 15 (2009) PARA 1684) or any local statutory provision: Statutory Water Companies Act 1991 s 4(8). Section 4 applies, in relation to a statutory water company, to the following limits, whether they are expressed by reference to a specified sum or percentage or by reference to the respective proportions of, or of different descriptions of, capital raised and sums borrowed or to any other matter, ie a limit: (a) on the amount of capital, or of capital of a particular description, that may be raised by the company; (b) on the amount that may be borrowed, or borrowed in a particular way or in particular circumstances, by the company; and (c) on the dividends payable on shares or stock in the company, or on shares or stock of a particular description: s 4(2).

Where, however, there is a division of the shares or stock of a statutory water company into different classes, no modification of a limit falling within head (c) above has effect unless a consent to or approval of the modification has been given in respect of each class the rights attached to which are varied in consequence of the modification (s 4(3)); and where this restriction applies in relation to a modification specified in a resolution passed for these purposes, the holders of not less in the aggregate than 15% in nominal value of the issued shares or stock of any class of shares or stock of the company who have not consented to the modification or voted in favour of any resolution for the modification may apply to the High Court to have the modification cancelled (s 5(1)). Such an application may be made on behalf of the shareholders or stockholders entitled to make it by such one or more of their number as they may appoint in writing for the purpose, but may not be made in relation to any modification more than 21 days after the date of the giving of the last consent or approval to the modification to be given for the purposes of s 4(1) or (3): s 5(2). Where such an application is made, the modification to which it relates has no effect unless and until it is confirmed by the court: s 5(3)(a). After hearing the applicant and any other persons who apply to be heard and appear to the court to be interested in the application, the High Court may disallow the modification if satisfied that, having regard to all the circumstances of the case, the variation would unfairly prejudice the shareholders or stockholders of the class represented by the applicant, and must confirm it if not so satisfied: s 5(3)(b). The decision of the High Court on the application is final: s 5(4). A consent or approval is given for the purposes of s 4(3) if: (i) consent in writing to the modification has been given by not less than three quarters, in nominal value, of the members of the company holding shares or stock of that class; or (ii) a resolution approving the modification is passed by not less than three quarters, in nominal value, of the members of the company holding shares or stock of that class who are present, whether in person or by proxy, at a meeting of which not less than 21 days' notice, specifying the intention to propose the resolution, has been duly given: s 4(4). For the purpose of determining whether these requirements are satisfied in relation to any two or more classes of shares or stock in a statutory water company, it is immaterial that consents and approvals have been given in respect of different classes in accordance with different heads of s 4(4) above: s 4(5). Provision having effect by virtue of a resolution passed in accordance with s 4 may be modified by a subsequent such resolution: s 4(6). The modifications that may be so made do not, however, include, in the case of a limit falling within head (a) above, any modification having the effect of reducing the authorised share capital, or the authorised capital stock, of the statutory water company in question: s 4(7). 'Modifications' includes additions, alterations and omissions, and in relation to any provision imposing a limit to which s 4 applies in relation to any statutory water company, the removal of that limit and the replacement of that provision with a provision imposing a different such limit in relation to that company; and cognate expressions are to be construed accordingly: s 15(1). 'Special resolution', in relation to a statutory water company, means a resolution passed by a majority of not less than three quarters of such of the members of the company as, being entitled to do so, vote, whether in person or by proxy, at a meeting of the company of which not less than 21 days' notice, specifying the intention to propose the resolution, has been duly given: s 4(8).

Nothing in so much of any local statutory provision as imposes a requirement as to the rate of interest at which sums may be borrowed by a statutory water company or as to the rate at which interest on sums so borrowed is to be paid applies in relation to any borrowing by a statutory water company after 31 August 1989: s 6. For these purposes, references to a local statutory provision do not include a reference to any provision contained in any enactment or instrument passed or made on or after 1 September 1989: s 15(3). Notwithstanding the provisions of any local statutory provision, every statutory water company has power to form and maintain reserve and contingency funds by setting apart such sums in such circumstances, and to invest those funds in such manner, as it thinks fit; but this does not authorise any failure by such a company to meet any obligation imposed on it by virtue of any local statutory provisions to pay any sum to any other person: s 7(1), (2). Nothing in any local statutory provision has effect: (A) so as to impose a limit on the amount that may be carried forward at the end of any period to the credit of the profit and loss (net revenue) account of a statutory water company (s 7(3)); (B) so as to require any shares or stock in a statutory water company to be offered for sale to the public

(s 8(a)); or (c) so as to require any offer for the sale of any such shares or stock to be an offer for sale by auction or tender (s 8(b)).

14 The statutory provisions relating to company arrangements and reconstructions (ie the Companies Act 2006 Pt 26 (ss 895-901): see **COMPANIES** vol 15 (2009) PARA 1425 et seq) have effect in relation to statutory water companies that are not limited companies with such modifications as may be prescribed by regulations made by the Secretary of State or, so far as this power to make regulations is exercisable in relation to Wales, by the Welsh Ministers: Statutory Water Companies Act 1991 s 9(1) (amended by SI 2008/948). For these purposes, 'limited company' means a company within the meaning of the Companies Act 1985 (see **COMPANIES** vol 14 (2009) PARA 1) which is limited by shares: Statutory Water Companies Act 1991 ss 9(3), 15(1). The Water Industry Act 1991 s 213 (procedure for making regulations and supplemental powers: see PARA 21) applies in relation to the making of such regulations as it applies in relation to the making of regulations under that Act: Statutory Water Companies Act 1991 s 9(2). As to the regulations made see the Companies Act 1985 (Modifications for Statutory Water Companies) Regulations 1989, SI 1989/1461, which have effect under these provisions by virtue of the Water Consolidation (Consequential Provisions) Act 1991 Sch 2 Pt I para 1(1), (2). All the functions of the Secretary of State under the Statutory Water Companies Act 1991, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

15 Any person employed as chief engineer, general manager or secretary of a statutory water company may be appointed, either by the directors or in the manner provided by the Companies Clauses Consolidation Act 1845 (see **COMPANIES** vol 15 (2009) PARA 1845 et seq), a director of the company, whether or not he is a shareholder of the company: Statutory Water Companies Act 1991 s 10(2). This provision applies notwithstanding anything in the Companies Clauses Consolidation Act 1845 as applied to any company, but subject to any provision of a memorandum and articles having effect by virtue of an order under the Statutory Water Companies Act 1991 s 12 (see PARA 135) and to any modification of any such memorandum and articles: s 10(1). 'Memorandum and articles' means a document containing only such provision as may be contained in a memorandum and articles of association registered under the Companies Act 1985: Statutory Water Companies Act 1991 s 15(1). No appointment may, however, be so made if it would increase the number of the directors of the company in question beyond the maximum number prescribed by any provision of any enactment or statutory order relating to the company; and not more than one director of the company may hold office by virtue of these provisions at the same time: s 10(3). A person so appointed does not cease to be a director by reason that he is employed as mentioned in s 10(2); but, if he was appointed by the directors, he ceases to be a director as from the date of the next ordinary general meeting of the company unless his appointment is approved at that meeting by a majority of the votes of the proprietors of the company entitled to vote or voting, whether personally or by proxy, at the meeting: s 10(4). The provisions of the Companies Clauses Consolidation Act 1845 requiring directors to retire by rotation have effect as if a person so appointed were not a director: Statutory Water Companies Act 1991 s 10(5).

16 See the Water Industry Act 1991 s 7(1); and PARA 137. By virtue of being a company the present water companies have powers which were not available to the former water authorities. As a creation of statute, the water authorities only had the powers given to them by statute; therefore some of the statutory powers given to water authorities (eg power to sell land) are not required by the present water undertakers. See generally **COMPANIES**. The power of the former water authorities to employ officers and other staff was not expressly conferred on them but it was essential to the carrying out of those authorities' functions and so was necessarily implied by the Water Act 1973 s 2(8), Sch 3 para 2(1) (repealed). As to the transfer of the former water authorities' property, rights, liabilities and functions to successor companies see PARA 108.

## UPDATE

### 134 In general

NOTE 14--Statutory Water Companies Act 1991 s 9(3) amended: SI 2009/1941.

NOTE 15--Statutory Water Companies Act 1991 s 10(1) amended: SI 2009/1941.  
Definition of 'memorandum and articles' omitted: SI 2009/1941.

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### **135. Conversion of statutory water companies.**

Statutory water companies<sup>1</sup> may register under the Companies Act 1985<sup>2</sup>.

A statutory water company holding an appointment as a water undertaker<sup>3</sup> may propose by special resolution<sup>4</sup>, whether before or after becoming a registered water company, that provision contained in a memorandum and articles<sup>5</sup> is to have effect in substitution for certain local statutory provisions<sup>6</sup> in which provision for the constitution and regulation of the company is contained or would otherwise be contained if the company became a registered water company<sup>7</sup>. Where such a proposal has been approved by order<sup>8</sup> made by the Secretary of State or, in relation to Wales, by the Welsh Ministers<sup>9</sup> and, in the case of a company that has not already done so, the company becomes a registered water company<sup>10</sup>, those local statutory provisions cease to have effect on the date specified or described for these purposes in the order and the proposed memorandum and articles come into force on that date, subject to any modifications<sup>11</sup>, terms or conditions contained in any order which may be made by the High Court<sup>12</sup> on a review of the special resolution in question<sup>13</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may not make an order approving such a proposal unless it appears to them:

- 120 (1) that neither an application to the High Court<sup>14</sup> with respect to the company's proposal nor an appeal with respect to the subject matter of such an application is pending and that the period within which any such application or appeal may be made or brought has expired<sup>15</sup>; and
- 121 (2) where there is a division of the shares or stock of the company into different classes and such a proposed difference between the memorandum and articles and the local statutory provisions which they will replace as will vary the rights attached to any such class, that a consent to, or approval of, the difference has been given<sup>16</sup> in respect of each class the rights attached to which would be varied if the order were made<sup>17</sup>.

Where the Secretary of State or, in relation to Wales, the Welsh Ministers, has made such an order in relation to any company, nothing in the statutory provisions relating to such a company's powers and finances<sup>18</sup> has effect on or after the date specified or described in the order so as to confer powers in relation to the company in addition to those conferred by virtue of its memorandum and articles<sup>19</sup>. On and after that date, the memorandum and articles which come into force by virtue of the order have effect<sup>20</sup> as if they were the company's registered memorandum and articles<sup>21</sup> and the company must, before the end of the period of 15 days beginning with the day after that date, deliver to the registrar of companies<sup>22</sup> a printed copy of the memorandum and articles which have so come into force<sup>23</sup>.

The Secretary of State has or, in relation to Wales, the Welsh Ministers, also have power, where it appears to him or them to be appropriate to do so for the purposes of, or in consequence of, the approval contained in an order made under the above provisions, to repeal or amend by order any local statutory provision<sup>24</sup>.

1 As to the meaning of 'statutory water company' see PARA 134 note 1.

2 See the Statutory Water Companies Act 1991 s 11. The Companies Act 1985 Pt XXII Ch II (ss 680-690) has effect in relation to such companies as if: (1) any reference therein to a joint stock company included a reference to such a statutory water company as would not otherwise fall to be treated as a joint stock company for those purposes; and (2) any reference therein to an Act of Parliament included a reference to a local statutory provision which is not contained in an Act of Parliament: Statutory Water Companies Act 1991 s 11(1). As to the meaning of 'local statutory provision' see PARA 134 note 13. However, nothing in the Companies Act 1985, the Water Act 1989, the Water Industry Act 1991 or the Statutory Water Companies Act 1991 is to be construed as requiring a statutory water company to which a certificate has been issued under the Companies Act 1985 s 688 (certificates of registration under Pt XXII Ch II) to be treated for the purposes of those Acts or for any other purposes as if it had been a different person in law before the issue of the certificate: Statutory Water Companies Act 1991 s 11(2). As to the meaning of 'person' see PARA 13 note 29.

3 Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

4 'Special resolution' means, in relation to a time: (1) after the company in question has become a registered water company, a special resolution as defined in the Companies Act 2006 s 283 (see **COMPANIES** vol 14 (2009) PARA 614); and (2) before that company becomes a registered water company, a special resolution within the meaning of the Statutory Water Companies Act 1991 s 4 (see PARA 134 note 13), but in each case subject to s 13(2) (see PARA 136 note 7): s 12(8) (definition amended by SI 2007/2194). A reference to a company's becoming a registered water company is a reference to the issue to that company, whether before, or on or after 1 September 1989, of a certificate under the Companies Act 1985 s 688: Statutory Water Companies Act 1991 s 15(1), (2).

5 As to the meaning of 'memorandum and articles' see PARA 134 note 15.

6 Ie local statutory provisions having effect in accordance with the Companies Act 1985 Sch 21 para 5 (enactments to have effect as if contained in memorandum and articles): Statutory Water Companies Act 1991 s 12(1)(a)(i).

7 See the Statutory Water Companies Act 1991 s 12(1)(a), (b).

8 The power to make such an order is exercisable by statutory instrument subject, in the case of an order of the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Statutory Water Companies Act 1991 s 12(7). As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the Secretary of State see PARA 15 note 1.

9 Statutory Water Companies Act 1991 s 12(1)(c). All the functions of the Secretary of State under the Statutory Water Companies Act 1991, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

10 Statutory Water Companies Act 1991 s 12(1)(d).

11 As to the meaning of 'modifications' see PARA 134 note 13.

12 Ie under the Statutory Water Companies Act 1991 s 13: see PARA 136.

13 Statutory Water Companies Act 1991 s 12(1).

14 Ie under the Statutory Water Companies Act 1991 s 13: see PARA 136.

15 Statutory Water Companies Act 1991 s 12(2)(a).

16 A consent or approval is so given in respect of a class of shares or stock if: (1) consent in writing to the proposal has been given by the holders of not less than three quarters, in nominal value, of the issued shares or stock of that class; or (2) a special resolution approving the proposal is passed at a separate general meeting of holders of shares or stock of that class: Statutory Water Companies Act 1991 s 12(3) (amended by SI 2007/2194).

17 Statutory Water Companies Act 1991 s 12(2). For the purpose of determining whether the requirements specified in head (2) in the text are satisfied in relation to any two or more classes of shares or stock in a company, it is immaterial that consents and approvals have been given in respect of different classes in accordance with different heads of s 12(3) (see note 16): s 12(4).

- 18    le nothing in the Statutory Water Companies Act 1991 ss 1-8: see PARA 134.
- 19    Statutory Water Companies Act 1991 s 12(5)(a).
- 20    le in accordance with the Companies Act 1985 s 14 and the other provisions of that Act.
- 21    Statutory Water Companies Act 1991 s 12(5)(b).
- 22    For these purposes, 'registrar of companies' has the same meaning as in the Companies Act 1985: Statutory Water Companies Act 1991 s 12(8).
- 23    Statutory Water Companies Act 1991 s 12(5)(c). The Companies Act 1985 s 6(3) (penalty for default in delivering documents to the registrar of companies) applies in relation to the obligation so imposed as it applies in relation to the obligations imposed by s 6(1) of that Act: Statutory Water Companies Act 1991 s 12(6).
- 24    Statutory Water Companies Act 1991 s 14(1). The power to make such an order is exercisable by statutory instrument subject, in the case of an order of the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 14(2). Such an order may make different provision for different cases, including different provision in relation to different persons, circumstances or localities; and may contain such supplemental, consequential and transitional provision as the Secretary of State, or as the case may be, the Welsh Ministers considers appropriate: s 14(3). As to the procedure for orders made by the Welsh Ministers see note 8.

## UPDATE

### 135 Conversion of statutory water companies

NOTE 2--Reference to Companies Act 1985 Pt XXII Ch II now to Companies Act 2006 Pt 33 Ch 1 (ss 1040-1042) (see **COMPANIES** vol 14 (2009) PARA 33); reference to Companies Act 1985 now to Companies Act 2006 Pt 33 Ch 1; and reference to a statutory water company to which a certificate has been issued under the Companies Act 1985 s 688 now to a statutory water company registered under the Companies Act 2006 s 1040 (see **COMPANIES** vol 14 (2009) PARA 33): Statutory Water Companies Act 1991 s 11(1), (2) (s 11(1) amended, s 11(2) substituted, by SI 2009/1941).

TEXT AND NOTES 3-13--Statutory Water Companies Act 1991 s 12(1) amended: SI 2009/1941.

NOTE 4--Reference to a certificate under the Companies Act 1985 s 688 now to a certificate of registration under the Companies Act 2006 Pt 33 Ch 1 or corresponding earlier provision: Statutory Water Companies Act 1991 s 15(1), (2) (amended by SI 2009/1941).

NOTE 6--Reference is now to local statutory provisions having effect in accordance with regulations made under the Companies Act 2006 s 1042 (see **COMPANIES** vol 14 (2009) PARA 33) as if contained in the company's articles: Statutory Water Companies Act 1991 s 12(1)(a)(i) (amended by SI 2009/1941).

TEXT AND NOTES 14-17--Statutory Water Companies Act 1991 s 12(2) amended: SI 2009/1941.

TEXT AND NOTES 18-23--Statutory Water Companies Act 1991 s 12(5) amended: SI 2009/1941.

NOTE 20--Now in accordance with the Companies Act 2006 s 33 (see **COMPANIES** vol 14 (2009) PARA 243) and the other provisions of the Companies Act 2006: Statutory Water Companies Act 1991 s 12(5)(b) (amended by SI 2009/1941).

NOTE 22--'Registrar of companies' now means the registrar of companies for England and Wales (see **COMPANIES** vol 14 (2009) PARA 131 et seq): Statutory Water Companies Act 1991 s 12(8) (definition amended by SI 2009/1941).

NOTE 23--Reference to Companies Act 1985 s 6(3) now to Companies Act 2006 s 26(3), (4) (see **COMPANIES** vol 14 (2009) PARA 236) and reference to Companies Act 1985 s 6(1) now to Companies Act 2006 s 26(1): Statutory Water Companies Act 1991 s 12(6) (substituted by SI 2009/1941).



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### **136. Review by the High Court.**

Where a special resolution has been passed containing a proposal in relation to a statutory water company<sup>1</sup> for a memorandum and articles<sup>2</sup> to have effect in substitution for certain local statutory provisions<sup>3</sup>, an application for the resolution to be cancelled may be made to the High Court<sup>4</sup>. Such an application may not be made by any person<sup>5</sup> who has consented to, or voted in favour of, the proposal<sup>6</sup> but, subject to this, may be made on behalf of the persons entitled to make it<sup>7</sup> by such one or more of their number as they may appoint in writing for the purpose<sup>8</sup>.

On such an application the High Court has one or more of the following powers, namely power:

- 122 (1) to make an order, on such terms and conditions as it thinks fit, cancelling the resolution to which the application relates or confirming the proposal contained in that resolution either subject to such modifications of the proposed memorandum and articles as may be specified in the order or without modifications<sup>9</sup>;
- 123 (2) if it thinks fit, to adjourn the proceedings in order that arrangements may be made to the court's satisfaction for the purchase of the interests of dissentient members or for the payment of compensation to such members<sup>10</sup>;
- 124 (3) to give such directions and make such orders as it thinks expedient for facilitating or carrying into effect any such arrangement<sup>11</sup>; and
- 125 (4) to require that provision contained in any memorandum and articles, as confirmed by the court, is not at any time to be modified in the respects specified in the court's order except with the leave of the court<sup>12</sup>.

On such an application, the High Court may not confirm any proposal in so far as it incorporates such an alteration of a company's objects as could not be made under the relevant statutory provision<sup>13</sup> if the company were entitled to alter its objects thereunder<sup>14</sup>.

1 As to the meaning of 'statutory water company' see PARA 134 note 1.

2 As to the meaning of 'memorandum and articles' see PARA 134 note 15.

3 To have effect as mentioned in the Statutory Water Companies Act 1991 s 12(1): see PARA 135. As to the meaning of 'local statutory provision' see PARA 134 note 13.

4 Statutory Water Companies Act 1991 s 13(1). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Statutory Water Companies Act 1991 s 13(1). It is immaterial whether that person did so for the purposes of s 12(1) or s 12(2)(b) (see PARA 135): see s 13(1).

7 The following persons are entitled to make such an application: (1) the holders of not less in the aggregate than 15% in nominal value of the company's issued share capital or issued stock (Statutory Water Companies Act 1991 s 13(1)(a)); (2) the holders of not less in the aggregate than 15% in nominal value of the issued shares or stock of any class in respect of which a consent to, or approval of, the proposal to which the resolution relates is required for the purposes of s 12(2)(b) (see PARA 135) (s 13(1)(b)); or (3) if the resolution incorporates a modification of the company's objects, the holders of not less than 15% of such of the company's debentures as entitle the holders to object to such a modification (s 13(1)(c)). The debentures so entitling the holders to object to a modification of the company's objects are any debentures secured on the company's undertaking

which were issued, or first issued, before 6 July 1989, or form part of the same series as any debentures so issued but have been issued on or after that date; and 'debentures' has the same meaning as in the Companies Act 1985: Statutory Water Companies Act 1991 s 13(7). As to the meaning of 'modifications' see PARA 134 note 13.

In the case of such a special resolution for the purposes of s 12(1) (see PARA 135) as incorporates a modification of the company's objects: (a) notice must be given to the holders of debentures entitling the holders to object under s 13 to a modification of the company's objects; (b) that notice must in the case of a written resolution, be given no later than the last day on which copies of the resolution are sent or submitted to members of the company, and in the case of a resolution to be proposed at a meeting, be the same notice as is given for the purposes of the resolution to members of the company; and (c) in the absence of any local statutory provision regulating the giving of that notice, that notice must be given in accordance with the provisions regulating the giving of the notice to the members: s 13(2) (amended by SI 2007/2194). As to the meanings of 'written' and 'writing' see PARA 22 note 1.

8 Statutory Water Companies Act 1991 s 13(3)(a). The application may not be made in relation to any special resolution more than 21 days after the date of the last resolution, consent or approval to be passed or given for the purposes of s 12(1)(b) or (2)(b) (see PARA 135) or for the purposes, in connection with the company's becoming a registered water company, of the Companies Act 1985 s 681 (procedural requirements for registration): Statutory Water Companies Act 1991 s 13(3)(b).

9 Statutory Water Companies Act 1991 s 13(4)(a).

10 Statutory Water Companies Act 1991 s 13(4)(b).

11 Statutory Water Companies Act 1991 s 13(4)(c). Without prejudice to the powers so conferred, an order of the High Court under s 13 may, if the court thinks fit, provide for the purchase by a company of the shares or stock of any members of the company and the reduction accordingly of the company's capital; and an order which so provides may not confirm a proposal for a memorandum and articles to have effect in substitution for any local statutory provisions except subject to such modifications, if any, as may be required in consequence of that purchase and reduction: s 13(5).

12 Statutory Water Companies Act 1991 s 13(4)(d).

13 In the Companies Act 1985 s 4 (alteration of objects).

14 Statutory Water Companies Act 1991 s 13(6).

## UPDATE

### 136 Review by the High Court

TEXT AND NOTES 1-8--Reference to 'a memorandum and articles' now to 'articles of association': Statutory Water Companies Act 1991 s 13(1) (amended by SI 2009/1941).

NOTE 7--Statutory Water Companies Act 1991 s 13(7) amended: SI 2009/1941.

NOTE 8--Reference to the Companies Act 1985 s 681 now to regulations under the Companies Act 2006 s 1042 (see **COMPANIES** vol 14 (2009) PARA 33): Statutory Water Companies Act 1991 s 13(3)(b) (amended by SI 2009/1941).

TEXT AND NOTES 9, 12--Reference to 'a memorandum and articles' now to 'articles': Statutory Water Companies Act 1991 s 13(4)(a), (d) (amended by SI 2009/1941).

NOTE 11--Reference to 'a memorandum and articles' now to 'articles of association': Statutory Water Companies Act 1991 s 13(5) (amended by SI 2009/1941).

TEXT AND NOTES 13, 14--Repealed: SI 2009/1941.

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## **(ii) Relevant Undertakers**

### **A. MAKING OF APPOINTMENTS**

#### **137. Appointment of relevant undertakers.**

A company may be appointed<sup>1</sup> by the Secretary of State<sup>2</sup>, or, with his consent or in accordance with a general authorisation given by him, by the Water Services Regulation Authority<sup>3</sup>, to be the water undertaker or sewerage undertaker<sup>4</sup> for any area of England<sup>5</sup>. Water undertakers must be limited companies or statutory water companies<sup>6</sup>, and sewerage undertakers must be limited companies<sup>7</sup>. A company may not be appointed to be a relevant undertaker<sup>8</sup> if it is a licensed water supplier<sup>9</sup>.

The appointment of a company as a relevant undertaker is made by service on the company of an instrument in writing<sup>10</sup> containing the appointment and describing the area for which it is made<sup>11</sup>. A single instrument may contain the appointment of a company to be both the water undertaker for an area and the sewerage undertaker for the whole or any part of that area, or for an area which includes the whole or any part of that area<sup>12</sup>. As soon as practicable after making such an appointment, the Secretary of State must send a copy of the appointment to the Water Services Regulation Authority<sup>13</sup>.

Without prejudice to the obligation of a company holding any such appointment to comply with the conditions of its appointment<sup>14</sup>, the appointment of a company to be the water undertaker or sewerage undertaker for any area has the effect, while the appointment remains in force:

- 126 (1) of requiring the company to perform any statutory duty imposed by or under any enactment<sup>15</sup> on such an undertaker<sup>16</sup>;
- 127 (2) of authorising the company, for the purposes of or in connection with the carrying out of any of the functions<sup>17</sup> of such an undertaker, to exercise any power conferred by or under any enactment on an undertaker of that description<sup>18</sup>;
- 128 (3) of requiring enactments and subordinate legislation<sup>19</sup> authorising or requiring anything to be done in relation to an undertaker of the relevant description to be construed as authorising or requiring that thing to be done in relation to that company<sup>20</sup>; and
- 129 (4) of requiring other references in any enactment or subordinate legislation to an undertaker of the relevant description, or to the area of that undertaker, to be construed, so far as necessary for the purposes of, or in connection with, the carrying out by that company of the functions of an undertaker of that description, as references to that company or to that area<sup>21</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales<sup>22</sup>.

<sup>1</sup> The Water Industry Act 1991 s 6(1) is expressed to be subject to the following provisions of Pt II Ch I, ie ss 7-17 (see note 5 and PARA 138 et seq): s 6(1).

2 Water Industry Act 1991 s 6(1)(a). As to the Secretary of State see PARA 15 note 1. As to the transfer of the functions of the Secretary of State to the Welsh Ministers see the text to note 22. As to the exercise by the Secretary of State of his powers and duties relating to the regulation of undertakers see s 2; and PARA 130.

3 Water Industry Act 1991 s 6(1)(b) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see s 2; and PARA 130.

4 The terms 'water undertaker' and 'sewerage undertaker' are not defined in the Water Industry Act 1991. However, in any Act, 'water undertaker' and 'sewerage undertaker', in relation to England and Wales, are to be construed in accordance with the Water Industry Act 1991 s 6: see the Interpretation Act 1978 s 5, Sch 1 (definitions substituted by the Water Act 1989 s 190, Sch 25 para 55; and amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1, paras 3, 32). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to sewerage undertakers see further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 999 et seq.

5 Water Industry Act 1991 s 6(1). It is the duty of the Secretary of State to secure that such appointments are made as will ensure that for every area of England there is at all times both: (1) a company holding an appointment under Pt II Ch II (ss 6-17) as water undertaker (s 7(1)(a)); and (2) whether or not the same company in relation to the whole or any part of that area, a company holding an appointment as sewerage undertaker (s 7(1)(b)). As to the power to terminate an appointment or vary an appointee's area, and as to replacement appointments, see PARA 138. As to the duty of water and sewerage undertakers to furnish information to the Secretary of State see PARA 182. As to the functions and duties of water undertakers see further PARA 453 et seq; and as to the functions and duties of sewerage undertakers see further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 999 et seq.

6 As to the meaning of 'statutory water company' see PARA 134 note 1.

7 See the Water Industry Act 1991 s 6(5). 'Limited company' means a company within the meaning of the Companies Act 1985 which is limited by shares: Water Industry Act 1991 s 219(1). As to companies limited by shares see **COMPANIES** vol 14 (2009) PARA 102.

8 'Relevant undertaker' means a water undertaker or sewerage undertaker: Water Industry Act 1991 s 219(1).

9 Water Industry Act 1991 s 6(5A) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 3). As to the meaning of 'licensed water supplier' see PARA 152.

10 As to the service of documents see PARA 22. As to the meaning of 'writing' see PARA 22 note 1.

11 Water Industry Act 1991 s 6(3). The instruments of appointment of water undertakers and sewerage undertakers are available on the Water Services Regulation Authority website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

12 Water Industry Act 1991 s 6(4). In practice the areas are not co-extensive as they are based on the areas of the former water authorities for water supply and sewerage functions. As to areas of appointment in relation to water supply see PARA 318.

13 Water Industry Act 1991 s 6(6) (amended by the Water Act 2003 s 36(2)).

14 An appointment may contain such conditions as appear to the Secretary of State or the Water Services Regulation Authority to be requisite or expedient: see Water Industry Act 1991 s 11(1)(a); and PARA 142. If an undertaker contravenes a condition of its appointment the Secretary of State or the Authority (whichever is the enforcing authority) may set in motion the enforcement procedure under s 18: see PARA 163.

15 As to the meaning of 'enactment' see PARA 14 note 31.

16 Water Industry Act 1991 s 6(2)(a).

17 As to the meaning of 'functions' see PARA 133 note 5.

18 Water Industry Act 1991 s 6(2)(b).

19 As to the meaning of 'subordinate legislation' see PARA 21 note 36.

20 Water Industry Act 1991 s 6(2)(c).

21 Water Industry Act 1991 s 6(2)(d).

22 The functions of the Secretary of State under the Water Industry Act 1991 ss 6, 7 were so transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the exercise by the Welsh Ministers of their powers and duties relating to the regulation of undertakers see s 2; and PARA 130.

## **UPDATE**

### **137 Appointment of relevant undertakers**

NOTE 7--'Limited company' now means a company (as defined in the Companies Act 2006 s 1(1)) (see **COMPANIES** vol 14 (2009) PARA 24) that is registered in England and Wales or Scotland, and is limited by shares: Water Industry Act 1991 s 219(1) (definition substituted by SI 2009/1941).

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### **138. Replacement or variation of appointments.**

The Secretary of State<sup>1</sup> and, with the consent of or in accordance with a general authorisation given by the Secretary of State, the Water Services Regulation Authority<sup>2</sup>, has power, by notice<sup>3</sup> to a company holding an appointment as a relevant undertaker<sup>4</sup>, to terminate the appointment or to vary the area to which it relates<sup>5</sup>. The appointment of a company to be a water undertaker or sewerage undertaker<sup>6</sup> may not, however, be terminated or otherwise cease to relate to, or to any part of, any area except with effect from the coming into force of such appointments and variations replacing that company as a relevant undertaker<sup>7</sup> as secure either: (1) that another company becomes the water undertaker or sewerage undertaker for that area or part, or for an area that includes that area or part<sup>8</sup>; or (2) that two or more companies each become the water undertaker or sewerage undertaker for one of a number of different areas that together constitute or include that area or part<sup>9</sup>.

An appointment or variation replacing a company as a relevant undertaker may not be made in relation to the whole or any part of the area to which that company's appointment as water undertaker or sewerage undertaker relates except where:

- 130 (a) that company consents to the appointment or variation<sup>10</sup>;
- 131 (b) the appointment or variation relates only to parts of that area, none of the premises in which is served by that company<sup>11</sup>;
- 132 (c) the appointment or variation relates only to parts of that area and the statutory conditions<sup>12</sup> are satisfied in relation to each of the premises in those parts which are served by that company<sup>13</sup>; or
- 133 (d) the appointment or variation is made in such circumstances as may be set out for these purposes in the conditions of that company's appointment<sup>14</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales<sup>15</sup>.

1 Water Industry Act 1991 s 7(2)(a). As to the Secretary of State see PARA 15 note 1. As to the transfer of the functions of the Secretary of State to the Welsh Ministers see the text to note 15. As to the exercise by the Secretary of State of his powers and duties relating to the regulation of undertakers see s 2; and PARA 130.

2 Water Industry Act 1991 s 7(2)(b) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see s 2; and PARA 130.

3 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

4 I.e. an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARAS 137, 139 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

5 Water Industry Act 1991 s 7(2).

6 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

7 For these purposes, references to an 'appointment or variation replacing a company as a relevant undertaker' are references to the following, that is to say: (1) the appointment of a company to be the water

undertaker or sewerage undertaker for any area which is or includes the whole or any part of any area for which another company already holds an appointment as water undertaker or, as the case may be, sewerage undertaker; or (2) a variation by virtue of which the area for which a company holds an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17) is modified so as to include the whole or any part of an area for which another company already holds an appointment as water undertaker or, as the case may be, sewerage undertaker: s 36(2).

8 Water Industry Act 1991 s 7(3)(a).

9 Water Industry Act 1991 s 7(3)(b).

10 Water Industry Act 1991 s 7(4)(a).

11 Water Industry Act 1991 s 7(4)(b) (amended by the Competition and Service (Utilities) Act 1992 s 40(1)). For these purposes, premises in a part of an area are served by a company holding an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): (1) in relation to an appointment or variation by virtue of which that company would be replaced as the water undertaker for that part of that area, if those premises are supplied with water by means of a connection with a distribution main of that company; and (2) in relation to an appointment or variation by virtue of which that company would be replaced as the sewerage undertaker for that part of that area, if those premises are drained by means of a relevant sewer or drain: s 36(3) (amended by the Competition and Service (Utilities) Act 1992 ss 40(5), 56(7), Sch 2; the Water Act 2003 s 97(1), (2)(a)).

'Distribution main' means a water main that is not a trunk main: Water Industry Act 1991 s 36(4). 'Water main' means, subject to the Water Industry Act 1991 s 219(2) (see below), any pipe, not being a pipe for the time being vested in a person other than the undertaker, which is used or to be used by a water undertaker or licensed water supplier for the purpose of making a general supply of water available to customers or potential customers of the undertaker or licensed water supplier, as distinct from for the purpose of providing a supply to particular customers: s 219(1) (definition amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 50(1), (2)(b) (ii)). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'customers or potential customers' see PARA 118 note 7. As to the meaning of 'licensed water supplier' see PARA 152. 'Trunk main' means a water main which is or is to be used by a water undertaker for the purpose of: (a) conveying water from a source of supply to a filter or reservoir or from one filter or reservoir to another filter or reservoir; or (b) conveying water in bulk, whether in the course of taking a supply of water in bulk or otherwise, between different places outside the area of the undertaker, from such a place to any part of that area or from one part of that area to another part of that area: Water Industry Act 1991 s 219(1). 'Supply of water in bulk' means a supply of water for distribution by a water undertaker taking the supply: s 219(1). In the Water Industry Act 1991 references to a 'pipe', including references to a main, a drain or a sewer, include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and, accordingly, references to the 'laying of a pipe' include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another: s 219(2). 'Accessories', in relation to a water main, sewer or other pipe, includes any manholes, ventilating shafts, inspection chambers, settling tanks, wash-out pipes, pumps, ferrules or stopcocks for the main, sewer or other pipe, or any machinery or other apparatus which is designed or adapted for use in connection with the use or maintenance of the main, sewer or other pipe or of another accessory for it, but does not include any electronic communications apparatus unless: (i) it is or is to be situated inside or in the close vicinity of the main, sewer or other pipe or inside or in the close vicinity of another accessory for it; and (ii) is intended to be used only in connection with the use or maintenance of the main, sewer or other pipe or of another accessory for it: s 219(1) (definition amended by the Communications Act 2003 s 406(1), Sch 17 para 110). 'Stopcock' includes any box or pit in which a stopcock is enclosed and the cover to any such box or pit: Water Industry Act 1991 s 219(1). 'Drain' means (subject to s 219(2): see above) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage: s 219(1). 'Sewer' includes (without prejudice to s 219(2): see above) all sewers and drains (not being drains within the meaning given above) which are used for the drainage of buildings and yards appurtenant to buildings: s 219(1).

'Relevant sewer or drain', in relation to any appointment or variation which would replace a company as a sewerage undertaker, means any of the following, that is to say: (A) a public sewer or lateral drain vested in that company; (B) a sewer or lateral drain in relation to which that company has made a declaration of vesting under the Water Industry Act 1991 s 102 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1004) which has not yet taken effect; (C) a sewer or lateral drain in relation to which that company has entered into an agreement under s 104 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1006): s 36(4) (definition substituted by the Water Act 2003 s 97(1), (2)(b)). 'Public sewer' means (subject to the Water Industry Act 1991 s 106(1A): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1041) a sewer for the time being vested in a sewerage undertaker in its capacity as such, whether vested in that undertaker by virtue of a scheme under the Water Act 1989 Sch 2 (see PARA 108) or the Water Industry Act 1991 Sch 2 (see PARA 141) or under s 179 (see PARA 464) or otherwise; and 'private sewer' is to be construed accordingly: s 219(1) (definition amended by the Water Act 2003 s 99(1), (6)). 'Public sewer' is similarly defined in the Water Resources Act 1991: see s 221(1). 'Lateral drain' means: (aa) that part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate; or (bb) (if different and the context so requires) the part of a drain identified in a

declaration of vesting made under the Water Industry Act 1991 s 102 or in an agreement made under s 104: s 219(1) (definition added by the Water Act 2003 s 97(1), (9)(a)).

12 The statutory conditions are that: (1) the premises are, or are likely to be, supplied with not less than the following quantity of water in any period of 12 months: (a) if the area of the relevant undertaker concerned is wholly or mainly in Wales, 250 megalitres (Water Industry Act 1991 s 7(5)(a) (s 7(5), (6) added by the Competition and Service (Utilities) Act 1992 s 40(2); Water Industry Act 1991 s 7(5)(a) substituted by SI 2000/1842)); (b) in all other cases, 50 megalitres (Water Industry Act 1991 s 7(5)(b) (as so added; and amended by SI 2005/268)); and (2) the person who is the customer in relation to the premises consents in writing to the appointment or variation (s 7(5) (as so added)). As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'writing' see PARA 22 note 1. The Secretary of State or, in relation to Wales, the Welsh Ministers (see the text to note 15) may, after consulting the Water Services Regulation Authority, make regulations amending s 7(5) by substituting, for the quantity of water for the time being specified there, such smaller quantity as he or they consider appropriate: s 7(6) (as so added; and amended by the Water Act 2003 s 36(2)). As to the making of regulations see PARA 21. As to the regulations made see the Water and Sewerage Undertakers (Inset Appointments) Regulations 2000, SI 2000/1842; the Water and Sewerage Undertakers (Inset Appointments) Regulations 2005, SI 2005/268.

13 Water Industry Act 1991 s 7(4)(bb) (added by the Competition and Service (Utilities) Act 1992 s 40(1)). An appointment made in such circumstances is generally referred to as an 'inset appointment'. A list of inset appointments is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

14 Water Industry Act 1991 s 7(4)(c).

15 The functions of the Secretary of State under the Water Industry Act 1991 s 7 were so transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the exercise by the Welsh Ministers of their powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

## UPDATE

### 138 Replacement or variation of appointments

NOTE 11--See *R (on the application of Welsh Water Ltd) v Water Services Regulation Authority (Ofwat)* [2009] EWHC 3493 (Admin), [2010] All ER (D) 123 (Jan).



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### **139. Procedure with respect to appointments and variations.**

An application for an appointment or variation replacing a company as a relevant undertaker<sup>1</sup> must be made in the prescribed<sup>2</sup> manner<sup>3</sup>. Within 14 days of making such an application, the applicant must serve notice<sup>4</sup> of the application on the existing appointee<sup>5</sup>, on the Environment Agency<sup>6</sup>, and on every local authority<sup>7</sup> whose area includes the whole or any part of the area to which the application relates<sup>8</sup>, and must publish a copy of the notice in the prescribed manner<sup>9</sup>.

Before making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State or the Water Services Regulation Authority<sup>10</sup>, must give notice stating that he or it proposes to make the appointment or variation<sup>11</sup>, stating why he or it proposes to make the appointment or variation<sup>12</sup>, and specifying the period<sup>13</sup> within which representations or objections with respect to the proposed appointment or variation may be made<sup>14</sup>.

As soon as practicable after making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State or the Authority must serve a copy of the appointment or variation on the existing appointee<sup>15</sup>, and serve notice of the making of the appointment or variation on the Environment Agency and on every local authority whose area includes the whole or any part of the area to which the appointment or variation relates<sup>16</sup>; and as soon as practicable after exercising any power to vary the area to which an appointment relates, the Secretary of State must send a copy of the variation to the Authority<sup>17</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales<sup>18</sup>.

1 As to the meaning of references to such an appointment or variation see PARA 138 note 7. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 'Prescribed' means prescribed by regulations: see the Water Industry Act 1991 s 219(1). As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

3 Water Industry Act 1991 s 8(1). The Secretary of State, or in relation to Wales, the Welsh Ministers (see the text to note 18) may by regulations impose such additional procedural requirements as he or they consider appropriate for any case where the conditions mentioned in s 7(5) (see PARA 138 note 12) are required to be satisfied in relation to an application for an appointment or variation replacing a company as a relevant undertaker: s 8(7) (added by the Competition and Service (Utilities) Act 1992 s 40(3)). At the date at which this volume states the law no such regulations had been made. As to the Secretary of State see PARA 15 note 1. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

4 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

5 'Existing appointee', in relation to an appointment or variation replacing a company as a relevant undertaker, means the company which is replaced in relation to the whole or any part of the area to which the appointment or variation relates or, where there is more than one such company, each of them: Water Industry Act 1991 s 8(6).

6 As to the Environment Agency see PARA 17.

7 As to the meaning of 'local authority' see PARA 118 note 17.

8 Water Industry Act 1991 s 8(2)(a) (amended by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 17(a); and by virtue of the Environment Act 1995 ss 2, 3).

9 Water Industry Act 1991 s 8(2)(b). At the date at which this volume states the law, no regulations had been made for this purpose.

10 As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

11 Water Industry Act 1991 s 8(3)(a) (amended by the Water Act 2003, s 36(2)).

12 Water Industry Act 1991 s 8(3)(b) (amended by the Water Act 2003, s 36(2)).

13 It is not being less than 28 days from the date of publication of the notice: Water Industry Act 1991 s 8(3)(c).

14 Water Industry Act 1991 s 8(3)(c). The notice must be given by publishing it in such manner as the Secretary of State or, as the case may be, the Authority considers appropriate for bringing it to the attention of persons likely to be affected by the making of the proposed appointment or variation (s 8(4)(a) amended by the Water Act 2003 s 36(2)), and by serving a copy of the notice on the existing appointee, on the Environment Agency and on every local authority whose area includes the whole or any part of the area to which the appointment or variation relates (Water Industry Act 1991 s 8(4)(b) (amended by the Competition and Service (Utilities) Act 1992 Sch 1 para 17(a); and by virtue of the Environment Act 1995 ss 2, 3)). As to the meaning of 'person' see PARA 13 note 29. As to the duty to consider representations or objections made and not withdrawn see the Water Industry Act 1991 s 9(1); and PARA 140.

15 Water Industry Act 1991 s 8(5)(a).

16 Water Industry Act 1991 s 8(5)(b) (amended by the Competition and Service (Utilities) Act 1992 Sch 1 para 17(b); and by virtue of the Environment Act 1995 ss 2, 3).

17 Water Industry Act 1991 s 8(5) (amended by the Water Act 2003 s 36(2)).

18 The functions of the Secretary of State under the Water Industry Act 1991 s 8 were so transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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#### **140. Duties affecting the making of appointments and variations of appointments.**

Before making an appointment or variation replacing a company as a relevant undertaker<sup>1</sup>, the Secretary of State<sup>2</sup> or the Water Services Regulation Authority<sup>3</sup> must consider any representations or objections which have been duly made<sup>4</sup> and not withdrawn<sup>5</sup>. Before making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State must consult the Authority<sup>6</sup>. In determining whether to make an appointment or variation<sup>7</sup> in relation to any part of an area served by a company, the Secretary of State or, as the case may be, the Authority must have regard in particular to any arrangements made or expenditure incurred by the existing appointee<sup>8</sup> for the purpose of enabling premises in that part of that area to be served by the existing appointee<sup>9</sup>.

It is the duty of the Secretary of State or, as the case may be, the Water Services Regulation Authority:

- 134 (1) in making an appointment or variation replacing a company as a relevant undertaker<sup>10</sup>; and
- 135 (2) where such an appointment or variation is made, in determining what provision is to be made with respect to the fixing by the new appointee<sup>11</sup> of any water or drainage charges<sup>12</sup>,

to ensure<sup>13</sup> that the interests of the members and creditors of the existing appointee are not unfairly prejudiced as respects the terms on which the new appointee could accept transfers of property, rights and liabilities from the existing appointee<sup>14</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales<sup>15</sup>.

1 As to the meaning of references to such an appointment or variation see PARA 138 note 7. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Secretary of State see PARA 15 note 1. As to the transfer of the functions of the Secretary of State to the Welsh Ministers see the text to note 15. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of relevant undertakers see the Water Industry Act 1991 s 2; and PARA 130.

3 As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

4 Ie in pursuance of the notice under the Water Industry Act 1991 s 8(3): see PARA 139.

5 Water Industry Act 1991 s 9(1) (amended by the Water Act 2003 s 36(2)).

6 Water Industry Act 1991 s 9(2) (amended by the Water Act 2003 s 36(2)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

7 Ie by virtue of the Water Industry Act 1991 s 7(4)(b) or (bb): see PARA 138.

8 'Existing appointee', in relation to an appointment or variation replacing a company as a relevant undertaker in relation to any area or part of an area, means the company which is replaced by that appointment or variation: Water Industry Act 1991 s 9(5).

9 Water Industry Act 1991 s 9(3) (amended by the Competition and Service (Utilities) Act 1992 s 40(4); Water Act 2003 s 36(2)). As to when premises are served by a company see PARA 138 note 11.

10 Water Industry Act 1991 s 9(4)(a).

11 'New appointee', in relation to an appointment or variation replacing a company as a relevant undertaker in relation to any area or part of an area, means the company which by virtue of the appointment or variation becomes a relevant undertaker for the area or part of an area in question: Water Industry Act 1991 s 9(5).

12 Water Industry Act 1991 s 9(4)(b) (amended by the Water Act 2003 s 36(2)). 'Water or drainage charges' means: (1) charges in respect of any services provided in the course of the carrying out of the functions of a water undertaker or sewerage undertaker; or (2) amounts of any other description which such an undertaker is authorised by or under any enactment to require any person to pay: Water Industry Act 1991 s 9(5). As to charges see PARA 417 et seq. As to the meaning of 'functions' see PARA 133 note 5. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'person' see PARA 13 note 29.

13 In so far as consistent with his or its duties under the Water Industry Act 1991 Pt I (ss 1-5).

14 Water Industry Act 1991 s 9(4) (amended by the Water Act 2003 s 36(2)).

15 The functions of the Secretary of State under the Water Industry Act 1991 s 9 were so transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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#### **141. Transitional provision with respect to replacement appointments.**

Transitional provision may be made<sup>1</sup> with respect to cases in which a company is replaced by another as a relevant undertaker<sup>2</sup> by an appointment or variation made<sup>3</sup> under the relevant statutory provisions<sup>4</sup>. Where:

- 136 (1) the Secretary of State<sup>5</sup> or the Water Services Regulation Authority<sup>6</sup> is proposing to make an appointment or variation replacing a company as a relevant undertaker<sup>7</sup> and by virtue of that appointment a company (the 'new appointee') will hold an appointment as the water undertaker or sewerage undertaker<sup>8</sup> for an area which includes the whole or any part of the area for which, until the relevant date<sup>9</sup>, another company (the 'existing appointee') holds an appointment as the water undertaker or sewerage undertaker<sup>10</sup>; or
- 137 (2) the High Court has made a special administration order<sup>11</sup> in relation to any company<sup>12</sup> (the 'existing appointee') and it is proposed that on or after the relevant date<sup>13</sup> another company (the 'new appointee') should, without any such appointment or variation as is mentioned in head (1) above having been made, hold an appointment as water undertaker or sewerage undertaker for an area which is or includes the whole or any part of the area for which until that date the existing appointee holds an appointment as water undertaker or sewerage undertaker<sup>14</sup>,

the following provisions apply<sup>15</sup>.

The existing appointee, acting with the consent of the new appointee and of any other appointees<sup>16</sup> in relation to the matters affecting them, may make a scheme for the transfer of property, rights and liabilities from the existing appointee to the new appointee<sup>17</sup>. Such a scheme does not take effect unless it is approved by the Secretary of State or the Water Services Regulation Authority<sup>18</sup>; and if, at any time after such a scheme has come into force in relation to the property, rights and liabilities of any company, the Secretary of State considers it appropriate to do so and the existing appointee, the new appointee and, in relation to the provisions of the order which affect them, any other appointees consent to the making of the order, the Secretary of State may by order provide<sup>19</sup> that that scheme is to be deemed for all purposes to have come into force with such modifications<sup>20</sup> as may be specified in the order<sup>21</sup>.

A scheme made under these provisions for the transfer of the existing appointee's property, rights and liabilities comes into force on the relevant date and, on coming into force, has effect, in accordance with its provisions<sup>22</sup> and without further assurance, so as to transfer the property, rights and liabilities<sup>23</sup> to which the scheme relates to the new appointee<sup>24</sup>. Where a scheme is made in the case specified in head (2) above, it may provide for the transfer to the new appointee, with such modifications as may be specified in the scheme, of the appointment<sup>25</sup> which is held by the existing appointee<sup>26</sup>, and different schemes may provide for the transfer of such an appointment to different companies as respects different parts of the area to which the appointment relates<sup>27</sup>.

A scheme may contain supplemental, consequential and transitional provision for the purposes of, or in connection with, the provision for the transfers or any other provision made by it<sup>28</sup>. It may provide for the imposition of duties<sup>29</sup> on the existing appointee and on the new appointee

to take all such steps as may be requisite to secure that the vesting in the new appointee, by virtue of the scheme, of any foreign property, right or liability<sup>30</sup> is effective under the relevant foreign law<sup>31</sup>. The provisions of such a scheme may require the existing appointee to comply with any directions of the new appointee in performing any duty imposed by virtue of a provision so included<sup>32</sup>. A scheme may provide:

- 138 (a) that until the vesting of any foreign property, right or liability of the existing appointee in the new appointee is effective under the relevant foreign law, it is the duty of the existing appointee to hold that property or right for the benefit of, or to discharge that liability on behalf of, the new appointee<sup>33</sup>;
- 139 (b) that in specified cases foreign property, rights or liabilities that are acquired or incurred by an existing appointee after the scheme comes into force are immediately to become property, rights or liabilities of the new appointee<sup>34</sup>.

If the Secretary of State thinks it appropriate to do so for the purposes of, or in connection with, any appointment or variation replacing a company as a relevant undertaker or any scheme made under the above provisions, he may, by order made by statutory instrument, make any provision which corresponds in relation to any specified enactment<sup>35</sup> to any provision originally made by the Water Act 1989<sup>36</sup> or makes similar provision in relation to any other enactment, or may amend or repeal any local statutory provision<sup>37</sup>.

Where, by an appointment or variation, one company (the 'new undertaker') is to replace another company as a relevant undertaker, but the appointment or variation has not come into force, certain provisions of the Water Industry Act 1991<sup>38</sup> apply in relation to the new undertaker, except where they are inapplicable to the kind of undertaker in question, as if the appointment or variation had come into force<sup>39</sup>. Such of the conditions imposed on the new undertaker<sup>40</sup> as the Water Services Regulation Authority may specify in a written notice given by it to the undertaker have effect, in relation to the operation of any of those statutory provisions before the appointment or variation comes into force, as if the appointment or variation had come into force<sup>41</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales but not in relation to any licensed water suppliers<sup>42</sup>.

1    le by virtue of the Water Industry Act 1991 s 10(1), Sch 2: see below.

2    As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3    le under the Water Industry Act 1991 Pt I Ch II (ss 6-17): see PARAS 137-140.

4    Water Industry Act 1991 s 10(1) (renumbered as such by the Competition and Service (Utilities) Act 1992 s 42).

5    As to the Secretary of State see PARA 15 note 1. As to the transfer of the functions of the Secretary of State to the Welsh Ministers see the text to note 42. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of relevant undertakers see the Water Industry Act 1991 s 2; and PARA 130.

6    As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

7    As to the meaning of references to such appointments and variations see PARA 138 note 7.

8    As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

9    For these purposes the 'relevant date' means the coming into force of the appointment or variation mentioned in head (1) in the text: Water Industry Act 1991 Sch 2 para 1(4)(a).

10 Water Industry Act 1991 Sch 2 para 1(2) (amended by the Water Act 2003 s 36(2)).

11 As to the meaning of 'special administration order' see PARA 173. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

12 Ie holding an appointment under the Water Industry Act 1991 Pt II Ch 1 (ss 6-17).

13 For these purposes the 'relevant date' means such day, being a day before the discharge of the special administration order takes effect, as the High Court may appoint for the purposes of the Water Industry Act 1991 Sch 2: Sch 2 para 1(4)(b).

14 Water Industry Act 1991 Sch 2 para 1(3) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 51(1), (3)).

15 Water Industry Act 1991 Sch 2 para 1(1). As to the application of these provisions where the High Court has made a special administration order in relation to any company which is a qualifying licensed water supplier see PARA 154.

16 'Other appointees' means any company, other than the existing appointee and the new appointee (construed in accordance with head (1) or head (2) in the text, as appropriate), which are likely on or at a time after the relevant date to be holding appointments as water undertakers or sewerage undertakers for any area which is or includes any part of the area for which the existing appointee has at any time held an appointment as water undertaker or sewerage undertaker: Water Industry Act 1991 Sch 2 para 1(4).

17 Water Industry Act 1991 Sch 2 para 2(1).

18 Water Industry Act 1991 Sch 2 para 2(2) (Sch 2 para 2(2), (3), (6), (7) amended by the Water Act 2003, s 36(2)). Without prejudice to the other provisions of the Water Industry Act 1991 relating to the special administrator of a company, anything which is required by Sch 2 para 2 to be done by a company is, where that company is a company in relation to which a special administration order is in force, effective only if it is done on the company's behalf by its special administrator: Sch 2 para 2(9). 'Special administrator', in relation to a company with respect to which a special administration order has been made, means the person for the time being holding office for the purposes of s 23(1) (see PARA 173): Sch 2 para 1(4).

Where a scheme is submitted to the Secretary of State or the Authority for approval he or it may, with the consent of the new appointee, of the existing appointee and, in relation to the matters affecting them, of any other appointees, modify the scheme before approving it: Sch 2 para 2(3) (as so amended). In determining, in accordance with his or its duties under Pt I (ss 1-5), whether and in what manner to exercise any power conferred on him or on it by Sch 2 para 2, the Secretary of State or the Authority must have regard to the need to ensure that any provision for the transfer of property, rights and liabilities in accordance with a scheme under Sch 2 allocates property, rights and liabilities to the different companies affected by the scheme in such proportions as appear to him or it to be appropriate in the context of the different functions which will be carried out at different times on and after the relevant date by the new appointee, by the existing appointee and by any other appointees: Sch 2 para 2(6) (as so amended). It is the duty of the new appointee, of the existing appointee and of any other appointees to provide the Secretary of State or the Authority with all such information and other assistance as he or it may reasonably require for the purposes of, or in connection with, the exercise of any such powers (Sch 2 para 2(7) (as so amended)); and a company which without reasonable excuse fails to do anything so required of it is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale (Sch 2 para 2(8)). As to the meaning of 'information' see PARA 117 note 13. 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 PARA 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

19 Such an order may make, with effect from the coming into force of the scheme to which it relates, any such provision as could have been made by the scheme and, in connection with giving effect to that provision from that time, may contain such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: Water Industry Act 1991 Sch 2 para 2(5).

20 'Modifications' includes additions, alterations and omissions, and cognate expressions must be construed accordingly: Water Industry Act 1991 s 219(1). There is an identical definition in the Water Resources Act 1991: see s 221(1).

21 Water Industry Act 1991 Sch 2 para 2(4). Orders under this provision are local in nature and are not recorded in this work.

22 For the purpose of making any division of property, rights or liabilities which it is considered appropriate to make in connection with the transfer of property, rights and liabilities in accordance with a scheme under the Water Industry Act 1991 Sch 2, the provisions of that scheme may: (1) create for the existing appointee, the new appointee or any other appointees an interest in or right over any property to which the scheme relates; (2) create new rights and liabilities as between any two or more of those companies; and (3) in connection with any provision made by virtue of head (1) or (2) above, make incidental provision as to the interests, rights and liabilities of other persons with respect to the subject matter of the scheme: Sch 2 para 3(2). A scheme may contain provision for the consideration to be provided by the new appointee and by any other appointees in respect of the transfer or creation of property, rights and liabilities of other persons with respect to the subject matter of the scheme; and any such provision is enforceable in the same way as if the property, rights and liabilities had been created or transferred, and, if the case so requires, had been capable of being created or transferred, by agreement between the parties: Sch 2 para 3(3). The provision that may be made by virtue of head (2) above includes: (a) provision for treating any person who is entitled by virtue of a scheme under Sch 2 to possession of a document as having given another person an acknowledgment in writing of the right of that other person to the production of the document and to copies of it; and (b) provision applying the Law of Property Act 1925 s 64 (production and custody of documents: see **SALE OF LAND** vol 42 (Reissue) PARA 299) in relation to any case in respect of which provision falling within head (a) has effect: Water Industry Act 1991 Sch 2 para 3(5). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'writing' see PARA 22 note 1.

23 The property, rights and liabilities of the existing appointee that are capable of being transferred in accordance with a scheme under the Water Industry Act 1991 Sch 2 include: (1) property, rights and liabilities that would not otherwise be capable of being transferred or assigned by the existing appointee; (2) such property, rights and liabilities to which the existing appointee may become entitled or subject after the making of the scheme and before the relevant date as may be described in the scheme; (3) property situated anywhere in the United Kingdom or elsewhere; (4) rights and liabilities under enactments; (5) rights and liabilities under the law of any part of the United Kingdom or of any country or territory outside the United Kingdom: Sch 2 para 3(4). The transfers authorised by head (1) above include transfers which, by virtue thereof, are to take effect as if there were no such contravention, liability or interference with any interests or right as there would be, in the case of a transfer or assignment otherwise than in accordance with a scheme under Sch 2, by reason of any provision having effect, whether under any enactment or agreement or otherwise, in relation to the terms on which the existing appointee is entitled or subject to the property, right or liability in question: Sch 2 para 3(6). As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'United Kingdom' see PARA 22 note 5.

24 Water Industry Act 1991 Sch 2 para 3(1).

25 In the appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17).

26 Water Industry Act 1991 Sch 2 para 4(1).

27 Water Industry Act 1991 Sch 2 para 4(2).

28 Water Industry Act 1991 Sch 2 para 5(1). Without prejudice to the generality of this provision, a scheme under Sch 2 may provide: (1) that for purposes connected with any transfers made in accordance with the scheme, including the transfer of rights and liabilities under an enactment, the new appointee is to be treated as the same person in law as the existing appointee (Sch 2 para 5(2)(a)); (2) that, so far as may be necessary for the purposes of or in connection with any such transfers, agreements made, transactions effected and other things done by or in relation to the existing appointee are to be treated as made, effected or done by or in relation to the new appointee (Sch 2 para 5(2)(b)); (3) that, so far as may be necessary for the purposes of or in connection with any such transfers, references in any agreement, whether or not in writing, or in any deed, bond, instrument or other document to, or to any officer of, the existing appointee are to have effect with such modifications as are specified in the scheme (Sch 2 para 5(2)(c)); (4) that proceedings commenced by or against the existing appointee are to be continued by or against the new appointee (Sch 2 para 5(2)(d)); (5) that the effect of any transfer under the scheme in relation to contracts of employment with the existing appointee is not to be to terminate any of those contracts but is to be that periods of employment with the existing appointee are to count for all purposes as periods of employment with the new appointee (Sch 2 para 5(2)(e)); (6) that disputes as to the effect of the scheme between the existing appointee and the new appointee, between either of them and any other appointee or between different companies which are other appointees are to be referred to such arbitration as may be specified in or determined under the scheme (Sch 2 para 5(2)(f)); (7) that determinations on such arbitrations and certificates given jointly by two or more such appointees as are mentioned in head (6) above as to the effect of the scheme as between the companies giving the certificates are to be conclusive for all purposes (Sch 2 para 5(2)(g)).

29 Duties so imposed on a company are enforceable in the same way as if they were imposed by a contract between the existing appointee and the new appointee: Water Industry Act 1991 Sch 2 para 6(8).



30 References to 'any foreign property, right or liability' are references to any property, right or liability as respects which any issue arising in any proceedings would have to be determined, in accordance with the rules of private international law, by reference to the law of a country or territory outside the United Kingdom: Water Industry Act 1991 Sch 2 para 6(6).

31 Water Industry Act 1991 Sch 2 para 6(1). Nothing in any provision included by virtue of Sch 2 para 6 in a scheme under Sch 2 is to be taken as prejudicing the effect under the law of any part of the United Kingdom of the vesting by virtue of the scheme in the new appointee of any foreign property, right or liability: Sch 2 para 6(4).

32 Water Industry Act 1991 Sch 2 para 6(2). Any expenses incurred by an existing appointee in consequence of any provision included in a scheme by virtue of Sch 2 para 6 must be met by the new appointee: Sch 2 para 6(7). As to the recovery of expenses see PARA 131 note 6.

33 Water Industry Act 1991 Sch 2 para 6(3).

34 Water Industry Act 1991 Sch 2 para 6(5). Such a scheme may make the same provision in relation to any such property, rights or liabilities as can be made, by virtue of Sch 2 para 6(1)-(4) (see the text to notes 29-33), in relation to foreign property, rights and liabilities vested in the existing appointee when the scheme comes into force: Sch 2 para 6(5).

35 Ie any enactment referred to at the passing of the Water Act 1989 (ie 6 July 1989) in s 190(2), Sch 26 to that Act: Water Industry Act 1991 Sch 2 para 7(1)(a).

36 Ie by the Water Act 1989 Sch 26 (transitional provisions and savings): Water Industry Act 1991 Sch 2 para 7(1)(a).

37 Water Industry Act 1991 Sch 2 para 7(1)(a), (b). Such an order may: (1) make provision applying generally in relation to local statutory provisions of a description specified in the order; (2) make different provision for different cases, including different provision in relation to different persons, circumstances or localities; and (3) contain such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: Sch 2 para 7(2). As to the meaning of 'local statutory provision' see PARA 14 note 24. Orders made under these provisions are local in nature and are not recorded in this work.

38 Ie the Water Industry Act 1991 ss 18-24 and Sch 3 (see PARA 163 et seq); ss 32-35 (see PARAS 150-151); s 155 and Sch 9 (see PARA 453); s 156 (see PARA 454); ss 158-161 (see PARAS 462-463; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARAS 1024-1025), ss 163-167 and Sch 11 (see PARA 460 et seq); ss 168-171 (see PARA 477 et seq); s 173 (see PARA 481); s 174 (see PARA 486); ss 178-180 and Sch 12 (see PARAS 464, 470 et seq); ss 181-183 and Sch 13 (see PARA 474 et seq); ss 184-188 and Sch 14 (see PARA 489 et seq); ss 189-192 (see PARAS 487, 687); ss 197-200 (see PARAS 179, 467); s 202 (see PARA 182); s 203 (see PARA 169); s 206 (see PARA 183); s 208 (see PARA 129); s 209 (see PARA 672); s 211; s 212 (see PARA 186); s 217 (see PARA 133 note 5); s 10(3) (s 10(2)-(5) added by the Competition and Service (Utilities) Act 1992 s 42). The Secretary of State may by regulations amend the Water Industry Act 1991 s 10(3) by adding to, removing or modifying references to provisions of the Water Industry Act 1991: s 10(5) (as so added). As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

39 Water Industry Act 1991 s 10(2), (3) (as added: see note 38).

40 Ie by the Water Industry Act 1991 s 11: see PARA 142.

41 Water Industry Act 1991 s 10(2), (4) (as added (see note 38); s 10(4) amended by the Water Act 2003 s 36(2)).

42 The functions of the Secretary of State under the Water Industry Act 1991 s 10, Sch 2 were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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## ***B. CONDITIONS OF APPOINTMENTS***

### **142. Power to impose conditions.**

An appointment as a relevant undertaker<sup>1</sup> may include:

- 140 (1) such conditions<sup>2</sup> as appear to the Secretary of State<sup>3</sup> or, as the case may be, the Water Services Regulation Authority<sup>4</sup> to be requisite or expedient having regard to the duties imposed<sup>5</sup> on him or on it<sup>6</sup>;
- 141 (2) conditions<sup>7</sup> with respect to the circumstances in which an appointment or variation may be made replacing that company as a relevant undertaker<sup>8</sup>; and
- 142 (3) conditions requiring the rendering to the Secretary of State of a payment on the making of an appointment, or payments while such an appointment is in force, or both, of such amount or amounts as may be determined by or under the conditions<sup>9</sup>.

Where the same instrument contains an appointment of the same company to be both a water undertaker and a sewerage undertaker, whether or not for the same area, all the conditions included in that instrument have effect, irrespective of their subject matter, as conditions of both appointments<sup>10</sup>.

Where an instrument of appointment has been served<sup>11</sup> on any company, the coming into force of the appointment for the specified purposes<sup>12</sup> is not affected by any contravention<sup>13</sup> of the requirements of the Water Industry Act 1991 with respect to the provision contained by way of conditions of appointment in that instrument<sup>14</sup>. If the Secretary of State considers it appropriate to do so in consequence of any legal proceedings with respect to any such provision, he may by order made by statutory instrument direct that such conditions as may be specified in the order are to be treated as included in the appointment in question until there is an opportunity<sup>15</sup> for the provision to which the proceedings relate to be replaced<sup>16</sup>.

Conditions included in an appointment by virtue of head (1) above<sup>17</sup> may:

- 143 (a) require the appointed company to comply with any direction given by the Water Services Regulation Authority as to specified matters or matters of a specified description<sup>18</sup>; and
- 144 (b) require the appointed company, except in so far as the Authority consents to the company's doing or not doing them, not to do or to do such things as are specified in the appointment or are of a description so specified<sup>19</sup>.

Such conditions may provide<sup>20</sup> for the reference to, and determination by, the Secretary of State or the Water Services Regulation Authority<sup>21</sup> or, on a reference by the Authority, the Competition Commission<sup>22</sup>, of such questions arising under the appointment and of such other matters, including, in the case of references to the Commission, disputes as to determinations by the Authority, as are specified in the appointment or are of a description so specified<sup>23</sup>. Where any question or other matter falls to be determined by the Commission in pursuance of a provision contained in an appointment<sup>24</sup>:

- 145 (i) it is the duty of the Authority, on being required to do so by the company holding that appointment, to refer that question or matter to that Commission<sup>25</sup>; and
- 146 (ii) it is the duty of the Commission to determine any question or other matter so referred in accordance with the principles which apply<sup>26</sup> in relation to determinations<sup>27</sup> by the Authority<sup>28</sup>.

Where the question or matter referred to the Commission concerns the review of a price control imposed on the company holding the appointment<sup>29</sup>, and the Commission is to decide to what extent it is reasonable to take into account in its determination costs incurred or borne by the company in connection with the reference<sup>30</sup>, the Commission must also have regard to the extent to which, in its view, its determination is likely to support the company's (rather than the Authority's) claims in relation to the question or matter referred to it<sup>31</sup>. A report of the Commission on a reference under these provisions must be made to the Authority<sup>32</sup>, and must include definite conclusions on the questions or other matters comprised in the reference, together with such an account of its reasons for those conclusions as, in the opinion of the Commission, is expedient for facilitating a proper understanding of those questions or other matters and of its conclusions<sup>33</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales<sup>34</sup>.

1    Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARAS 137-141. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2    Conditions included in an appointment may contain provision for the conditions to cease to have effect or be modified at such times, in such manner and in such circumstances as may be specified in or determined by or under the conditions: Water Industry Act 1991 s 11(3). Any provision so included in an appointment has effect in addition to the provision made by Pt II Ch I (ss 6-17) with respect to the modification of the conditions of an appointment (see PARAS 143-148): s 11(4). As to enforcement orders where a company fails to comply with conditions of appointment see PARA 163 et seq. The instruments of appointment of the water undertakers are available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

3    As to the Secretary of State see PARA 15 note 1. As to the transfer of the functions of the Secretary of State to the Welsh Ministers see the text to note 34. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of relevant undertakers see the Water Industry Act 1991 s 2; and PARA 130.

4    As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

5    Ie by the Water Industry Act 1991 Pt I (ss 1-5).

6    Water Industry Act 1991 s 11(1)(a) (amended by the Water Act 2003 s 36(2)). Conditions may be included by virtue of this provision in an appointment whether or not they are connected with the supply of water, the provision of sewerage services or the exercise or performance of any power or duty conferred or imposed by or under any enactment on water undertakers or sewerage undertakers: Water Industry Act 1991 s 11(2). As to the meaning of 'sewerage services' see PARA 129 note 7. As to the meaning of 'enactment' see PARA 14 note 31. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

7    Ie conditions for the purposes of the Water Industry Act 1991 s 7(4)(c): see PARA 138.

8    Water Industry Act 1991 s 11(1)(b).

9    Water Industry Act 1991 s 11(1)(c). Any sums received by the Secretary of State in consequence of the provisions of any condition of an appointment must be paid into the Consolidated Fund: s 11(8). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

The conditions included in an appointment under Pt II Ch I (ss 6-17) by virtue of s 11(1)(c) may, without prejudice to the generality of s 11(1)(c), require the payment by the company holding the appointment of sums

relating to any of the expenses of the Consumer Council for Water, and the expenses of the Water Services Regulation Authority, the Secretary of State or the Welsh Ministers in relation to the establishment of the Council: see the Water Act 2003 s 37(1)-(3); Government of Wales Act 2006 Sch 11 para 32. The Secretary of State may, after consulting the Welsh Ministers, give directions to the Water Services Regulation Authority for the purpose of securing that sums relating to any such expenses are included in the sums payable by virtue of those conditions; and the Authority must comply with any such direction: Water Act 2003 s 37(8); Government of Wales Act 2006 Sch 11 para 32. Other powers which related to expenses in connection with the establishment of the Consumer Council for Water and the abolition of the former customer service committees have now lapsed: see the Water Act 2003 s 37(4)-(7). As to the Consumer Council for Water see PARA 115. Functions under the Water Act 2003 s 37 which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

10 Water Industry Act 1991 s 11(5).

11 le under the Water Industry Act 1991 s 6(3): see PARA 137.

12 le for the purposes specified in the Water Industry Act 1991 s 6(2): see PARA 137.

13 As to the meaning of 'contravention' see PARA 20 note 5.

14 Water Industry Act 1991 s 11(6).

15 le by virtue of any of the other provisions of the Water Industry Act 1991 Pt II Ch I (ss 6-17).

16 Water Industry Act 1991 s 11(7). Such orders, being of local effect, are not recorded in this work.

17 le without prejudice to the generality of the Water Industry Act 1991 s 11(1)(a): see head (1) in the text.

18 Water Industry Act 1991 s 12(1)(a) (s 12(1)(a), (b) amended by the Water Act 2003 s 36(2)).

19 Water Industry Act 1991 s 12(1)(b) (as amended: see note 18).

20 le without prejudice to the generality of the Water Industry Act 1991 s 11(1)(a): see head (1) in the text.

21 Water Industry Act 1991 s 12(2)(a) (amended by the Water Act 2003 s 36(2)).

22 Water Industry Act 1991 s 12(2)(b) (amended by SI 1999/506; Water Act 2003 s 36(2)). As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12. Under the Utilities Act 2000, specialist members of the Commission must be appointed to exercise its functions under the Water Industry Act 1991 s 12, 14 (see PARA 144), s 16A (see PARA 147), s 17K (see PARA 158) or s 17P (see PARA 161): see the Utilities Act 2000 s 104(1)(c) (added by the Water Act 2003 s 53(1)); and **COMPETITION** vol 18 (2009) PARA 9.

23 Water Industry Act 1991 s 12(2) (amended by the Water Act 2003 s 36(2)). The Water Industry Act 1991 s 14(4), (5) (see PARA 144) and ss 16A, 16B (see PARA 147) apply to references to the Commission under s 12 as they apply to references under s 14: s 12(3B) (s 12(3A)-(3C) added by the Water Act 2003 s 54(1), (2)).

24 Water Industry Act 1991 s 12(3) (amended by SI 1999/506).

25 Water Industry Act 1991 s 12(3)(a) (amended by the Water Act 2003 s 36(2)).

26 le by virtue of the Water Industry Act 1991 Pt I (ss 1-5). See in particular s 2; and PARA 130.

27 le under the Water Industry Act 1991 Pt II Ch I (ss 6-17).

28 Water Industry Act 1991 s 12(3)(b) (amended by the Water Act 2003 ss 36(2), 54(1), (3), 101(2), Sch 9 Pt 2).

29 Water Industry Act 1991 s 12(3A)(a) (as added: see note 23).

30 Water Industry Act 1991 s 12(3A)(b) (as added: see note 23).

31 Water Industry Act 1991 s 12(3A) (as added: see note 23).

32 Water Industry Act 1991 s 12(3C)(a) (as added: see note 23).

33 Water Industry Act 1991 s 12(3C)(b) (as added: see note 23). Section 15(5), (6) (see PARA 145) applies to such a report as it applies to a report on a reference under s 14: s 12(3C) (as so added).

34 The functions of the Secretary of State under the Water Industry Act 1991 ss 11, 12 were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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### **143. Modification of conditions by agreement.**

Subject to the following provisions, the Water Services Regulation Authority<sup>1</sup> may modify<sup>2</sup> the conditions of a company's appointment as a relevant undertaker<sup>3</sup> if the company consents to the modifications<sup>4</sup>. Before making any modifications, the Authority must give notice<sup>5</sup> stating that it proposes to make the modifications and setting out their effect<sup>6</sup>, the reasons why it proposes to make them<sup>7</sup>, and specifying a period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made<sup>8</sup>.

The Authority must consider any representations or objections which are duly made and not withdrawn<sup>9</sup>; and must not make any modifications which the Secretary of State has, within the time specified in the notice, directed it not to make<sup>10</sup>.

The functions of the Secretary of State under the above provisions are transferred to the Welsh Ministers in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales<sup>11</sup>.

1 As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

2 As to the meaning of 'modify' see PARA 141 note 20.

3 I.e. an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17); see PARAS 137-141. As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the power to impose conditions on appointments see PARA 142.

4 Water Industry Act 1991 s 13(1) (s 13(1)-(4) amended by the Water Act 2003 s 36(2)). As to the entry of any modification of conditions in the register kept by the Authority see s 195; and PARA 178.

5 As to the meaning of 'notice' see PARA 22 note 1. The notice must be given by publishing it in such manner as the Authority considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications (Water Industry Act 1991 s 13(3)(a) (as amended: see note 4)) and by serving a copy of it on the company and on the Secretary of State (s 13(3)(b)). As to the meaning of 'person' see PARA 13 note 29. As to the service of documents see PARA 22. As to the Secretary of State see PARA 15 note 1. As to the transfer of the functions of the Secretary of State to the Welsh Ministers see the text to note 11.

6 Water Industry Act 1991 s 13(2)(a) (as amended: see note 4).

7 Water Industry Act 1991 s 13(2)(b) (as amended: see note 4).

8 Water Industry Act 1991 s 13(2)(c).

9 Water Industry Act 1991 s 13(2) (as amended: see note 4).

10 Water Industry Act 1991 s 13(4) (as amended: see note 4). The Secretary of State must not give such a direction in relation to any modification unless: (1) the modification is a modification of provision contained in the appointment for the purposes of s 7(4)(c) (see PARA 138) (s 13(5)(a)); (2) the modification is a modification of a provision of the appointment which relates to the disposal of, or of interests or rights in or over, a company's protected land and is stated in the appointment to be a provision which cannot be modified (s 13(5)(b)); or (3) it appears to him that the modification should be made, if at all, under s 16 (see PARA 146) (s 13(5)(c)). As to the meaning of 'disposal' see PARA 130 note 20. As to the meaning of 'protected land' see PARA 130 note 21. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of relevant undertakers see s 2; and PARA 130.

11 The functions of the Secretary of State under the Water Industry Act 1991 s 13 were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

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#### **144. Modification references to the Competition Commission.**

The Water Services Regulation Authority<sup>1</sup> may make to the Competition Commission<sup>2</sup> a reference which is so framed as to require the Commission to investigate and report on the questions<sup>3</sup>:

- 147 (1) whether any matters which relate to the carrying out of any function<sup>4</sup> which is a function of any company by virtue of an appointment of that company as a relevant undertaker<sup>5</sup> and which are specified in the reference operate, or may be expected to operate, against the public interest<sup>6</sup>; and
- 148 (2) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications<sup>7</sup> of the conditions of the company's appointment<sup>8</sup>.

The Authority may at any time vary such a reference, by notice<sup>9</sup> given to the Commission, by adding to the matters specified in it<sup>10</sup> or excluding from it some or all of the matters so specified<sup>11</sup>, and on receipt of any such notice the Commission must give effect to the variation<sup>12</sup>. The Authority may specify in a reference, or in a variation of such a reference, for the purpose of assisting the Commission in carrying out the investigation on the reference<sup>13</sup>: (a) any effects adverse to the public interest which, in the Authority's opinion, the matters specified in the reference or variation have or may be expected to have<sup>14</sup>; and (b) any modifications of the conditions of any appointment mentioned in the reference or variation by which, in its opinion, those effects could be remedied or prevented<sup>15</sup>.

As soon as practicable after making a reference or a variation of a reference, the Authority must serve a copy of the reference or variation on the company whose appointment is mentioned in it and publish particulars of the reference or variation in such manner as the Authority considers appropriate for the purpose of bringing it to the attention of persons<sup>16</sup> likely to be affected by it<sup>17</sup>. It is the Authority's duty, for the purpose of assisting the Commission in carrying out an investigation on such a reference, or in carrying out functions relating to its power of veto<sup>18</sup>, to give to the Commission:

- 149 (i) any information<sup>19</sup> in its possession which relates to matters falling within the scope of the investigation or the carrying out of those functions, and which is either requested by the Commission for that purpose or is information which, in the Authority's opinion, it would be appropriate for that purpose to give to the Commission without any such request<sup>20</sup>; and
- 150 (ii) any other assistance which the Commission may require, and which it is within the Authority's power to give, in relation to any such matters<sup>21</sup>,

and the Commission, for the purpose of carrying out any such investigation or such functions, must take account of any information so given to it for that purpose<sup>22</sup>.

Every reference under the above provisions must specify a period, not longer than six months<sup>23</sup> beginning with the date of the reference, within which a report on the reference is to be made<sup>24</sup>. Certain powers of investigation under the Enterprise Act 2002<sup>25</sup> apply, with



modifications, for the purposes of references under the above provisions as they apply for the purposes of references<sup>26</sup> of that Act<sup>27</sup>.

- 1 As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.
- 2 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12. Under the Utilities Act 2000, specialist members of the Commission must be appointed to exercise its functions under the Water Industry Act 1991 s 14: see the Utilities Act 2000 s 104(1)(c) (added by the Water Act 2003 s 53(1)); and **COMPETITION** vol 18 (2009) PARA 9.
- 3 Water Industry Act 1991 s 14(1) (amended by SI 1999/506; the Water Act 2003 s 36(2)).
- 4 As to the meaning of 'functions' see PARA 133 note 5.
- 5 Is an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.
- 6 Water Industry Act 1991 s 14(1)(a). In determining for these purposes whether any particular matter operates, or may be expected to operate, against the public interest, the Commission must have regard to the matters as respects which duties are imposed on the Secretary of State or on the Authority by Pt I (ss 1-5): s 14(6) (amended by SI 1999/506; the Water Act 2003 s 36(2)). As to the Secretary of State see PARA 15 note 1.
- 7 As to the meaning of 'modifications' see PARA 141 note 20.
- 8 Water Industry Act 1991 s 14(1)(b). As to the power to impose conditions on the appointment of a company see PARA 142.
- 9 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 10 Water Industry Act 1991 s 14(2)(a).
- 11 Water Industry Act 1991 s 14(2)(b).
- 12 Water Industry Act 1991 s 14(2) (amended by SI 1999/506; the Water Act 2003 s 36(2)).
- 13 Water Industry Act 1991 s 14(3) (amended by SI 1999/506; the Water Act 2003 s 36(2)).
- 14 Water Industry Act 1991 s 14(3)(a) (amended by the Water Act 2003 s 36(2)).
- 15 Water Industry Act 1991 s 14(3)(b) (amended by the Water Act 2003 s 36(2)).
- 16 As to the meaning of 'person' see PARA 13 note 29.
- 17 See the Water Industry Act 1991 s 14(4) (amended by the Water Act 2003 s 36(2)).
- 18 Is functions under the Water Industry Act 1991 s 16A: see PARA 147.
- 19 As to the meaning of 'information' see PARA 117 note 13.
- 20 Water Industry Act 1991 s 14(5)(a) (amended by the Water Act 2003 ss 36(2), 55(1), (2)(b)).
- 21 Water Industry Act 1991 s 14(5)(b) (amended by the Water Act 2003 s 36(2)).
- 22 Water Industry Act 1991 s 14(5) (amended by SI 1999/506; the Water Act 2003 ss 36(2), 55(1), (2)(a), (c)).
- 23 As to the meaning of 'month' see PARA 23 note 10.
- 24 Water Industry Act 1991 s 14A(1) (ss 14A, 14B added by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (5)). As to such reports see PARA 145.
- 25 The following provisions of the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275) apply, with the modifications mentioned in the Water Industry Act 1991 s 14B(2), (3) (see below), for the purposes of references under s 14 (see the text to notes 1-22) as they apply for the purposes of references under the Enterprise Act 2002 Pt 3: (1) s 109 (attendance of witnesses and production of documents etc); (2) s 110 (enforcement of powers under s 109: general); (3) s 111 (penalties); (4) s 112 (penalties: main procedural

requirements); (5) s 113 (payments and interest by instalments); (6) s 114 (appeals in relation to penalties); (7) s 115 (recovery of penalties); and (8) s 116 (statement of policy): Water Industry Act 1991 s 14B(1)(a)-(h) (as added: see note 24). The Enterprise Act s 110, in its application by virtue of head (2) above, is to have effect as if s 100(2) were omitted and in s 110(9), the words from 'or section' to 'section 65(3))' were omitted: Water Industry Act 1991 s 14B(2) (as so added). The Enterprise Act 2002 s 111(5)(b)(ii), in its application by virtue of head (7) above, is to have effect as if: (a) for the words 'published (or, in the case of a report under section 50 or 65, given)' there were substituted 'made'; (b) for the words 'published (or given)', in both places where they appear, there were substituted 'made'; and (c) the words 'by this Part' were omitted: Water Industry Act 1991 s 14B(3) (as so added). Provisions of the Enterprise Act 2002 Pt 3 which have effect for the purposes of ss 109-116 (including, in particular, provisions relating to offences and the making of orders) are to have effect, for the purposes of the application of those sections by virtue of heads (1)-(8) above, in relation to those sections as so applied; and accordingly, corresponding provisions of the Water Industry Act 1991 do not have effect in relation to those sections as applied by virtue of s 14B(1) (as so added): s 14B(4), (5) (as so added).

26 le under the Enterprise Act 2002 Pt 3 (ss 22-130): see **COMPETITION** vol 18 (2009) PARAS 173-275.

27 Water Industry Act 1991 s 14B(1) (as added: see note 25).

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#### **145. Reports on modification references.**

A report of the Competition Commission on a modification reference<sup>1</sup> does not have effect, and no action may be taken in relation to it<sup>2</sup>, unless the report is made before the end of the period specified in the reference<sup>3</sup> or such further period, if any, as may be allowed by the Water Services Regulation Authority<sup>4</sup>.

A report of the Competition Commission on a modification reference must be made to the Authority<sup>5</sup>. In making such a report, the Commission:

- 151 (1) must include in the report definite conclusions on the questions comprised in the reference together with such an account of its reasons for those conclusions as, in its opinion, is expedient for facilitating a proper understanding of those questions and of its conclusions<sup>6</sup>;
- 152 (2) where it concludes that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, must specify in the report the effects adverse to the public interest which those matters have or may be expected to have<sup>7</sup>; and
- 153 (3) where it concludes that any adverse effects so specified could be remedied or prevented by modifications<sup>8</sup> of the conditions of a company's appointment as a relevant undertaker<sup>9</sup>, must specify in the report modifications by which those effects could be remedied or prevented<sup>10</sup>.

For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Commission on a modification reference<sup>11</sup>. However, in making any such report the Commission must have regard to a number of considerations before disclosing any information<sup>12</sup>.

On receiving such a report, the Authority must send a copy of it to the company to whose appointment it relates and to the Secretary of State<sup>13</sup>. The Authority must also, not less than 14 days after that copy is received by the Secretary of State, publish another copy of that report in such manner as it considers appropriate for bringing the report to the attention of persons likely to be affected by it<sup>14</sup>.

For the purposes of the provisions relating to the making of modifications to an appointment following a finding that there are matters against the public interest<sup>15</sup>, a conclusion contained in a report of the Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted<sup>16</sup> in connection with the reference<sup>17</sup>. If a member of a group so constituted disagrees with any conclusions contained in a report as the conclusions of the Commission, the report must, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing<sup>18</sup>.

<sup>1</sup> I.e. a report on a reference under the Water Industry Act 1991 s 14: see PARA 144. As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

<sup>2</sup> I.e. under the Water Industry Act 1991 s 16: see PARA 146.

<sup>3</sup> As to the requirement to specify such a period in a reference see the Water Industry Act 1991 s 14A(1); and PARA 144.

4 Water Industry Act 1991 s 14A(2) (s 14A added by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (5); Water Industry Act 1991 s 14A(2), (3), (5) amended by the Water Act 2003 s 36(2)). The Authority may, if it has received representations on the subject from the Commission and is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, extend that period by no more than six months: Water Industry Act 1991 s 14A(3) (as so added and amended). No more than one such extension is possible in relation to the same reference: s 14A(4) (as so added). The Authority must, in the case of an extension so made by it: (1) publish that extension in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it (s 14A(5)(a) (as so added and amended)); and (2) send a copy of what has been so published by it to the company whose appointment is mentioned in the reference (s 14A(5)(b) (as so added and amended)). As to the meaning of 'month' see PARA 23 note 10. As to the meaning of 'person' see PARA 13 note 29. As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see s 2; and PARA 130.

5 Water Industry Act 1991 s 15(4) (s 15(1), (4) amended by SI 1999/506; Water Industry Act 1991 s 15(4)-(6) further amended by the Water Act 2003 s 36(2)).

6 Water Industry Act 1991 s 15(1)(a) (s 15(1) as amended: see note 5).

7 Water Industry Act 1991 s 15(1)(b) (s 15(1) as amended: see note 5).

8 As to the meaning of 'modifications' see PARA 141 note 20.

9 Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

10 Water Industry Act 1991 s 15(1)(c) (s 15(1) as amended: see note 5). As to the making of modifications following a report see PARA 146.

11 Water Industry Act 1991 s 15(3) (s 15(3) substituted, (3A)-(3D) added, by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (6)(b)). As to absolute privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq.

12 Water Industry Act 1991 s 15(3A) (as added: see note 11). The considerations are: (1) the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest (s 15(3B) (as so added)); (2) the need to exclude from disclosure (so far as practicable) (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates (s 15(3C)(a) (as so added)); or (b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests (s 15(3C)(b) (as so added)); and (3) the extent to which the disclosure of the information mentioned in head (a) or (b) above is necessary for the purposes of the report (s 15(3D) (as so added)).

13 Water Industry Act 1991 s 15(5)(a) (as amended: see note 5). As to the Secretary of State see PARA 15 note 1.

14 Water Industry Act 1991 s 15(5)(b) (as amended: see note 5). If it appears to the Secretary of State that the publication of any matter in such a report would be against the public interest or the commercial interests of any person, he may, before the end of that period of 14 days, direct the Authority to exclude that matter from every copy of the report to be so published; and the Authority must comply with any such direction: s 15(6) (as so amended).

15 Ie for the purposes of the Water Industry Act 1991 s 16: see PARA 146.

16 Ie in pursuance of the Competition Act 1998 Sch 7 para 15: see **COMPETITION** vol 18 (2009) PARA 11.

17 Water Industry Act 1991 s 15(1A) (s 15(1A), (1B) added by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (6)).

18 Water Industry Act 1991 s 15(1B) (as added: see note 17).

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#### **146. Modification following report.**

Where a report of the Competition Commission<sup>1</sup> on a modification reference<sup>2</sup>:

- 154 (1) includes conclusions to the effect that any of the matters specified in the reference operate, or may be expected to operate, against the public interest<sup>3</sup>;
- 155 (2) specifies effects adverse to the public interest which those matters have or may be expected to have<sup>4</sup>;
- 156 (3) includes conclusions to the effect that those effects could be remedied or prevented by modifications<sup>5</sup> of the conditions of a company's appointment<sup>6</sup> as a relevant undertaker<sup>7</sup>; and
- 157 (4) specifies modifications by which those effects could be remedied or prevented<sup>8</sup>,

the Water Services Regulation Authority<sup>9</sup> must, subject to the following provisions, make such modifications of the conditions of that appointment as appear to it to be requisite for the purpose of remedying or preventing the adverse effects specified in the report<sup>10</sup>.

Before making any modifications, the Authority must have regard to the modifications specified in the report<sup>11</sup>; and must give notice<sup>12</sup> stating that it proposes to make the modifications and setting out their effect<sup>13</sup>, stating the reasons why it proposes to make them<sup>14</sup>, and specifying the period<sup>15</sup> within which representations or objections with respect to the proposed modifications may be made<sup>16</sup>. The Authority must consider any representations or objections which are duly made and not withdrawn<sup>17</sup>.

After considering any representations or objections made in response to proposals set out in the notice, the Authority must give notice to the Commission setting out the modifications it proposes to make to remedy or prevent the adverse effects specified in the report<sup>18</sup>, and stating the reasons for making the modifications<sup>19</sup>. If the period of four weeks<sup>20</sup> from the date on which the notice to the Commission is given elapses without a direction that the modifications set out in the notice are not to be made<sup>21</sup> being given to the Authority, the Authority must make the modifications set out in the notice<sup>22</sup> or, if a direction specifying certain modifications that may not be made has been given<sup>23</sup> to it, make the modifications which are not specified in that direction<sup>24</sup>.

The Authority must not make any modification under these powers of any provisions of a company's appointment which<sup>25</sup>: (a) are contained in that appointment for the purposes<sup>26</sup> of setting out the circumstances in which an appointment or variation replacing that company as a relevant undertaker may be made<sup>27</sup>; or (b) relate to the disposal<sup>28</sup> of, or of interests or rights in or over, a company's protected land<sup>29</sup>, and are stated in the appointment to be provisions which cannot be modified<sup>30</sup>.

1 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

2 ie a reference under the Water Industry Act 1991 s 14: see PARA 144. As to reports on modification references see PARA 145.

3 Water Industry Act 1991 s 16(1)(a).

4 Water Industry Act 1991 s 16(1)(b).

5 As to the meaning of 'modifications' see PARA 141 note 20.

6 le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

7 Water Industry Act 1991 s 16(1)(c). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

8 Water Industry Act 1991 s 16(1)(d).

9 As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

10 Water Industry Act 1991 s 16(1) (amended by SI 1999/506; the Water Act 2003 s 36(2)). The instruments of appointment of water undertakers are available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

11 Water Industry Act 1991 s 16(2) (amended by the Water Act 2003 s 36(2)).

12 The notice must be given by publishing it in such manner as the Authority considers appropriate for the purpose of bringing the matters to which it relates to the attention of persons likely to be affected by the making of the modifications (Water Industry Act 1991 s 16(4)(a) (amended by the Water Act 2003 s 36(2)), and by serving a copy of the notice on the company whose appointment it is proposed to modify (s 16(4)(b)). As to the meaning of 'notice' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29. As to the service of documents see PARA 22.

13 Water Industry Act 1991 s 16(3)(a) (amended by the Water Act 2003 s 36(2)).

14 Water Industry Act 1991 s 16(3)(b) (amended by the Water Act 2003 s 36(2)).

15 le not being less than 28 days from the date of the publication of the notice.

16 Water Industry Act 1991 s 16(3)(c).

17 Water Industry Act 1991 s 16(3) (amended by the Water Act 2003 s 36(2)).

18 Water Industry Act 1991 s 16(4A)(a) (s 16(4A)-(4C) added by the Water Act 2003 s 55(1), (3)).

19 Water Industry Act 1991 s 16(4A)(b) (as added: see note 18). The Authority must include with the notice a copy of any representations or objections it received: see s 16(4B) (as so added).

20 The Commission may apply to the Secretary of State for the period to be extended: see the Water Industry Act 1991 s 16A(2); and PARA 147. As to the Secretary of State see PARA 15 note 1.

21 le a direction under the Water Industry Act 1991 s 16A(1)(a): see PARA 147.

22 Water Industry Act 1991 s 16(4C)(a) (as added: see note 18).

23 le a direction under the Water Industry Act 1991 s 16A(1)(b): see PARA 147.

24 Water Industry Act 1991 s 16(4C)(b) (as added: see note 18).

25 Water Industry Act 1991 s 16(5) (amended by the Water Act 2003 s 36(2)).

26 le for the purposes of the Water Industry Act 1991 s 7(4)(c): see PARA 138.

27 Water Industry Act 1991 s 16(5)(a).

28 As to the meaning of 'disposal' see PARA 130 note 20.

29 As to the meaning of 'protected land' see PARA 130 note 21.

30 Water Industry Act 1991 s 16(5)(b).

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#### **147. Competition Commission's power of veto following report.**

The Competition Commission<sup>1</sup> may, within the period of four weeks after the date on which it is given a notice by the Water Services Regulation Authority<sup>2</sup> of the modifications<sup>3</sup> the Authority proposes to make to the conditions of appointment of a company as a relevant undertaker, direct the Authority<sup>4</sup>:

- 158 (1) not to make the modifications set out in that notice<sup>5</sup>; or
- 159 (2) not to make such of the modifications as may be specified in the direction<sup>6</sup>;

and the Authority must comply with any such direction<sup>7</sup>.

The power to give such a direction may only be exercised in respect of such of the modifications set out in the notice of proposed modifications as appear to the Commission not to be the modifications which are requisite for the purpose of remedying or preventing all or any of the adverse effects specified in the report as effects which could be remedied or prevented by modifications<sup>8</sup>.

If the Commission gives such a direction it:

- 160 (a) must give notice<sup>9</sup> setting out the modifications proposed by the Authority, the terms of the direction and the reasons for giving it<sup>10</sup>; and
  - 161 (b) must itself make such modifications as appear to it to be requisite for the purpose of remedying or preventing:
- 11
  - 13. (i) if the direction was given under head (1) above, the adverse effects specified in the report as effects which could be remedied or prevented by modifications<sup>11</sup>;
  - 14. (ii) if the direction was given under head (2) above, such of those adverse effects as are not remedied or prevented by the modifications made<sup>12</sup> by the Authority<sup>13</sup>.

12

The Commission may not make any modification under the above provisions which the Water Services Regulation Authority could not make<sup>14</sup> under its powers to make modifications following a report<sup>15</sup>. After making modifications under the above provisions the Commission must publish a notice stating that the modifications have been made and setting them out, with the reasons for making them<sup>16</sup>.

Certain provisions of the Enterprise Act 2002 apply, with specified modifications<sup>17</sup>, for the purposes of any investigation by the Commission in order to exercise its functions under the above provisions<sup>18</sup>. The Authority is under a duty to give the Commission information in order to assist it in the exercise of these functions<sup>19</sup>.

1 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12. Under the Utilities Act 2000, specialist members of the Commission must be appointed to exercise its functions under the Water Industry Act 1991 s 16A: see **COMPETITION** vol 18 (2009) PARA 9.

2 le a notice under the Water Industry Act 1991 s 16(4A): see PARA 146. As to the Water Services Regulation Authority see PARA 109.

3 As to the meaning of 'modifications' see PARA 141 note 20.

4 The Secretary of State may, within the period of four weeks after the date on which the Commission is given a notice under the Water Industry Act 1991 s 16(4A) (see PARA 146), and on the application of the Commission, direct that the period for giving such a direction (and, accordingly, the period mentioned in s 16(4C) (see PARA 146)) be extended by 14 days: s 16A(2) (ss 16A, 16B added by the Water Act 2003 s 55(1), (4)). As to the Secretary of State see PARA 15 note 1. As to the exercise by the Secretary of State of his powers and duties relating to the regulation of relevant undertakers see the Water Industry Act 1991 s 2; and PARA 130.

5 Water Industry Act 1991 s 16A(1)(a) (as added: see note 4).

6 Water Industry Act 1991 s 16A(1)(b) (as added: see note 4).

7 Water Industry Act 1991 s 16A(1) (as added: see note 4).

8 Water Industry Act 1991 s 16A(3) (as added: see note 4).

9 A notice under the Water Industry Act 1991 s 16A(4)(a) or (6) (see note 13) must be given: (1) by publishing it in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications (Water Industry Act 1991 s 16A(7) (a) (as added: see note 4)); and (2) by serving a copy on the Authority and the company whose conditions of appointment it is proposed should be modified (s 16A(7)(b) (as so added)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29.

For the purposes of the law relating to defamation, absolute privilege attaches to any notice under s 16A(4)(a), (6) (see note 13) or (9) (see the text to note 16): s 16B(1) (as so added). In giving any notice under s 16A(4)(a) or (6), or publishing any notice under s 16A(9), the Commission must have regard to the following considerations before disclosing any information: s 16B(2) (as so added). The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest: s 16B(3) (as so added). The second consideration is the need to exclude from disclosure (so far as practicable) (1) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates (s 16B(4)(a) (as so added)); or (2) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests (s 16B(4)(b) (as so added)). The third consideration is the extent to which the disclosure of the information mentioned in head (1) or (2) above is necessary for the purposes of the notice: s 16B(5) (as so added). As to absolute privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq. As to the meaning of 'information' see PARA 117 note 13.

10 Water Industry Act 1991 s 16A(4)(a) (as added: see note 4).

11 Water Industry Act 1991 s 16A(4)(b)(i) (as added: see note 4). As to the duty of the Water Services Regulation Authority to enter details of any modification in the register kept by it see s 195; and PARA 178.

12 le under the Water Industry Act 1991 s 16(4C)(b): see PARA 146.

13 Water Industry Act 1991 s 16A(4)(b)(ii) (as added: see note 4). In exercising its power under s 16A(4)(b), the Commission must have regard to the matters to which the Authority is required to have regard when determining the conditions of a company's appointment: s 16A(5) (as so added). Before making such modifications the Commission must give notice: (1) stating that it proposes to make the modifications and setting them out (s 16A(6)(a) (as so added)); (2) stating the reason why it proposes to make them (s 16A(6)(b) (as so added)); (3) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made (s 16A(6)(c) (as so added)), and must consider any representations or objections which are duly made and not withdrawn (s 16A(6) (as so added)). As to such notice see also note 9.

14 le under the Water Industry Act 1991 s 16: see PARA 146.

15 Water Industry Act 1991 s 16A(8) (as added: see note 4). Section 16A does not apply to the modification of the conditions of a company's appointment following a report of the Commission made before 1 October 2004 (being the date of the commencement of the Water Act 2003 s 55): Water Industry Act 1991 s 16A(10) (as so added); Water Act 2003 (Commencement No 2, Transitional Provisions and Savings) Order 2004, SI 2004/2528, art 2(h).

16 Water Industry Act 1991 s 16A(9) (as added: see note 4). As to such notice see note 9.



17 The following provisions of the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275) apply, with the modifications mentioned in the Water Industry Act 1991 s 16B(7), (8) (see below), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under s 16A, as they apply for the purposes of any investigations on references under the Enterprise Act 2002 Pt 3: (1) s 109 (attendance of witnesses and production of documents etc); (2) s 110 (enforcement of powers under s 109: general); (3) s 111 (penalties); (4) s 112 (penalties: main procedural requirements); (5) s 113 (payments and interest by instalments); (6) s 114 (appeals in relation to penalties); (7) s 115 (recovery of penalties); and (8) s 116 (statement of policy): Water Industry Act 1991 s 16B(6)(a)-(h) (as added: see note 4). The Enterprise Act 2002 s 110, in its application by virtue of head (2) above, has effect as if: (a) s 110(2) were omitted; (b) in s 110(4), for the words 'the publication of the report of the Commission on the reference concerned' there were substituted 'the publication by the Commission of a notice under the Water Industry Act 1991 s 16A(9) in connection with the reference concerned or, if no direction has been given by the Commission under s 16A(1) of that Act in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period'; and (c) in the Enterprise Act 2002 s 110(9) the words from 'or section' to 'section 65(3))' were omitted: Water Industry Act 1991 s 16B(7)(a)-(c) (as so added). The Enterprise Act 2002 s 111(5)(b), in its application by virtue of head (7) above, has effect as if for s 111(5)(b)(ii) there were substituted: '(ii) if earlier, the day on which a notice is published by the Commission under the Water Industry Act 1991 s 16A(9) in connection with the reference concerned or, if no direction is given by the Commission under s 16A(1) of that Act in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period': Water Industry Act 1991 s 16B(8) (as so added). Provisions of the Enterprise Act 2002 Pt 3 which have effect for the purposes of ss 109-116 of that Act (including, in particular, provisions relating to offences and the making of orders) have effect, for the purposes of the application of those sections by virtue of the Water Industry Act 1991 s 16B(6), in relation to those sections as so applied; and accordingly, corresponding provisions of the Water Industry Act 1991 do not have effect in relation to those sections as so applied: s 16B(9), (10) (as so added).

18 See the Water Industry Act 1991 s 16B(6) (as added: see note 4).

19 See the Water Industry Act 1991 s 14(5); and PARA 144.

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#### **148. Modification by order under other enactments.**

Where the Office of Fair Trading<sup>1</sup>, the Competition Commission<sup>2</sup> or, as the case may be, the Secretary of State<sup>3</sup> (the 'relevant authority') makes an order under certain provisions of the Enterprise Act 2002 (a 'relevant order')<sup>4</sup>, the order may<sup>5</sup> also provide for the modification<sup>6</sup> of the conditions of a company's appointment as a relevant undertaker<sup>7</sup> to such extent as may appear to the relevant authority to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order<sup>8</sup>. No modification may, however, be made under these powers of any provisions of a company's appointment which: (1) are contained in that appointment for the purposes<sup>9</sup> of setting out the circumstances in which an appointment or variation replacing that company as a relevant undertaker may be made<sup>10</sup>; or (2) relate to the disposal<sup>11</sup> of, or of interests or rights in or over, a company's protected land<sup>12</sup> and are stated in the appointment to be provisions which cannot be modified<sup>13</sup>.

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

2 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

3 As to the Secretary of State see PARA 15 note 1. As to the exercise by the Secretary of State of his powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

4 'Relevant order' means: (1) an order under the Enterprise Act 2002 s 75, 83 or 84, or s 45(7), Sch 7 para 5, 10 or 11 (see **COMPETITION** vol 18 (2009) PARA 219 et seq), where (a) one or more than one of the enterprises which have, or may have, ceased to be distinct enterprises was carried on by a relevant undertaker; or (b) one or more than one of the enterprises which will or may cease to be distinct enterprises is carried on by a relevant undertaker; or (2) an order under s 160 or s 161 (see **COMPETITION** vol 18 (2009) PARAS 302-303) where the feature, or combination of features, of the market in the United Kingdom for goods or services which prevents, restricts or distorts competition is (a) the structure or an aspect of the structure of a market for the supply of goods or services by a relevant undertaker; or (b) the conduct of a relevant undertaker or of customers of a relevant undertaker: Water Industry Act 1991 s 17(2) (s 17(1), (2), (4) substituted by the Enterprise Act 2002 ss 86(5), 164(2), Sch 9 Pt 1 para 7). As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the meaning of 'United Kingdom' see PARA 22 note 5. Expressions used in the Water Industry Act 1991 s 17(2) and in the Enterprise Act 2002 Pt 3 (ss 22-130) or (as the case may be) Pt 4 (ss 131-184) (see **COMPETITION** vol 18 (2009) PARAS 173-318) have the same meanings in that provision as in that Part: Water Industry Act 1991 s 17(4) (as so substituted).

5 Ie subject to the Water Industry Act 1991 s 17(3): see the text to notes 9-13.

6 As to the meaning of 'modification' see PARA 141 note 20.

7 Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. The instruments of appointment of water undertakers were available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

8 Water Industry Act 1991 s 17(1) (as substituted: see note 4). Section 17 contains the only direct provision for the Secretary of State to modify appointment conditions. As to modification by the Water Services Regulation Authority or the Competition Commission see PARAS 143-147.

9 Ie for the purposes of the Water Industry Act 1991 s 7(4)(c): see PARA 138.

10 Water Industry Act 1991 s 17(3)(a).

11 As to the meaning of 'disposal' see PARA 130 note 20.

- 12 As to the meaning of 'protected land' see PARA 130 note 21.
- 13 Water Industry Act 1991 s 17(3)(b).

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### **C. DISCLOSURE OF ARRANGEMENTS FOR REMUNERATION**

#### **149. Remuneration and standards of performance.**

The following provisions apply to any company holding an appointment<sup>1</sup> as a relevant undertaker<sup>2</sup>. As soon as reasonably practicable after the end of each financial year<sup>3</sup> of the company it must make a statement to the Water Services Regulation Authority<sup>4</sup>:

- 162 (1) disclosing whether or not remuneration<sup>5</sup> has been paid or become due during that financial year to the directors of the company<sup>6</sup> as a result of arrangements for linking the remuneration of the directors of the company to standards of performance<sup>7</sup> in connection with the carrying out by the company of the functions of a relevant undertaker<sup>8</sup>; and
- 163 (2) where such remuneration has been paid or become due, describing the arrangements and the remuneration<sup>9</sup>.

The statement must also state: (a) whether or not there are in force in respect of the financial year during which the statement is made arrangements falling within head (1) above<sup>10</sup>; or (b) if not, whether the company intends that such arrangements will be in force at some time during that financial year<sup>11</sup>; and if there are, or it is intended that there will be, such arrangements in force the statement must describe those arrangements<sup>12</sup>.

The statement must be made to the Authority in such manner as it may require<sup>13</sup>. The statement must be published by the company making the statement in such manner as it reasonably considers will secure adequate publicity for that statement<sup>14</sup>, and may be published by the Authority in such manner as it may consider appropriate<sup>15</sup>.

Any requirement imposed by the above provisions is to be treated as a statutory requirement enforceable<sup>16</sup> by the Authority<sup>17</sup>.

1    le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

2    Water Industry Act 1991 s 35A(1) (s 35A added by the Water Act 2003 s 50). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3    As to the meaning of 'financial year' see PARA 111 note 2.

4    As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

5    'Remuneration' in relation to a director of a company: (1) means any form of payment, consideration or other benefit (including pension benefit), paid or due to or in respect of the director; and (2) includes remuneration in respect of any of his services while a director of the company: Water Industry Act 1991 s 35A(10) (as added: see note 2). See also note 6.

6    The duty of a company under the Water Industry Act 1991 s 35A applies in respect of any person who has at any time been a director of the company: s 35A(9) (as added: see note 2).

7    'Standards of performance', in relation to any company, includes any standards which are: (1) set by or under any conditions of the company's appointment under the Water Industry Act 1991 Pt I Ch I (ss 6-13); (2) contained in or prescribed by regulations made under s 38(1)(b) or (2) (see PARA 325) or s 95(1)(b) or (2) (see

**ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1014); or (3) set or agreed to by the company: s 35A(10) (as added: see note 2). As to conditions to a company's appointment see PARA 142 et seq.

8 Water Industry Act 1991 s 35A(2)(a), (3) (s 35A as added: see note 2). As to the meaning of 'functions' see PARA 133 note 5.

9 Water Industry Act 1991 s 35A(2)(b) (as added: see note 2). A description under s 35A(2)(b) must include in particular: (1) a statement of when the arrangements were made (s 35A(4)(a) as so added)); (2) a description of the standards of performance in question (s 35A(4)(b) as so added)); (3) an explanation of the means by which the standards of performance are assessed (s 35A(4)(c) as so added)); and (4) an explanation of how the remuneration was calculated (s 35A(4)(d) as so added)).

10 Water Industry Act 1991 s 35A(5)(a) (as added: see note 2).

11 Water Industry Act 1991 s 35A(5)(b) (as added: see note 2).

12 Water Industry Act 1991 s 35A(5) (as added: see note 2). A description under s 35A(5) must: (1) include in particular the matters listed in s 35A(4)(a), (b) and (c) (see note 9) (s 35A(6)(a) (as so added)); and (2) where the arrangements described are different from any arrangements described under s 35A(2)(b) (see head (2) in the text), state the likely effect of those differences on the remuneration of each director of the company (s 35A(6)(b) (as so added)).

13 See the Water Industry Act 1991 s 35A(7) (as added: see note 2).

14 Water Industry Act 1991 S 35A(8)(a) (as added: see note 2).

15 Water Industry Act 1991 S 35A(8)(b) (as added: see note 2).

16 le under the Water Industry Act 1991 s 18: see PARA 163.

17 Water Industry Act 1991 s 35A(11) (as added: see note 2).

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## ***D. MERGERS OF UNDERTAKINGS***

### **150. Duty to refer merger of water undertakings.**

It is the duty of the Office of Fair Trading (the 'OFT')<sup>1</sup> to make a merger reference to the Competition Commission<sup>2</sup> if the OFT believes that it is or may be the case:

- 164 (1) that arrangements are in progress which, if carried into effect, will result in a merger<sup>3</sup> of any two or more water enterprises<sup>4</sup>; or
- 165 (2) that such a merger has taken place otherwise than as a result of the carrying into effect of arrangements that have been the subject of a reference by virtue of head (1) above<sup>5</sup>.

The OFT must not, however, make such a merger reference in respect of any actual or prospective merger of two or more water enterprises if it appears to it:

- 166 (a) that the value of the turnover of the water enterprise being taken over does not exceed or, as the case may be, would not exceed £10 million<sup>6</sup>; or
- 167 (b) that the only water enterprises already belonging to the person<sup>7</sup> making the takeover are enterprises each of which has a turnover the value of which does not exceed or, as the case may be, would not exceed £10 million<sup>8</sup>;

but in a case in which, or to any extent to which, the OFT is not required to make such a reference, nothing in the relevant provisions<sup>9</sup> prejudices any power of the OFT or the Secretary of State to make a reference under the Enterprise Act 2002<sup>10</sup> in respect of any actual or prospective merger of two or more water enterprises<sup>11</sup>.

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

2 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

3 References in the Water Industry Act 1991 Pt II Ch III (ss 27-35A) (including Sch 4ZA: see PARA 151), in relation to any two or more enterprises, to the merger of those enterprises are references to those enterprises ceasing, within the meaning of the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275), to be distinct enterprises; and ss 27-29 of that Act and any provision made under s 34 of that Act (time at which enterprises cease to be distinct) have effect for the purposes of the Water Industry Act 1991 Pt II Ch III (including Sch 4ZA) as they have effect for the purposes of the Enterprise Act 2002 Pt 3: Water Industry Act 1991 s 35(2) (ss 32-35 substituted by the Enterprise Act 2002 s 70(1), (2), Sch 6). 'Enterprise' has the same meaning as in the Enterprise Act 2002 Pt 3 (see **COMPETITION** vol 18 (2009) PARA 173): Water Industry Act 1991 s 35(1)(as so substituted).

4 Water Industry Act 1991 s 32(a) (as substituted: see note 3). 'Water enterprise' means an enterprise carried on by a relevant undertaker: s 35(1) (as so substituted; and amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 27(1), (2)). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

5 Water Industry Act 1991 s 32(b) (as substituted: see note 3).

6 Water Industry Act 1991 s 33(1)(a) (as substituted: see note 3). For these purposes, the value of the turnover of the water enterprise being taken over must be determined by taking the total value of the turnover of the water enterprises ceasing to be distinct enterprises and deducting: (1) the turnover of any water

enterprise continuing to be carried on under the same ownership and control (s 33(2)(a) (as so substituted)); or (2) if there is no water enterprise continuing to be carried on under the same ownership and control, the turnover which, of all the turnovers concerned, is the turnover of the highest value (s 33(2)(b) (as so substituted)). References in s 33 to enterprises being carried on under the same ownership and control must be construed in accordance with the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275): Water Industry Act 1991 s 33(9) (as so substituted).

For the purposes of s 33, the turnover of a water enterprise must be determined in accordance with such provisions as may be specified in regulations made by the Secretary of State: s 33(4) (as so substituted). Such regulations may, in particular, make provision: (a) as to the amounts which are, or which are not, to be treated as comprising an enterprise's turnover (s 33(5)(a) (as so substituted)); (b) as to the date or dates by reference to which an enterprise's turnover is to be determined (s 33(5)(b) (as so substituted)); and (c) enabling the Secretary of State or the OFT to determine matters of a description specified in the regulations (including any of the matters mentioned in heads (a)-(b) above) (s 33(6) (as so substituted)). The Secretary of State may by regulations amend the Water Industry Act 1991 s 33(1) so as: (i) to alter the sum for the time being mentioned in s 33(1)(a) or otherwise to modify the condition set out in s 33(1)(a) (s 33(7)(a) (as so substituted)); or (ii) to alter the sum for the time being mentioned in s 33(1)(b) (see the text to notes 7-8) or otherwise to modify the condition set out in s 33(1)(b) (s 33(7)(b) (as so substituted)). Such regulations must not make any modifications in relation to mergers on or before the coming into force of the regulations (s 33(8)(a) (as so substituted)), and may, in particular, include supplemental, consequential or transitional provision amending or repealing any provision of s 33 (s 33(8)(b) (as so substituted)). As to the Secretary of State see PARA 15 note 1. As to the making of regulations see PARA 21. As to the regulations made see the Water Mergers (Determination of Turnover) Regulations 2004, SI 2004/3206.

7 As to the meaning of 'person' see PARA 13 note 29.

8 Water Industry Act 1991 s 33(1)(b) (as substituted: see note 3). For these purposes (1) every water enterprise ceasing to be a distinct enterprise and whose turnover is to be deducted by virtue of s 33(2)(a) or (b) (see note 6) must be treated as a water enterprise belonging to the person making the take over (s 33(3)(a) (as so substituted)); and (2) water enterprises must be treated as separate enterprises so far as they are carried on by different companies holding appointments under Pt II Ch 1 (ss 6-17) (s 33(3)(b) (as so substituted)). See also note 6.

9 Ie nothing in the Water Industry Act 1991 ss 32-34 (including Sch 4ZA).

10 Ie under the Enterprise Act 2002 Pt 3 (ss 22-130): see **COMPETITION** vol 18 (2009) PARAS 173-275.

11 Water Industry Act 1991 s 35(3) (as substituted: see note 3). Where two or more enterprises have merged or will merge as part of transactions or arrangements which also involve an actual or prospective merger of two or more water enterprises, the Enterprise Act 2002 Pt 3 (ss 22-130) applies in relation to the actual or prospective merger of the enterprises concerned excluding the water enterprises; and references in that Part to the creation of a relevant merger situation must be construed accordingly: Water Industry Act 1991 s 35(4) (as so substituted). Subject to s 35(3), (4), the Enterprise Act 2002 Pt 3 (ss 22-130) does not apply in a case in which the OFT is required to make a reference under the Water Industry Act 1991 s 32 except as applied by virtue of Sch 4ZA (see PARA 151): s 35(5) (as so substituted).

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### **151. Procedure on a reference.**

The following provisions have effect with respect to mergers<sup>1</sup> of water enterprises<sup>2</sup>. The Enterprise Act 2002<sup>3</sup> applies, with such prescribed<sup>4</sup> modifications as the Secretary of State considers to be necessary or expedient<sup>5</sup>, in relation to water mergers and merger references<sup>6</sup> as that Act applies in relation to relevant merger situations and references under that Act<sup>7</sup>.

The first questions to be decided by the Competition Commission<sup>8</sup> on a merger reference on the grounds that arrangements are in progress which, if carried into effect, will result in a merger of any two or more water enterprises<sup>9</sup> are:

- 168 (1) whether arrangements are in progress which, if carried into effect, will result in a water merger<sup>10</sup>; and
- 169 (2) if so, whether that merger may be expected to prejudice the ability of the Water Services Regulation Authority<sup>11</sup>, in carrying out its functions<sup>12</sup> by virtue of the Water Industry Act 1991, to make comparisons between different water enterprises<sup>13</sup>.

In deciding, on such a merger reference, whether to take action for the purpose of remedying, mitigating or preventing the prejudice to the Water Services Regulation Authority or any adverse effect which may be expected to result from the prejudice to the Authority and, if so, what action should be taken, the Commission may, in particular, have regard to the effect of any such action on any relevant customer benefits<sup>14</sup> in relation to the merger concerned provided that:

- 170 (a) a consideration of those benefits would not prevent a solution to the prejudice concerned<sup>15</sup>; or
- 171 (b) the benefits which may be expected to accrue are substantially more important than the prejudice concerned<sup>16</sup>;

but this is without prejudice to the Secretary of State's power to provide in regulations<sup>17</sup> for other matters to which the Commission may or must have regard, including matters which are to take priority over the effect of action on relevant customer benefits<sup>18</sup>.

The first questions to be decided by the Commission on a merger reference on the grounds that such a merger has taken place otherwise than as mentioned above<sup>19</sup> are:

- 172 (i) whether a water merger has taken place<sup>20</sup>; and
- 173 (ii) if so, whether that merger has prejudiced, or may be expected to prejudice, the ability of the Water Services Regulation Authority, in carrying out its functions by virtue of the Water Industry Act 1991, to make comparisons between different water enterprises<sup>21</sup>.

In deciding, on such a merger reference, whether to take action for the purpose of remedying, mitigating or preventing the prejudice to the Authority or any adverse effect which has resulted from, or may be expected to result from, the prejudice to the Authority and, if so, what action



should be taken, the Commission may, in particular, have regard to the effect of any such action on any relevant customer benefits in relation to the merger concerned provided that:

- 174 (A) a consideration of those benefits would not prevent a solution to the prejudice concerned<sup>22</sup>; or
- 175 (B) the benefits which have accrued, or may be expected to accrue, are substantially more important than the prejudice concerned<sup>23</sup>;

but this is without prejudice to the Secretary of State's powers to make provision in regulations<sup>24</sup> for other matters to which the Commission may or must have regard in deciding those questions, including matters which are to take priority over the effect of action on relevant customer benefits<sup>25</sup>. No enforcement action is to be taken on such a merger reference in respect of an actual merger unless the reference was made within the period of four months<sup>26</sup> beginning with whichever is the later of the day on which the merger took place<sup>27</sup>, and the day on which the material facts about the transactions which resulted in the merger first came to the attention of the Office of Fair Trading or were made public<sup>28</sup>. If, on such a merger reference, the Commission is satisfied that the reference was not made within that period of four months, its report on the reference must state that fact<sup>29</sup>.

1 As to the meaning of 'merger' see PARA 150 note 3.

2 Water Industry Act 1991 s 34 (s 34 substituted, Sch 4ZA added, by the Enterprise Act 2002 s 70(1), (2), Sch 6). As to the meaning of 'water enterprise' see PARA 150 note 4. As to the duty of the Office of Fair Trading to make merger references in respect of water enterprises to the Competition Commission see PARA 150.

3 I.e. the Enterprise Act 2002 Pt 3 (ss 22-130), and any other provisions of that Act so far as relating to that Part: see **COMPETITION** vol 18 (2009) PARAS 173-275.

4 'Prescribed' means prescribed by regulations made by the Secretary of State: Water Industry Act 1991 s 219(1). As to the Secretary of State see PARA 15 note 1. As to the making of regulations see PARA 21. As to the regulations made see the Water Mergers (Modification of Enactments) Regulations 2004, SI 2004/3202.

5 The modifications so made must include modifications to give effect to the Water Industry Act 1991 Sch 4ZA paras 3-6 (see the text to notes 8-29): Sch 4ZA para 2 (as added: see note 2). As to the meaning of 'modifications' see PARA 141 note 20.

6 I.e. references under the Water Industry Act 1991 s 32: see PARA 150. 'Water merger' means a merger of any two or more water enterprises: Sch 4ZA para 8 (as added: see note 2).

7 See the Water Industry Act 1991 Sch 4ZA para 1 (as added: see note 2).

8 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

9 I.e. a reference under the Water Industry Act 1991 s 32(a): see PARA 150.

10 Water Industry Act 1991 Sch 4ZA para 3(1)(a) (as added: see note 2). Any decision of the Commission on a merger reference under s 32(a) that arrangements are in progress which, if carried into effect, will result in a water merger must be treated as a decision that no arrangements are in progress which, if carried into effect, will result in a water merger if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of the Competition Act 1998 Sch 7 para 15 (see **COMPETITION** vol 18 (2009) PARA 11): Water Industry Act 1991 Sch 4ZA para 3(3) (as so added).

11 As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

12 As to the meaning of 'functions' see PARA 133 note 5.

13 Water Industry Act 1991 Sch 4ZA para 3(1)(b) (as added (see note 2); and amended by the Water Act 2003 s 36(2)). Any decision of the Commission on a merger reference under the Water Industry Act 1991 s 32(a) (see PARA 150) that a water merger may be expected to prejudice the ability of the Authority, in carrying out its functions by virtue of the Water Industry Act 1991, to make comparisons between different water enterprises must be treated as a decision that the water merger may be expected not to prejudice that ability.

of the Authority if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of Competition Act 1998 Sch 7 para 15 (see **COMPETITION** vol 18 (2009) PARA 11): Water Industry Act 1991 Sch 4ZA para 3(4) (as so added; and amended by the Water Act 2003 s 36(2)).

14 A benefit is a 'relevant customer benefit' if: (1) it is a benefit to relevant customers in the form of (a) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or (b) greater innovation in relation to such goods or services; and (2) the Commission believes (a) in the case of a merger reference under the Water Industry Act 1991 s 32(a) (see PARA 150), as mentioned in Sch 4ZA para 7(2) (see below); and (b) in the case of a merger reference under s 32(b) (see PARA 150), as mentioned in Sch 4ZA para 7(3) (see below): Sch 4ZA para 7(1) (as added: see note 2). The belief, in the case of a merger reference under s 32(a), is that: (i) the benefit may be expected to accrue within a reasonable period as a result of the merger concerned; and (ii) the benefit is unlikely to accrue without the merger concerned or a similar prejudice to the Authority: Sch 4ZA para 7(2) (as so added; and amended by the Water Act 2003 s 36(2)). The belief, in the case of a merger reference under the Water Industry Act 1991 s 32(b), is that: (A) the benefit has accrued as a result of the merger concerned or may be expected to accrue within a reasonable period as a result of the merger concerned; and (B) the benefit was, or is, unlikely to accrue without the merger concerned or a similar prejudice to the Authority: Sch 4ZA para 7(3) (as so added; and amended by the Water Act 2003 s 36(2)). In the Water Industry Act 1991 Sch 4ZA para 7(1), 'relevant customers' means: (aa) customers of any person carrying on an enterprise which, in the merger concerned, has ceased to be, or (as the case may be) will cease to be, a distinct enterprise; (bb) customers of such customers; and (cc) any other customers in a chain of customers beginning with the customers mentioned in head (aa) above; and for these purposes 'customers' includes future customers: Sch 4ZA para 7(4) (as so added). In Sch 4ZA 'customers', 'goods', 'market in the United Kingdom', 'services' and 'relevant merger situation' have the same meanings as in the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275): Water Industry Act 1991 Sch 4ZA para 8 (as so added). As to the meaning of 'United Kingdom' see PARA 22 note 5. As to the meaning of 'person' see PARA 13 note 29.

15 Water Industry Act 1991 Sch 4ZA para 4(1)(a) (as added: see note 2).

16 Water Industry Act 1991 Sch 4ZA para 4(1)(b) (as added: see note 2).

17 le under the Water Industry Act 1991 Sch 4ZA para 1: see the text to notes 3-7.

18 Water Industry Act 1991 Sch 4ZA para 4(3) (as added: see note 2).

19 le a merger reference under the Water Industry Act 1991 s 32(b): see PARA 150.

20 Water Industry Act 1991 Sch 4ZA para 3(2)(a) (as added: see note 2). Any decision of the Commission on a merger reference under s 32(b) (see PARA 150) that a water merger has taken place must be treated as a decision that no water merger has taken place if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of the Competition Act 1998 Sch 7 para 15: Water Industry Act 1991 Sch 4ZA para 3(5) (as so added).

21 Water Industry Act 1991 Sch 4ZA para 3(2)(b) (as added (see note 2); and amended by the Water Act 2003 s 36(2)). Any decision of the Commission on a merger reference under the Water Industry Act 1991 s 32(b) (see PARA 150) that a water merger has prejudiced, or may be expected to prejudice, the ability of the Authority, in carrying out its functions by virtue of the Water Industry Act 1991, to make comparisons between different water enterprises must be treated as a decision that the water merger has not prejudiced, or may be expected not to prejudice, that ability of the Authority if the decision is not that of at least two-thirds of the members of the group constituted in connection with the reference in pursuance of the Competition Act 1998 Sch 7 para 15: Water Industry Act 1991 Sch 4ZA para 3(6) (as so added; and amended by the Water Act 2003 s 36(2)).

22 Water Industry Act 1991 Sch 4ZA para 4(2)(a) (as added: see note 2). See also note 14.

23 Water Industry Act 1991 Sch 4ZA para 4(2)(b) (as added: see note 2).

24 le under the Water Industry Act 1991 Sch 4ZA para 1: see the text to notes 3-7.

25 Water Industry Act 1991 Sch 4ZA para 4(3) (as added (see note 2); and amended by the Water Act 2003 s 36(2)).

26 This provision is without prejudice to the power of the Secretary of State to provide in regulations made under the Water Industry Act 1991 Sch 4ZA para 1 (see the text to notes 3-7) for extensions of the four month period; and, if any such provision is made in such regulations, the provision which is to be made in such regulations by virtue of Sch 4ZA para 5(1) or para 6 (see the text to note 29) may be adjusted accordingly: Sch 4ZA para 5(2) (as added: see note 2). As to the meaning of 'month' see PARA 23 note 10.

27 Water Industry Act 1991 Sch 4ZA para 5(1)(a) (as added: see note 2).

28 Water Industry Act 1991 Sch 4ZA para 5(1)(b) (as added: see note 2). 'Made public' means made public within the meaning given by the Enterprise Act 2002 s 24(3) (see **COMPETITION** vol 18 (2009) PARA 174); Water Industry Act 1991 Sch 4ZA para 5(1)(b) (as so added). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

29 Water Industry Act 1991 Sch 4ZA para 6 (as added: see note 2). See also note 26.

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## **(5) LICENSED WATER SUPPLIERS**

### **(i) Granting of Licences**

#### **152. Granting of licences.**

The Secretary of State<sup>1</sup>, or the Water Services Regulation Authority<sup>2</sup> with the consent of, or in accordance with a general authorisation given by, the Secretary of State after consulting the Welsh Ministers<sup>3</sup>, may grant to a company a licence (known as a 'water supply licence') giving it either the retail authorisation (known as a 'retail licence')<sup>4</sup>, or both that and the supplementary authorisation (known as a 'combined licence')<sup>5</sup>. A company which is the holder for the time being of a water supply licence is known as a 'licensed water supplier'<sup>6</sup>.

The retail authorisation is an authorisation to the company to use a water undertaker's<sup>7</sup> supply system<sup>8</sup> for the purpose of supplying water<sup>9</sup> to the premises of customers<sup>10</sup> of the company<sup>11</sup>. The following requirements must be satisfied in relation to each of the premises supplied by the company:

- 176 (1) the requirement that the premises are not household premises<sup>12</sup>;
- 177 (2) the threshold requirement<sup>13</sup>; and
- 178 (3) the requirement that the premises are not being supplied with water by another company pursuant to a water supply licence<sup>14</sup>,

and those requirements are enforceable<sup>15</sup> by the Water Services Regulation Authority<sup>16</sup>.

The Water Services Regulation Authority may determine, in a case referred to it by a licensed water supplier or a potential customer of a licensed water supplier, whether a proposed supply of water by the supplier to the customer would be in accordance with the retail authorisation given to the supplier in the licence<sup>17</sup>.

The supplementary authorisation is an authorisation to the company to introduce water into a water undertaker's supply system, by means of which any particular supply of water in accordance with the retail authorisation is to take place, in connection with that supply and in accordance with the relevant statutory provisions<sup>18</sup>.

Before granting a combined licence, the Secretary of State must consult the Welsh Ministers<sup>19</sup>, and the Water Services Regulation Authority must consult both the Secretary of State and the Welsh Ministers<sup>20</sup>. A water supply licence must not be granted to a company unless it is a limited company<sup>21</sup> and it is not a relevant undertaker<sup>22</sup>.

1 Water Industry Act 1991 s 17A(1)(a) (ss 17A-17E added by the Water Act 2003 s 56, Sch 4 paras 1, 2). As to the Secretary of State see PARA 15 note 1.

2 As to the Water Services Regulation Authority see PARA 109. Information as to water supply licensing and licences granted is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

3 Water Industry Act 1991 s 17A(1)(b) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 17A were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1),

Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

4 A water supply licence which gives a company only the retail authorisation is referred to in the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) as a 'retail licence': s 17A(4) (as added: see note 1).

5 Water Industry Act 1991 s 17A(1) (as added: see note 1). A water supply licence which gives a company also the supplementary authorisation is referred to in Pt II Ch 1A (ss 17A-17R) as a 'combined licence': s 17A(6) (as so added). As to the procedure for granting of licences see PARA 153.

6 See the Water Industry Act 1991 s 17B(9) (as added: see note 1), s 219(1) (definition added by the Water Act 2003 s 101(1), Sch 8 paras 2, 50(1), (2)(c)).

7 As to the meaning of 'water undertaker' see PARA 137 note 4.

8 References in the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) to the supply system of a water undertaker are to the system comprising the following: (1) any water mains and other pipes which it is the water undertaker's duty to develop and maintain by virtue of s 37 (see PARA 319) and which are used for the purpose of conveying water from the undertaker's treatment works to the premises of customers; and (2) any water mains and other pipes which (a) are used by the undertaker for the purpose of conveying non-domestic water from any of its sources to the premises of customers; and (b) are not connected to any water mains or pipes falling within head (1) above or to any water mains or other pipes connected to the treatment works mentioned in that head (whether directly or indirectly); and in head (a) the reference to non-domestic water is to water supplied other than for domestic or food production purposes: s 17B(5) (as added: see note 1). The reference above to 'treatment works' is a reference to the works designated from time to time by the Secretary of State as treatment works for these purposes: s 17B(6) (as so added). Before designating any works for these purposes, the Secretary of State must consult the Welsh Ministers: s 17B(7) (as so added); Government of Wales Act 2006 Sch 11 para 32. A list of any works designated for these purposes must be published from time to time by the Secretary of State in such manner as he considers appropriate for the purpose of bringing the designations to the attention of persons likely to be affected by them: Water Industry Act 1991 s 17B(8) (as so added). As to the meanings of 'water main' and 'pipe' see PARA 138 note 11. As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'person' see PARA 13 note 29.

9 le subject to the Water Industry Act 1991 s 17A(3) (see heads (1)-(3) in the text) in accordance with Pt III Ch 2A (ss 66A-66L) (see PARA 341 et seq).

10 As to the meaning of 'customers or potential customers' see PARA 118 note 7.

11 Water Industry Act 1991 s 17A(2) (as added: see note 1).

12 Water Industry Act 1991 s 17A(3)(a) (as added: see note 1). 'Household premises' means premises in which, or in any part of which, a person has his home: s 17C(1) (as so added). The fact that a person has his home in, or in part of, any premises does not mean that the premises are household premises unless the principal use of the premises is as a home: s 17C(2) (as so added). The Secretary of State may by regulations make provision as to: (1) the circumstances in which a person is or is not to be treated as having his home in, or in part of, any premises for these purposes (s 17C(3)(a) (as so added)); and (2) the factors which are, or are not, to be taken into account in determining the principal use of any premises for those purposes (s 17C(3)(b) (as so added)). The power to make such regulations is exercisable by the Welsh Ministers, and not by the Secretary of State, in relation to premises supplied with water using the supply system of a water undertaker whose area is wholly or mainly in Wales: s 17C(4) (as so added); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'Wales' see PARA 16 note 2. As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

13 Water Industry Act 1991 s 17A(3)(b) (as added: see note 1). The following provisions apply for the purpose of construing the threshold requirement in relation to the supply of water to any premises: see s 17D(1) (as so added). The requirement is that, at the time when the licensed water supplier first enters into an undertaking with a customer to give the supply, the total quantity of water estimated to be supplied to the premises annually pursuant to the undertaking is not less than 50 megalitres: s 17D(2) (as so added). Any estimate of the quantity of water to be supplied to any premises for these purposes must be made in accordance with guidance issued by the Water Services Regulation Authority with the approval of the Secretary of State: s 17D(3) (as so added). Any guidance so issued may, in particular: (1) specify the factors to be, and not to be, taken into account, the assumptions to be made and the method of calculation to be employed, in making estimates (s 17D(4)(a) (as so added)); and (2) make provision as to the commencement of the annual periods by reference to which estimates are to be made (s 17D(4)(b) (as so added)). Before giving his approval to any guidance so issued, the Secretary of State must consult the Welsh Ministers: s 17D(5) (as so added); Government of Wales Act 2006 Sch 11 para 32. The Water Industry Act 1991 s 17B(1)-(4) (see note 16) applies to guidance so issued as it applies to guidance issued under s 17A(9): s 17D(6) (as so added).

The Secretary of State may make provision by regulations as to the circumstances in which a licensed water supplier is not, for the purposes of s 17D(2), to be treated as entering into an undertaking with a new customer to give a supply of water to any premises (subject to s 17D(12): see below): s 17D(7) (as so added). The Secretary of State may also by regulations amend s 17D(2) (see above) by substituting, for the quantity of water for the time being specified there, a different quantity of water (subject to s 17D(12)): s 17D(8) (as so added). Regulations under s 17D(8) must include provision for the amendment made by the regulations not to apply in relation to any undertaking entered into before the date on which the regulations come into force (s 17D(9)(a) (as so added)); and may include provision for that amendment not to apply in relation to any undertaking which is proposed, but not entered into, before that date (s 17D(9)(b) (as so added)). A statutory instrument containing regulations under s 17D(8) must not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 17D(10) (as so added). Before making regulations under s 17D(8), the Secretary of State must consult the Water Services Regulation Authority and such other persons (if any) as the Secretary of State thinks it appropriate to consult: s 17D(11) (as so added). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. As to the regulations made see the Water Supply Licence (New Customer Exception) Regulations 2005, SI 2005/3076.

The powers to make regulations under the Water Industry Act 1991 s 17D(7) and (8) are exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to premises supplied with water using the supply system of a water undertaker whose area is wholly or mainly in Wales: s 17D(12) (as so added); Government of Wales Act 2006 Sch 11 para 32. The Water Industry Act 1991 s 17D(9), (11) applies in relation to such regulations made by the Welsh Ministers under s 17D(8) as it applies in relation to regulations made by the Secretary of State under s 17D(8): s 17D(13) (as so added). As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 3 para 9; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. At the date at which this volume states the law no such regulations had been made.

14 Water Industry Act 1991 s 17A(3)(c) (as added: see note 1).

15 *le* under the Water Industry Act 1991 s 18: see PARA 163.

16 Water Industry Act 1991 s 17A(3) (as added: see note 1). The Water Services Regulation Authority may, with the approval of the Secretary of State, issue guidance as to the factors which are, or are not, to be taken into account in determining the extent of any premises for the purposes of s 17A(3): s 17A(9) (as so added). Before giving his approval to any guidance so issued, the Secretary of State must consult the Welsh Ministers: s 17A(10) (as so added); Government of Wales Act 2006 Sch 11 para 32. The Authority must publish guidance so issued in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it: Water Industry Act 1991 s 17B(1) (as so added). The Authority may, with the approval of the Secretary of State, revise the guidance so issued: s 17B(2) (as so added). Before giving his approval to guidance so revised, the Secretary of State must consult the Welsh Ministers: s 17B(3) (as so added); Government of Wales Act 2006 Sch 11 para 32. The Water Industry Act 1991 s 17B(1) applies to guidance so revised as it applies to guidance issued under s 17A(9): s 17B(4) (as so added).

17 Water Industry Act 1991 s 17E(1) (as added: see note 1). The matters which the Authority may determine include the following matters: (1) the extent of the premises to be supplied for the purposes of s 17A(3) (see the text to notes 12-16) (s 17E(2)(a) (as so added)); (2) whether the premises to be supplied are household premises (s 17E(2)(b) (as so added)); and (3) whether the threshold requirement is satisfied in relation to the premises to be supplied (s 17E(2)(c) (as so added)); and also include any other matter the determination of which is relevant to those matters (s 17E(2) (as so added)).

18 Water Industry Act 1991 s 17A(5) (as added: see note 1). The relevant statutory provisions are the provisions of Pt III Ch 2A (ss 66A-66L): see PARA 341 *et seq*.

19 Water Industry Act 1991 s 17A(7)(a) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

20 Water Industry Act 1991 s 17A(7)(b) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.

21 Water Industry Act 1991 s 17A(8)(a) (as added: see note 1). As to the meaning of 'limited company' see PARA 137 note 7.

22 Water Industry Act 1991 s 17A(8)(b) (as added: see note 1). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

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### **153. Procedure for granting water supply licences.**

An application for:

- 179 (1) a water supply licence<sup>1</sup>;
- 180 (2) the variation of a retail licence<sup>2</sup> so that it gives also the supplementary authorisation<sup>3</sup>; or
- 181 (3) the variation of a combined licence<sup>4</sup> so that it gives only the retail authorisation<sup>5</sup>,

must be made in such form and manner, and must contain, or be accompanied by, such information and documents and such fee, if any, as may be prescribed<sup>6</sup>. Within the prescribed period after the making of such an application, the applicant must publish in the prescribed manner a notice of the application containing such particulars as may be prescribed<sup>7</sup>; and the particulars which may be so prescribed include the time within which, and the address at which, representations or objections with respect to the application may be made<sup>8</sup>.

If the Secretary of State or the Water Services Regulation Authority proposes to refuse the application, he or it must give to the applicant a notice stating that he or it proposes to refuse the application<sup>9</sup> and the reasons why he or it proposes to refuse the application<sup>10</sup>, and specifying the time within which representations or objections with respect to the proposed refusal may be made<sup>11</sup>. The Secretary of State or the Authority must consider any representations or objections which are duly made and not withdrawn<sup>12</sup>.

A licence must be in writing and, unless revoked or suspended in accordance with any condition contained in it<sup>13</sup>, continues in force for such period as may be specified in or determined by or under the licence<sup>14</sup>.

As soon as practicable after granting a licence or variation of a licence<sup>15</sup>, the Secretary of State or the Water Services Regulation Authority must serve<sup>16</sup> a copy of the licence or licence as varied on the licence holder<sup>17</sup>, the Welsh Ministers<sup>18</sup>, the Chief Inspector of Drinking Water<sup>19</sup>, the Environment Agency<sup>20</sup>, the Consumer Council for Water<sup>21</sup>, each relevant undertaker<sup>22</sup>, and each licensed water supplier (other than the holder of the licence in question)<sup>23</sup>. If the licence or variation is granted by the Secretary of State he must also serve a copy on the Authority<sup>24</sup>; and if the licence or variation is granted by the Authority it must also serve a copy on the Secretary of State<sup>25</sup>.

1 Water Industry Act 1991 s 17F(1)(a) (s 17F added by the Water Act 2003 s 56, Sch 4 paras 1, 2). As to the meaning of 'water supply licence' see PARA 152.

2 As to the meaning of 'retail licence' see PARA 152.

3 Water Industry Act 1991 s 17F(1)(b) (as added: see note 1). As to the meaning of 'supplementary authorisation' see PARA 152.

4 As to the meaning of 'combined licence' see PARA 152.

5 Water Industry Act 1991 s 17F(1)(c) (as added: see note 1). As to the meaning of 'retail authorisation' see PARA 152.

6 Water Industry Act 1991 s 17F(1) (as added: see note 1). 'Prescribed' means prescribed by regulations made by the Secretary of State: s 219(1). As to the Secretary of State see PARA 15 note 1. As to the making of regulations see PARA 21. An application must be made to the Water Services Regulation Authority in such form and manner, and contain, or be accompanied by, such information and documents, as the Authority determines in guidance issued by it: Water Supply Licence (Application) Regulations 2005, SI 2005/1638, reg 3(1). Before issuing such guidance, the Authority must consult such persons as it considers appropriate: reg 3(2). The Authority must publish the guidance issued by it in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it: reg 3(4). The Authority may from time to time revise the guidance but before doing so must consult such persons as it considers appropriate: reg 3(5), (6). Regulation 3(4) applies to guidance revised under reg 3(5) as it applies to guidance issued under reg 3(1): reg 3(7). The Authority may require an applicant in any particular case to submit such additional information or documents as the Authority determines are necessary for determining the application: reg 3(8). An application must be accompanied by the relevant fee: see reg 4, Sch 1. As to the Water Services Regulation Authority see PARA 109. As to the meaning of 'information' see PARA 117 note 13. As to the meaning of 'person' see PARA 13 note 29. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. Information as to applications for water supply licences is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

7 Water Industry Act 1991 s 17F(2) (as added: see note 1).

8 Water Industry Act 1991 s 17F(3) (as added: see note 1). The Secretary of State may make provision by regulations disapplying s 17F(2) (see the text to note 7) and (3) in relation to an application in such circumstances as may be prescribed: s 17F(5) (as so added). As soon as reasonably practicable after the Water Services Regulation Authority decides that a valid application has been made, it must notify the applicant in writing: Water Supply Licence (Application) Regulations 2005, SI 2005/1638, reg 5(1). For these purposes, a notification is treated as made in writing if transmitted to the applicant by facsimile transmission or electronic mail: reg 5(2). The period after the making of an application within which a notice of application must be published by the applicant expires at 17.00 hours on the tenth working day after the day on which the Authority notifies the applicant that a valid application has been made: reg 5(3). The specified particulars must be contained in a notice of application: see reg 5(4), Sch 2. The notice of application must be published on the applicant's website or in such other manner as the applicant considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it: reg 5(5). On or as soon as reasonably practicable after the day on which the applicant publishes a notice of application, the Authority must publish a copy of that notice on the Authority's website: reg 5(6). The Water Industry Act 1991 s 17F(2) and (3) do not apply in relation to an application for the variation of a combined licence so that it gives only the retail authorisation: reg 5(7). Any representations or objections with respect to a notice of application so published must be received by the Authority no later than 17.00 hours on a day specified by that notice (reg 6(1)); and for these purposes, the day specified must be the twentieth working day after the day of publication of the relevant notice of application on the Authority's website (reg 6(2)). As to the meaning of 'writing' see PARA 22 note 1. 'Working day' means any day which is not a Saturday, Sunday or any other day on which the offices of the Authority are closed for business: reg 2(1). As to the meaning of 'notice' see PARA 22 note 1.

9 Water Industry Act 1991 s 17F(4)(a) (as added: see note 1).

10 Water Industry Act 1991 s 17F(4)(b) (as added: see note 1).

11 Water Industry Act 1991 s 17F(4)(c) (as added: see note 1).

12 Water Industry Act 1991 s 17F(4) (as added: see note 1).

13 As to licence conditions see PARA 155.

14 Water Industry Act 1991 s 17F(6) (as added: see note 1).

15 As to licence variations see PARA 156 et seq.

16 As to the service of documents see PARA 22.

17 Water Industry Act 1991 s 17F(7)(a) (as added: see note 1).

18 Water Industry Act 1991 s 17F(7)(b) (as added: see note 1). Functions under the Water Industry Act 1991 s 17F were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

19 Water Industry Act 1991 s 17F(7)(c) (as added: see note 1). As to the Chief Inspector of Drinking Water see PARA 126.



20 Water Industry Act 1991 s 17F(7)(d) (as added: see note 1). As to the Environment Agency see PARA 17.

21 Water Industry Act 1991 s 17F(7)(e) (as added: see note 1). As to the Consumer Council for Water see PARA 115.

22 Water Industry Act 1991 s 17F(7)(f) (as added: see note 1). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

23 Water Industry Act 1991 s 17F(7)(g) (as added: see note 1). As to the meaning of 'licensed water supplier' see PARA 152.

24 Water Industry Act 1991 s 17F(7)(h) (as added: see note 1).

25 Water Industry Act 1991 s 17F(7)(i) (as added: see note 1).

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#### 154. Transitional provision with regard to transfer of specified activities.

Where the High Court has made a special administration order<sup>1</sup> in relation to any company which is a qualifying licensed water supplier<sup>2</sup> (the 'transferor') and it is proposed that on and after the relevant date<sup>3</sup> another company (the 'transferee') should carry on specified activities relating to the introduction or introductions of water<sup>4</sup> which were carried on by the transferor until that date, the statutory provisions with respect to replacement appointments of relevant undertakers<sup>5</sup> apply with modifications<sup>6</sup>. Where a scheme under those provisions is made in such a case, however, the scheme may not provide for the transfer to the transferee of the licence<sup>7</sup> which is held by the transferor<sup>8</sup>.

1 As to the meaning of 'special administration order' see PARA 173. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

2 For the purposes of the Water Industry Act 1991 ss 23-26, Sch 2 (see the text to notes 3-8; and PARA 173 et seq), a licensed water supplier is a 'qualifying licensed water supplier' if: (1) it is the holder of a combined licence (s 23(6)(a) (s 23(6) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 8(1), (6)); and (2) the introduction of water by it which is permitted under the Water Industry Act 1991 s 66B or s 66C (see PARAS 342-343) is designated as a strategic supply under s 66G (see PARA 344) or the introductions of water by it which are so permitted are designated as a collective strategic supply under s 66H (see PARA 345) (s 23(6)(b) (as so added)). As to the meanings of 'licensed water supplier' and 'combined licence' see PARA 152.

3 'Relevant date' means such day, being a day before the discharge of the special administration order takes effect, as the High Court may appoint therefor: Water Industry Act 1991 Sch 2 para 1(4)(b) (definition amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 51).

4 I.e. activities mentioned in the Water Industry Act 1991 s 23(6)(b): see note 2.

5 I.e. the Water Industry Act 1991 Sch 2: see PARA 141.

6 Water Industry Act 1991 Sch 2 para 1(1), (3A) (Sch 2 para 1(1) amended, paras 1(3A), 2(7A), 3(7), 4A, 5(3), 6(9) added, by the Water Act 2003 s 101(1), Sch 8 paras 2, 51). In such a case:

- 18 (1) Sch 2 para 2(1)-(7) (see PARA 141) has effect as if (a) any reference to the existing appointee were a reference to the transferor; (b) any reference to the new appointee were a reference to the transferee; and (c) any reference to other appointees were a reference to other relevant companies (Sch 2 para 2(7A)(a) (as so added));
- 19 (2) Sch 2 para 2(6) (see PARA 141) has effect as if the reference to functions were, in relation to a company which is a licensed water supplier, a reference to activities authorised by its licence and any statutory functions imposed on it in consequence of its licence (Sch 2 para 2(7A)(b) (as so added));
- 20 (3) Sch 2 para 3(1)-(7) (see PARA 141) has effect in such a case as if any reference to the existing appointee were a reference to the transferor, any reference to the new appointee were a reference to the transferee and any reference to other appointees were a reference to other relevant companies (Sch 2 para 3(7) (as so added));
- 21 (4) Sch 2 para 5(2) (see PARA 141) has effect in such a case as if any reference to the existing appointee were a reference to the transferor, any reference to the new appointee were a reference to the transferee and any reference to any other appointee or appointees were a reference to any other relevant company or companies (Sch 2 para 5(3)(a) (as so added));
- 22 (5) Sch 2 para 5(2)(g) (see PARA 141) has effect as if the reference to two or more such appointees as are mentioned in Sch 2 para 5(2)(f) were a reference to two or more such persons

as are mentioned in that paragraph (as it has effect by virtue of head (4) above) (Sch 2 para 5(3) (b) (as so added));

- 23 (6) Sch 2 para 6(1)-(8) (see PARA 141) has effect as if any reference to the existing appointee were a reference to the transferor and any reference to the new appointee were a reference to the transferee (Sch 2 para 6(9) (as so added)).

For these purposes, 'other relevant companies' means any companies, other than the transferor and the transferee, which are likely on or at a time after the relevant date to be holding appointments as water undertakers for any area in which, or in part of which, the activities relating to the introduction or introductions of water mentioned in s 23(6)(b) (see note 2) will be carried on by the transferee: Sch 2 para 1(4) (definition added by the Water Act 2003 s 101(1), Sch 8 paras 2, 51). As to the meaning of 'water undertaker' see PARA 137 note 4.

7 le the licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152.

8 Water Industry Act 1991 Sch 2 para 4A (as added: see note 6).

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## **(ii) Licence Conditions**

### **155. Water supply licence conditions.**

A water supply licence<sup>1</sup> may include:

- 182 (1) such conditions as appear to the Secretary of State<sup>2</sup> or, as the case may be, the Water Services Regulation Authority<sup>3</sup> to be requisite or expedient having regard to the statutory duties imposed<sup>4</sup> on him or it<sup>5</sup>;
- 183 (2) conditions requiring the rendering to the Secretary of State of a payment on the grant of a water supply licence, or payments while such a licence is in force, or both, of such amount or amounts as may be determined by or under the conditions<sup>6</sup>.

Conditions included in a water supply licence may:

- 184 (a) require the holder of the licence to comply with any direction given by a specified relevant person<sup>7</sup> as to specified matters or matters which are of a specified description<sup>8</sup>;
- 185 (b) require the holder of the licence to do or not to do specified things or things which are of a specified description, except in so far as a specified relevant person consents to the holder's not doing or doing them<sup>9</sup>;
- 186 (c) provide for the reference to and determination by a specified relevant person of specified questions, or questions which are of a specified description, which arise under or in connection with the licence<sup>10</sup>; and
- 187 (d) contain provision for the conditions to have effect, cease to have effect or be modified<sup>11</sup> at such times, in such manner and in such circumstances as may be specified in or determined in accordance with the conditions<sup>12</sup>.

Such conditions as may be determined by the Secretary of State, after consulting the Welsh Ministers<sup>13</sup>, and published by him in such manner as he considers appropriate<sup>14</sup>, will be standard conditions of water supply licences granted by the Secretary of State or the Water Services Regulation Authority<sup>15</sup>. The standard conditions which may be determined may be different for retail licences<sup>16</sup> and combined licences<sup>17</sup>; and standard conditions relating to the retail authorisation<sup>18</sup> may be different depending on whether they are to relate to retail licences or combined licences<sup>19</sup>. The power to determine standard conditions in relation to retail licences and combined licences may be exercised only before the grant of (respectively) the first retail licence and the first combined licence, but this is without prejudice to the power to modify<sup>20</sup> standard conditions<sup>21</sup>. The standard conditions for the purposes of water supply licences of either description may contain provision:

- 188 (i) for any standard condition included in a licence of that description not to have effect until brought into operation in such manner and in such circumstances as may be specified in or determined under the standard conditions<sup>22</sup>;

- 189 (ii) for the effect of any standard condition included in such a licence to be suspended in such manner, and in such circumstances, as may be so specified or determined<sup>23</sup>; and
- 190 (iii) for any standard condition included in such a licence which is for the time being suspended to be brought back into operation in such manner and in such circumstances as may be so specified or determined<sup>24</sup>.

Each condition which is a standard condition must be incorporated by reference in each water supply licence, or in each such licence to which the standard condition applies<sup>25</sup>. However, the Secretary of State or the Authority may<sup>26</sup>, in granting a licence, exclude or modify any of the standard conditions to such extent as he or it considers requisite to meet the circumstances of a particular case<sup>27</sup>; but may not so exclude any conditions, or make any modifications, unless he or it is of the opinion that the exclusions or modifications are such that (A) the licence holder would not be unduly disadvantaged in competing with other holders of water supply licences<sup>28</sup>; and (B) no other holder of a water supply licence would be unduly disadvantaged in competing with other holders of such licences, including the holder of the licence<sup>29</sup>. Before excluding any standard conditions or making any such modifications, the Secretary of State or the Authority must give notice<sup>30</sup> stating that he or it proposes to exclude the conditions or make the modifications and setting out the effect of so doing<sup>31</sup>, stating the reasons why he or it proposes to exclude the conditions or make the modifications<sup>32</sup>, and specifying the time<sup>33</sup> within which representations or objections with respect to the proposed exclusions or modifications may be made<sup>34</sup>. The Secretary of State or, as the case may be, the Authority must consider any representations or objections which are duly made and not withdrawn<sup>35</sup>. If, within the time specified in the notice, the Secretary of State, after consulting the Welsh Ministers, directs the Authority not to exclude or modify any standard condition, the Authority must comply with the direction<sup>36</sup>.

1 As to the meaning of 'water supply licence' see PARA 152. Information as to water supply licences and licence conditions is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

2 As to the Secretary of State see PARA 15 note 1.

3 As to the Water Services Regulation Authority see PARA 109.

4 Ie by the Water Industry Act 1991 Pt I (ss 1-5). See in particular s 2; and PARA 130.

5 Water Industry Act 1991 s 17G(1)(a) (ss 17G, 17H added by the Water Act 2003 s 56, Sch 4 paras 1, 2). Conditions may be included by virtue of the Water Industry Act 1991 s 17G(1)(a) in a water supply licence whether or not they are connected with the supply of water or the introduction of water into a water undertaker's supply system: s 17G(2) (as so added). As to the meaning of 'water undertaker's supply system' see PARA 152 note 8.

6 Water Industry Act 1991 s 17G(1)(b) (as added: see note 5).

7 For the purposes of the Water Industry Act 1991 s 17G(3): (1) the following are relevant persons, ie the Secretary of State, the Water Services Regulation Authority, the Welsh Ministers and the Environment Agency (Water Industry Act 1991 s 17G(4)(a)(i)-(iv) (as added: see note 5); Government of Wales Act 2006 Sch 11 para 32); and (2) 'specified' means specified in the licence in question (Water Industry Act 1991 s 17G(4)(b) (as so added)). Functions under the Water Industry Act 1991 ss 17G, 17H were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the Environment Agency see PARA 17.

8 Water Industry Act 1991 s 17G(3)(a) (as added: see note 5). As to the duty to give reasons for directions or determinations under s 17G(3) see s 195A; and PARA 181.

9 Water Industry Act 1991 s 17G(3)(b) (as added: see note 5). See also note 8.

- 10 Water Industry Act 1991 s 17G(3)(c) (as added: see note 5). See also note 8.
- 11 As to the meaning of 'modified' see PARA 141 note 20.
- 12 Water Industry Act 1991 s 17G(5) (as added: see note 5). Any such condition has effect in addition to the provision made by Pt II Ch 1A (ss 17A-17R) with respect to the modification of the conditions of a licence (see PARAS 156-162): s 17G(6) (as so added).
- 13 Water Industry Act 1991 s 17H(1)(a) (as added: see note 5); Government of Wales Act 2006 Sch 11 para 32. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 14 Water Industry Act 1991 s 17H(1)(b) (as added: see note 5).
- 15 Water Industry Act 1991 s 17H(1) (as added: see note 5).
- 16 Water Industry Act 1991 s 17H(2)(a) (as added: see note 5). As to the meaning of 'retail licence' see PARA 152.
- 17 Water Industry Act 1991 s 17H(2)(b) (as added: see note 5). As to the meaning of 'combined licence' see PARA 152.
- 18 As to the meaning of 'retail authorisation' see PARA 152.
- 19 Water Industry Act 1991 s 17H(2) (as added: see note 5).
- 20 ie in accordance with the provisions of the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R).
- 21 Water Industry Act 1991 s 17H(3) (as added: see note 5).
- 22 Water Industry Act 1991 s 17H(4)(a) (as added: see note 5).
- 23 Water Industry Act 1991 s 17H(4)(b) (as added: see note 5).
- 24 Water Industry Act 1991 s 17H(4)(c) (as added: see note 5).
- 25 Water Industry Act 1991 s 17H(5) (as added: see note 5).
- 26 ie subject to the Water Industry Act 1991 s 17H(7)-(11): see note 27 and the text to notes 28-36.
- 27 Water Industry Act 1991 s 17H(6) (as added: see note 5). The modification under s 17H(6) of part of a standard condition does not prevent any other part of the condition from continuing to be treated as a standard condition: see s 17H(11) (as so added).
- 28 Water Industry Act 1991 s 17H(10)(a) (as added: see note 5).
- 29 Water Industry Act 1991 s 17H(10)(b) (as added: see note 5).
- 30 The notice must be given: (1) by publishing the notice in such manner as the Secretary of State or, as the case may be, the Authority considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the exclusions or modifications (Water Industry Act 1991 s 17H(8) (a) (as added: see note 5)); and (2) by serving a copy of the notice on the Welsh Ministers and the Chief Inspector of Drinking Water; and if the notice is published by the Secretary of State, on the Authority, or if the notice is published by the Authority, on the Secretary of State (s 17H(8))b(i)-(iv) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to the Chief Inspector of Drinking Water see PARA 126. As to the meaning of 'notice' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29. As to the service of documents see PARA 22.
- 31 Water Industry Act 1991 s 17H(7)(a) (as added: see note 5).
- 32 Water Industry Act 1991 s 17H(7)(b) (as added: see note 5).
- 33 ie not being less than 28 days from the date of publication of the notice.
- 34 Water Industry Act 1991 s 17H(7)(c) (as added: see note 5).
- 35 See the Water Industry Act 1991 s 17H(7) (as added: see note 5).
- 36 Water Industry Act 1991 s 17H(9) (as added: see note 5); Government of Wales Act 2006 Sch 11 para 32.



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### **(iii) Modification of Licences**

#### **156. Modification of water supply licences by agreement.**

Subject to the following provisions<sup>1</sup>, the Water Services Regulation Authority<sup>2</sup> may modify<sup>3</sup> the conditions of a particular water supply licence<sup>4</sup>. The Authority may not, however, make any such modifications unless the licence holder has consented to the modifications and, in the case of standard conditions of the licence, the Authority is of the opinion that the modifications:

- 191 (1) are requisite to meet the circumstances of the particular case<sup>5</sup>; and
- 192 (2) are such that:
- 13
- 15. (a) the licence holder would not be unduly disadvantaged in competing with other holders of water supply licences<sup>6</sup>; and
- 16. (b) no other holder of a water supply licence would be unduly disadvantaged in competing with other holders of such licences, including the holder of the licence being modified<sup>7</sup>.
- 14

Before making such modifications, the Authority must give notice<sup>8</sup> stating that it proposes to make the modifications and setting out their effect<sup>9</sup>, stating the reasons why it proposes to make the modifications<sup>10</sup>, and specifying the period<sup>11</sup> within which representations or objections with respect to the proposed modifications may be made<sup>12</sup>. The Authority must consider any representations or objections which are duly made and not withdrawn<sup>13</sup>. If, within the period specified in the notice, the Secretary of State, after consulting the Welsh Ministers, directs the Authority not to make any modification, the Authority must comply with the direction<sup>14</sup>.

The modification under these provisions of part of a standard condition of a licence does not prevent any other part of the condition from continuing to be regarded<sup>15</sup> as a standard condition<sup>16</sup>.

1 le subject to the provisions of the Water Industry Act 1991 s 171(2)-(6): see the text to notes 5-16.

2 As to the Water Services Regulation Authority see PARA 109.

3 As to the meaning of 'modify' see PARA 141 note 20.

4 Water Industry Act 1991 s 171(1) (s 171 added by the Water Act 2003 s 56, Sch 4 paras 1, 2). As to the meaning of 'water supply licence' see PARA 152. As to water supply licence conditions and standard conditions see PARA 155. Information as to water supply licences and licence conditions is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

5 Water Industry Act 1991 s 171(2)(a) (as added: see note 4).

6 Water Industry Act 1991 s 171(2)(b)(i) (as added: see note 4).

7 Water Industry Act 1991 s 171(2)(b)(ii) (as added: see note 4).

8 The notice must be given: (1) by publishing it in such manner as the Authority considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the



modifications (Water Industry Act 1991 s 17I(4)(a) (as added: see note 4)); and (2) by serving a copy of the notice on the licence holder, the Consumer Council for Water, the Secretary of State, the Welsh Ministers, and the Chief Inspector of Drinking Water (s 17I(4)(b) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29. As to the Consumer Council for Water see PARA 115. As to the Chief Inspector of Drinking Water see PARA 126. As to the Secretary of State see PARA 15 note 1. Functions under the Water Industry Act 1991 s 17I which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

9 Water Industry Act 1991 s 17I(3)(a) (as added: see note 4).

10 Water Industry Act 1991 s 17I(3)(b) (as added: see note 4).

11 Ie not being less than 28 days from the date of publication of the notice.

12 Water Industry Act 1991 s 17I(3)(c) (as added: see note 4).

13 Water Industry Act 1991 s 17I(3) (as added: see note 4).

14 Water Industry Act 1991 s 17I(5) (as added: see note 4). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

15 Ie for the purposes of the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R).

16 Water Industry Act 1991 s 17I(6) (as added: see note 4).

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### **157. Modification of standard conditions of water supply licences.**

Subject to the following provisions<sup>1</sup>, the Water Services Regulation Authority<sup>2</sup> may modify<sup>3</sup> the standard conditions<sup>4</sup> of retail licences<sup>5</sup> or combined licences<sup>6</sup>. Where at any time the Authority does so modify the standard conditions of retail licences or combined licences it may make such incidental or consequential modifications as it considers necessary or expedient of any conditions of any licence of that description<sup>7</sup>.

Before making any modifications, the Authority must give notice<sup>8</sup> stating that it proposes to make the modifications and setting out their effect<sup>9</sup>, stating the reasons why it proposes to make the modifications<sup>10</sup>, and specifying the time<sup>11</sup> within which representations or objections with respect to the proposed modifications may be made<sup>12</sup>. The Authority must consider any representations or objections which are duly made and not withdrawn<sup>13</sup>. If, within the time specified in the notice, the Secretary of State, after consulting the Welsh Ministers, directs the Authority not to make any modification, the Authority must comply with the direction<sup>14</sup>.

The Authority may not under these provisions make any modifications of the standard conditions of retail licences or combined licences unless:

- 193 (1) no notice of objection to those modifications is given by any relevant licence holder to the Authority within the time specified in its notice<sup>15</sup>;
- 194 (2) if one or more relevant licence holders give notice of objection to the Authority within that time:
- 15
  - 17. (a) the proportion, expressed as a percentage, of the relevant licence holders who have given notice of objection is less than such percentage as may be specified in an order made by statutory instrument<sup>16</sup> by the Secretary of State<sup>17</sup>; and
  - 18. (b) the percentage given under the specified provision<sup>18</sup> is less than such percentage as may be so specified<sup>19</sup>; or
- 16
  - 195 (3) the case is one<sup>20</sup> where the Authority is satisfied that:
  - 17
    - 19. (a) the effect of the standard conditions is such as to impose a burden affecting relevant licence holders in the carrying on of activities to which the modifications relate<sup>21</sup>;
    - 20. (b) the modifications would remove or reduce the burden without removing any necessary protection<sup>22</sup>; and
    - 21. (c) the modifications are such that no holder of a water supply licence<sup>23</sup> would be unduly disadvantaged in competing with other holders of such licences<sup>24</sup>.
- 18

Where the Authority modifies the standard conditions of retail licences or combined licences, it must also make, as nearly as may be, the same modifications of those conditions for the purposes of their incorporation in licences of that description granted after that time<sup>25</sup>, and must publish the modifications in such manner as it considers appropriate<sup>26</sup>.

<sup>1</sup> ie subject to the Water Industry Act 1991 s 17J(2)-(13): see the text to notes 7-26.

2 As to the Water Services Regulation Authority see PARA 109.

3 As to the meaning of 'modify' see PARA 141 note 20.

4 As to the standard conditions see PARA 155.

5 As to retail licences see PARA 152.

6 Water Industry Act 1991 s 17J(1) (s 17J added by the Water Act 2003 s 56, Sch 4 paras 1, 2). As to combined licences see PARA 152. Information as to water supply licences and licence conditions is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

7 Water Industry Act 1991 s 17J(2) (as added: see note 6).

8 The notice must be given: (1) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications (Water Industry Act 1991 s 17J(4)(a) (as added: see note 6)); and (2) by serving a copy of the notice on each relevant licence holder, the Consumer Council for Water, the Secretary of State, the Welsh Ministers, and the Chief Inspector of Drinking Water (s 17J(4)(b)(i)-(v) (as so added); Government of Wales Act 2006 Sch 11 para 32).

'Relevant licence holder', in relation to proposed modifications of standard conditions of retail licences or combined licences, means the holder of a licence of that description (a) which is to be modified under the proposals by the inclusion of any new standard condition (Water Industry Act 1991 s 17J(13)(a) (as so added)); or (b) which includes any standard conditions to which the proposals relate, other than standard conditions which are not in effect (by virtue of anything done under s 17H(4) (see PARA 155)) at the time specified in the notice (s 17J(13)(b) (as so added)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29. As to the Consumer Council for Water see PARA 115. As to the Chief Inspector of Drinking Water see PARA 126. As to the Secretary of State see PARA 15 note 1. Functions under the Water Industry Act 1991 s 17J which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

9 Water Industry Act 1991 s 17J(3)(a) (as added: see note 6).

10 Water Industry Act 1991 s 17J(3)(b) (as added: see note 6).

11 ie not being less than 28 days from the date of publication of the notice.

12 Water Industry Act 1991 s 17J(3)(c) (as added: see note 6).

13 Water Industry Act 1991 s 17J(3) (as added: see note 6).

14 Water Industry Act 1991 s 17J(5) (as added: see note 6). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

15 Water Industry Act 1991 s 17J(6)(a) (as added: see note 6).

16 Such an order may include such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: Water Industry Act 1991 s 17J(9) (as added: see note 6). Before making such an order, the Secretary of State must consult the Welsh Ministers: s 17J(10) (as so added); Government of Wales Act 2006 Sch 11 para 32. A statutory instrument containing such an order may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: Water Industry Act 1991 s 17J(11) (as so added). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

17 Water Industry Act 1991 s 17J(6)(b)(i) (as added: see note 6). The percentage specified for these purposes is 20%: Water Supply Licence (Modification of Standard Conditions) Order 2005, SI 2005/2033, art 3(1).

18 The percentage for these purposes is the proportion (expressed as a percentage) of the relevant licence holders who have given notice of objection, weighted according to their market share at such time and in such manner as may be specified in an order under the Water Industry Act 1991 s 17J(6) (see the text to note 17): s 17J(7) (as added: see note 6). 'Weighted according to their market share' in relation to each relevant licence holder who has given notice of objection means weighted by attributing to that relevant licence holder a proportion equal to the total volume of water supplied by that relevant licence holder to the premises of customers during the relevant period divided by the total volume of water supplied by all relevant licence holders to the premises of customers during that period, such that the sum of all such proportions expresses

the proportion to which s 17J(7) refers: Water Supply Licence (Modification of Standard Conditions) Order 2005, SI 2005/2033, art 4(1). For these purposes 'relevant period' means the period of 12 months ending on the last day of the relevant month; 'relevant month' means the last month before the relevant notice was given for which the Authority considers it reasonably practicable for all relevant information to be provided to it; 'relevant notice' means the notice given under the Water Industry Act 1991 s 17J(3) (see the text to notes 8-13) in relation to the modifications in question; and 'relevant information' means information material to a determination of the total volume of water supplied by each relevant licence holder to the premises of customers during the relevant period: Water Supply Licence (Modification of Standard Conditions) Order 2005, SI 2005/2033, art 4(2). As to the meaning of 'month' see PARA 23 note 10. As to the meaning of 'information' see PARA 117 note 13.

19 Water Industry Act 1991 s 17J(6)(b)(ii) (as added: see note 6). The percentage specified for these purposes is 20%: Water Supply Licence (Modification of Standard Conditions) Order 2005, SI 2005/2033, art 3(2).

20 See the Water Industry Act 1991 s 17J(6)(c) (as added: see note 6).

21 Water Industry Act 1991 s 17J(8)(a) (as added: see note 6).

22 Water Industry Act 1991 s 17J(8)(b) (as added: see note 6).

23 As to the meaning of 'water supply licence' see PARA 152.

24 Water Industry Act 1991 s 17J(8)(c) (as added: see note 6).

25 Water Industry Act 1991 s 17J(12)(a) (as added: see note 6).

26 Water Industry Act 1991 s 17J(12)(b) (as added: see note 6).

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**158. Modification references to the Competition Commission with regard to water supply licences.**

The Water Services Regulation Authority<sup>1</sup> may make to the Competition Commission<sup>2</sup> a reference<sup>3</sup> which is so framed as to require the Commission to investigate and report<sup>4</sup> on the questions:

- 196 (1) whether any matters which relate to the carrying on of activities authorised or regulated by a particular licence<sup>5</sup>, and which are specified in the reference<sup>6</sup>, operate, or may be expected to operate, against the public interest<sup>7</sup>; and
- 197 (2) if so, whether the effects adverse to the public interest which those matters have, or may be expected to have, could be remedied or prevented by modifications<sup>8</sup> of the conditions of the licence<sup>9</sup>.

The Authority may also make to the Commission a reference which is so framed as to require the Commission to investigate and report on the questions:

- 198 (a) whether any matters which relate to the carrying on of activities authorised or regulated by retail licences or combined licences<sup>10</sup>, and which are specified in the reference<sup>11</sup>, operate, or may be expected to operate, against the public interest<sup>12</sup>; and
- 199 (b) if so, whether the effects adverse to the public interest which those matters have, or may be expected to have, could be remedied or prevented by modifications of the standard conditions<sup>13</sup> of licences of that description<sup>14</sup>.

Every reference under the above provisions must specify a period, not longer than six months<sup>15</sup> beginning with the date of the reference, within which a report on the reference is to be made<sup>16</sup>. A report of the Commission on a reference does not have effect (and no action may be taken in relation to it<sup>17</sup>) unless the report is made before the end of the period specified in the reference or such further period (if any) as may be allowed by the Authority<sup>18</sup>.

The Authority may at any time, by notice<sup>19</sup> given to the Commission, vary a reference by adding to the matters specified in the reference<sup>20</sup> or excluding from the reference some of the matters so specified<sup>21</sup>, and on receipt of any such notice the Commission must give effect to the variation<sup>22</sup>. The Authority may specify in a reference, or in a variation of such a reference, for the purpose of assisting the Commission in carrying out the investigation on the reference, any effects adverse to the public interest which, in its opinion, the matters specified in the reference or variation have or may be expected to have<sup>23</sup>, and any modifications of the relevant conditions<sup>24</sup> by which, in its opinion, those effects could be remedied or prevented<sup>25</sup>. As soon as practicable after making a reference or a variation of such a reference, the Authority must publish particulars of the reference or variation in such manner as it considers appropriate for the purpose of bringing the reference or variation to the attention of persons likely to be affected by it<sup>26</sup>. If, before the end of the period of 28 days beginning with the day on which the Secretary of State receives the copy of the reference or variation, the Secretary of State directs the Commission not to proceed with the reference<sup>27</sup>, or not to give effect to the variation<sup>28</sup>, the Commission must comply with the direction<sup>29</sup>.

It is the duty of the Authority, for the purpose of assisting the Commission in carrying out an investigation on a reference under these provisions or in carrying out functions relating to its power to veto proposed modifications<sup>30</sup>, to give to the Commission:

- 200 (i) any information<sup>31</sup> in the Authority's possession which relates to matters falling within the scope of the investigation or the carrying out of those functions and which is either requested by the Commission for that purpose<sup>32</sup>, or is information which, in the Authority's opinion, it would be appropriate for that purpose to give to the Commission without any such request<sup>33</sup>; and
- 201 (ii) any other assistance which the Commission may require, and which it is within the Authority's power to give, in relation to any such matters<sup>34</sup>,

and the Commission, for the purpose of carrying out any such investigation or such functions, must take account of any information given to it for that purpose<sup>35</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12. Under the Utilities Act 2000, specialist members of the Commission must be appointed to exercise its functions under the Water Industry Act 1991 s 17K: see **COMPETITION** vol 18 (2009) PARA 9.

3 For the purposes of such references, the following provisions of the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275) (with the modifications mentioned in the Water Industry Act 1991 s 17M(2), (3) (see below)) apply as they apply for the purposes of references under the Enterprise Act 2002 Pt 3: (1) s 109 (attendance of witnesses and production of documents etc); (2) s 110 (enforcement of powers under s 109: general); (3) s 111 (penalties); (4) s 112 (penalties: main procedural requirements); (5) s 113 (payments and interest by instalments); (6) s 114 (appeals in relation to penalties); (7) s 115 (recovery of penalties); and (8) s 116 (statement of policy): Water Industry Act 1991 s 17M(1) (ss 17K-17M added by the Water Act 2003 s 56, Sch 4 paras 1, 2). The Enterprise Act 2002 s 110, in its application by virtue of head (2) above, has effect as if s 110(2) were omitted and in s 110(9) the words from 'or section' to 'section 65(3))' were omitted: Water Industry Act 1991 s 17M(2) (as so added). The Enterprise Act 2002 s 111(5)(b)(ii), in its application by virtue of head (7) above, has effect as if (a) for the words 'published (or, in the case of a report under section 50 or 65, given)' there were substituted 'made'; (b) for the words 'published (or given)', in both places where they appear, there were substituted 'made'; and (c) the words 'by this Part' were omitted: Water Industry Act 1991 s 17M(3) (as so added). Provisions of the Enterprise Act 2002 Pt 3 which have effect for the purposes of ss 109-116 of that Act (including, in particular, provisions relating to offences and the making of orders), have effect, for the purposes of the application of those sections by virtue of heads (1)-(8) above, in relation to those sections as so applied; and accordingly, corresponding provisions of the Water Industry Act 1991 do not have effect in relation to those sections as so applied: s 17M(4), (5) (as so added).

4 As to reports on references see PARA 159.

5 Water Industry Act 1991 s 17K(1)(a)(i) (as added: see note 3).

6 Water Industry Act 1991 s 17K(1)(a)(ii) (as added: see note 3).

7 Water Industry Act 1991 s 17K(1)(a) (as added: see note 3). In determining for the purposes of s 17K whether any particular matter operates, or may be expected to operate, against the public interest, the Commission must have regard to the matters as respects which duties are imposed on the Secretary of State and the Water Services Regulation Authority by Pt I (ss 1-5): s 17K(9) (as so added). As to the Secretary of State see PARA 15 note 1.

8 As to the meaning of 'modifications' see PARA 141 note 20.

9 Water Industry Act 1991 s 17K(1)(b) (as added: see note 3).

10 Water Industry Act 1991 s 17K(2)(a)(i) (as added: see note 3). As to retail licences and combined licences see PARA 152.

11 Water Industry Act 1991 s 17K(2)(a)(ii) (as added: see note 3).

12 Water Industry Act 1991 s 17K(2)(a) (as added: see note 3). See also note 7.

13 As to standard conditions see PARA 155.

14 Water Industry Act 1991 s 17K(2)(b) (as added: see note 3).

15 As to the meaning of 'month' see PARA 23 note 10.

16 Water Industry Act 1991 s 17L(1) (as added: see note 3).

17 le under the Water Industry Act 1991 s 17O: see PARA 160.

18 Water Industry Act 1991 s 17L(2) (as added: see note 3). The Authority may, if it has received representations on the subject from the Commission and is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, extend that period by no more than six months: s 17L(3) (as so added). No more than one such extension is possible in relation to the same reference: s 17L(4) (as so added). The Authority must, in the case of an extension made by it publish that extension in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it (s 17L(5)(a) (as so added)), and send a copy of what has been so published by it to the holder of the licence or, as the case may be, the relevant licence holders (s 17L(5)(b) (as so added)). 'Relevant licence holder' means the holder of a licence to which a reference under heads (a) and (b) in the text relates: s 17K(8) (as so added). As to the meaning of 'person' see PARA 13 note 29.

19 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

20 Water Industry Act 1991 s 17K(3)(a) (as added: see note 3).

21 Water Industry Act 1991 s 17K(3)(b) (as added: see note 3).

22 Water Industry Act 1991 s 17K(3) (as added: see note 3).

23 Water Industry Act 1991 s 17K(4)(a) (as added: see note 3).

24 'Relevant conditions': (1) in relation to a reference under the Water Industry Act 1991 s 17K(1) (see heads (1) and (2) in the text), means the conditions of the licence to which the reference relates; and (2) in relation to a reference under s 17K(2) (see heads (a) and (b) in the text), means the standard conditions of the licences to which the reference relates: s 17K(8) (as added: see note 3).

25 Water Industry Act 1991 s 17K(4)(b) (as added: see note 3).

26 Water Industry Act 1991 s 17K(5)(a) (as added: see note 3). The Authority must also serve a copy of the reference or variation on the licence holder or, as the case may be, the relevant licence holders, the Consumer Council for Water, the Secretary of State, the Welsh Ministers and the Chief Inspector of Drinking Water: s 17K(5)(b) (as so added); Government of Wales Act 2006 Sch 11 para 32. As to the Consumer Council for Water see PARA 115. As to the Chief Inspector of Drinking Water see PARA 126. Functions under the Water Industry Act 1991 s 17K which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

27 Water Industry Act 1991 s 17K(6)(a) (as added: see note 3).

28 Water Industry Act 1991 s 17K(6)(b) (as added: see note 3).

29 Water Industry Act 1991 s 17K(6) (as added: see note 3).

30 le functions under the Water Industry Act 1991 s 17P: see PARA 161. As to the meaning of 'functions' see PARA 133 note 5.

31 As to the meaning of 'information' see PARA 117 note 13.

32 Water Industry Act 1991 s 17K(7)(a)(i) (as added: see note 3).

33 Water Industry Act 1991 s 17K(7)(a)(ii) (as added: see note 3).

34 Water Industry Act 1991 s 17K(7)(b) (as added: see note 3).

35 Water Industry Act 1991 s 17K(7) (as added: see note 3).

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### **159. Reports on modification references.**

In making a report on a modification reference relating to a water supply licence<sup>1</sup>, the Competition Commission<sup>2</sup>:

- 202 (1) must include in the report definite conclusions on the questions comprised in the reference together with such an account of its reasons for those conclusions as in its opinion is expedient for facilitating a proper understanding of those questions and of its conclusions<sup>3</sup>;
- 203 (2) where it concludes that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, must specify in the report the effects adverse to the public interest which those matters have or may be expected to have<sup>4</sup>; and
- 204 (3) where it concludes that any adverse effects so specified could be remedied or prevented by modifications<sup>5</sup> of the relevant conditions<sup>6</sup>, must specify in the report modifications by which those effects could be remedied or prevented<sup>7</sup>.

For the purposes of the making of modifications of the relevant conditions following a report<sup>8</sup>, a conclusion contained in a report of the Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted<sup>9</sup> in connection with the reference concerned<sup>10</sup>.

A report of the Commission on a reference must be made to the Water Services Regulation Authority<sup>11</sup>. For the purposes of the law relating to defamation, absolute privilege attaches to any such report made by the Commission<sup>12</sup>; but in making the report the Commission must have regard to the specified considerations before disclosing any information<sup>13</sup>.

On receiving a report:

- 205 (a) on a reference regarding matters relating to the carrying on of activities authorised or regulated by a particular licence<sup>14</sup>, the Water Services Regulation Authority must:
  - 19
  - 22. (i) serve a copy<sup>15</sup> of it on the licence holder<sup>16</sup>, the Consumer Council for Water<sup>17</sup>, the Secretary of State<sup>18</sup> and the Welsh Ministers<sup>19</sup>; and
  - 23. (ii) not earlier than the relevant time<sup>20</sup>, publish another copy of the report in such manner as it considers appropriate for bringing the report to the attention of persons<sup>21</sup> likely to be affected by it<sup>22</sup>;
  - 20
  - 206 (b) on a reference regarding matters relating to the carrying on of activities authorised or regulated by retail licences or combined licences<sup>23</sup>, the Authority must<sup>24</sup>:
    - 21
    - 24. (i) serve a copy of it on the Secretary of State<sup>25</sup> and the Welsh Ministers<sup>26</sup>; and
    - 25. (ii) not earlier than the relevant time, serve another copy on each relevant licence holder<sup>27</sup> and, not less than 24 hours after doing so, publish another copy of



the report in such manner as it considers appropriate for bringing the report to the attention of persons likely to be affected by it<sup>28</sup>.

22

If it appears to the Secretary of State that the publication of any matter in a report on a reference as mentioned in either head (a) or (b) above would be against the public interest<sup>29</sup> or against the commercial interests of any person<sup>30</sup>, the Secretary of State may, not later than the relevant time, direct the Authority to exclude that matter from the copy of the report, or, as the case may be, each copy of the report, to be served and published under those heads<sup>31</sup>. The Authority must comply with any such direction<sup>32</sup>.

1     Ie a reference under the Water Industry Act 1991 s 17K: see PARA 158. As to the meaning of 'water supply licence' see PARA 152. As to the effect of a report not made within the time specified in the reference see s 17L(2); and PARA 158.

2     As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

3     Water Industry Act 1991 s 17N(1)(a) (s 17N added by the Water Act 2003 s 56, Sch 4 paras 1, 2).

4     Water Industry Act 1991 s 17N(1)(b) (as added: see note 3).

5     As to the meaning of 'modifications' see PARA 141 note 20.

6     As to the meaning of 'relevant conditions' see PARA 158 note 24.

7     Water Industry Act 1991 s 17N(1)(c) (as added: see note 3).

8     Ie for the purposes of the Water Industry Act 1991 s 17O: see PARA 160.

9     Ie in pursuance of the Competition Act 1998 Sch 7 para 15: see **COMPETITION** vol 18 (2009) PARA 11.

10    Water Industry Act 1991 s 17N(2) (as added: see note 3). If a member of a group so constituted disagrees with any conclusions contained in a report as the conclusions of the Commission, the report must, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing: see s 17N(3) (as so added).

11    Water Industry Act 1991 s 17N(9) (as added: see note 3). As to the Water Services Regulation Authority see PARA 109.

12    Water Industry Act 1991 s 17N(4) (as added: see note 3). As to absolute privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq.

13    Water Industry Act 1991 s 17N(5) (as added: see note 3). The first consideration is the need to exclude from disclosure, so far as practicable, any information whose disclosure the Commission thinks is contrary to the public interest: s 17N(6) (as so added). The second consideration is the need to exclude from disclosure, so far as practicable: (1) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or (2) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests: s 17N(7) (as so added). The third consideration is the extent to which the disclosure of the information mentioned in head (1) or head (2) above is necessary for the purposes of the report: s 17N(8) (as so added).

14    Ie a report on a reference under the Water Industry Act 1991 s 17K(1): see PARA 158.

15    Ie subject to the Water Industry Act 1991 s 17N(13): see the text to notes 29-30. As to the service of documents see PARA 22.

16    Water Industry Act 1991 s 17N(10)(a)(i) (as added: see note 3).

17    Water Industry Act 1991 s 17N(10)(a)(ii) (as added: see note 3). As to the Consumer Council for Water see PARA 115.

18    Water Industry Act 1991 s 17N(10)(a)(iii) (as added: see note 3). As to the Secretary of State see PARA 15 note 1.

19 Water Industry Act 1991 s 17N(10)(a)(iv) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 17N which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

20 'Relevant time' for the purposes of heads (a) and (b) in the text means: (1) 14 days after the copy of the report in question is received by the Secretary of State and the Welsh Ministers; or (2) if copies are received by them on different days, 14 days after the later day: Water Industry Act 1991 s 17N(12) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32.

21 As to the meaning of 'person' see PARA 13 note 29.

22 Water Industry Act 1991 s 17N(10)(b) (as added: see note 3).

23 Ie a report on a reference under the Water Industry Act 1991 s 17K(2): see PARA 158.

24 Ie subject to the Water Industry Act 1991 s 17N(13): see the text to notes 29-30.

25 Water Industry Act 1991 s 17N(11)(a)(i) (as added: see note 3).

26 Water Industry Act 1991 s 17N(11)(a)(ii) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32.

27 Water Industry Act 1991 s 17N(11)(b)(i) (as added: see note 3). As to the meaning of 'relevant licence holder' see PARA 158 note 18.

28 Water Industry Act 1991 s 17N(11)(b)(ii) (as added: see note 3).

29 Water Industry Act 1991 s 17N(13)(a) (as added: see note 3).

30 Water Industry Act 1991 s 17N(13)(b) (as added: see note 3).

31 Water Industry Act 1991 s 17N(14) (as added: see note 3).

32 Water Industry Act 1991 s 17N(14) (as added: see note 3).

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## **160. Modification of water supply licences following report.**

Where a report of the Competition Commission<sup>1</sup> on a modification reference<sup>2</sup>:

- 207 (1) includes conclusions to the effect that any of the matters specified in the reference operate, or may be expected to operate, against the public interest<sup>3</sup>;
- 208 (2) specifies effects adverse to the public interest which those matters have or may be expected to have<sup>4</sup>;
- 209 (3) includes conclusions to the effect that those effects could be remedied or prevented by modifications<sup>5</sup> of the relevant conditions<sup>6</sup>; and
- 210 (4) specifies modifications by which those effects could be remedied or prevented<sup>7</sup>,

the Water Services Regulation Authority<sup>8</sup> must, subject to the following provisions, make such modifications of the relevant conditions as appear to it requisite for the purpose of remedying or preventing the adverse effects specified in the report<sup>9</sup>.

Where at any time it so modifies the standard conditions<sup>10</sup> of retail licences or combined licences<sup>11</sup> in consequence of a reference relating to such licences<sup>12</sup>, the Authority may make such incidental or consequential modifications as it considers necessary or expedient of any conditions of licences of that description<sup>13</sup>. It must also make, as nearly as may be, the same modifications of those conditions for the purposes of their incorporation in licences of that description granted after that time<sup>14</sup>, and must publish the modifications made for those purposes in such manner as it considers appropriate<sup>15</sup>. The modification<sup>16</sup> of part of a standard condition of a particular licence in consequence of a particular reference<sup>17</sup> does not prevent any other part of the condition from continuing to be regarded as a standard condition for the relevant statutory purposes<sup>18</sup>.

Before making modifications under the above provisions, the Authority must have regard to the modifications specified in the report<sup>19</sup>; and it must give notice<sup>20</sup> stating that it proposes to make the modifications and setting out their effect<sup>21</sup>, stating the reasons why it proposes to make the modifications<sup>22</sup>, and specifying the period<sup>23</sup> within which representations or objections with respect to the proposed modifications may be made<sup>24</sup>. The Authority must consider any representations or objections which are duly made and not withdrawn<sup>25</sup>.

After considering any representations or objections made in response to proposals set out in such a notice, the authority must give notice to the Commission<sup>26</sup> setting out the modifications it proposes to make to remedy or prevent the adverse effects specified in the report<sup>27</sup> and stating the reasons for making the modifications<sup>28</sup>. If the period of four weeks from the date on which the notice is given<sup>29</sup> elapses without a direction that it is not to make the proposed modifications having been given to it<sup>30</sup>, the Authority must make the modifications set out in the notice<sup>31</sup>. If, however, a direction not to make such of the modifications as are specified in the direction has been given<sup>32</sup>, the Authority must make the modifications set out in the notice which are not specified in that direction<sup>33</sup>.

1 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

2 le a reference under the Water Industry Act 1991 s 17K: see PARA 158. As to the effect of conclusions in a report not reached by at least two thirds of the group constituted in connection with the reference see the Water Industry Act 1991 s 17N(2); and PARA 159. As to the effect of a report not made within the time specified in the reference see s 17L(2); and PARA 158.

3 Water Industry Act 1991 s 17O(1)(a) (s 17O added by the Water Act 2003 s 56, Sch 4 paras 1, 2).

4 Water Industry Act 1991 s 17O(1)(b) (as added: see note 3).

5 As to the meaning of 'modifications' see PARA 141 note 20.

6 Water Industry Act 1991 s 17O(1)(c) (as added: see note 3). As to the meaning of 'relevant conditions' see PARA 158 note 24.

7 Water Industry Act 1991 s 17O(1)(d) (as added: see note 3).

8 As to the Water Services Regulation Authority see PARA 109.

9 Water Industry Act 1991 s 17O(1) (as added: see note 3).

10 As to the standard conditions see PARA 155.

11 As to the meanings of 'retail licence' and 'combined licence' see PARA 152.

12 le a reference under the Water Industry Act 1991 s 17K(2): see PARA 158.

13 Water Industry Act 1991 s 17O(2) (as added: see note 3).

14 Water Industry Act 1991 s 17O(10)(a) (as added: see note 3).

15 Water Industry Act 1991 s 17O(10)(b) (as added: see note 3).

16 le under the Water Industry Act 1991 s 17O(1): see the text to notes 1-9.

17 le a reference under the Water Industry Act 1991 s 17K(1): see PARA 158.

18 Water Industry Act 1991 s 17O(9) (as added: see note 3). The relevant statutory purposes mentioned in the text are the purposes of Pt II Ch 1A (ss 17A-17R).

19 Water Industry Act 1991 s 17O(3) (as added: see note 3).

20 The notice must be given: (1) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by the making of the modifications (Water Industry Act 1991 s 17O(5)(a) (as added: see note 3)); (2) by serving a copy of the notice on the holder of the licence in question or, as the case may be, the relevant licence holders (s 17O(5)(b) (as so added)); and (3) by serving a copy of the notice on the Consumer Council for Water, the Secretary of State, the Welsh Ministers and the Chief Inspector of Drinking Water (s 17O(5)(c)(i)-(iv) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'relevant licence holder' see PARA 158 note 18. As to the Consumer Council for Water see PARA 115. As to the Secretary of State see PARA 15 note 1. As to the Chief Inspector of Drinking Water see PARA 126. Functions under the Water Industry Act 1991 s 17O which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

21 Water Industry Act 1991 s 17O(4)(a) (as added: see note 3).

22 Water Industry Act 1991 s 17O(4)(b) (as added: see note 3).

23 le not being less than 28 days from the date of publication of the notice.

24 Water Industry Act 1991 s 17O(4)(c) (as added: see note 3).

25 Water Industry Act 1991 s 17O(4) (as added: see note 3).

26 The Authority must include with the notice a copy of any representations or objections received in relation to the notice under the Water Industry Act 1991 s 17O(4) (see the text to notes 20-25): s 17O(7) (as added: see note 3).

- 27 Water Industry Act 1991 s 17O(6)(a) (as added: see note 3).
- 28 Water Industry Act 1991 s 17O(6)(b) (as added: see note 3).
- 29 The Secretary of State may extend such period: see the Water Industry Act 1991 s 17P(2); and PARA 161.
- 30 le a direction under the Water Industry Act 1991 s 17P(1)(a): see PARA 161.
- 31 Water Industry Act 1991 s 17O(8)(a) (as added: see note 3).
- 32 le a direction under the Water Industry Act 1991 s 17P(1)(b): see PARA 161.
- 33 See the Water Industry Act 1991 s 17O(8)(b) (as added: see note 3).

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### **161. Competition Commission's power of veto following report.**

The Competition Commission<sup>1</sup> may, within the period of four weeks after the date on which it is given a notice of proposed modifications<sup>2</sup>, direct the Water Services Regulation Authority<sup>3</sup>:

- 211 (1) not to make the modifications set out in that notice<sup>4</sup>; or
- 212 (2) not to make such of the modifications as may be specified in the direction<sup>5</sup>;

and the Authority must comply with any such direction<sup>6</sup>. The power to give such a direction may only be exercised in respect of such of the modifications set out in the notice from the Authority<sup>7</sup> as appear to the Commission not to be the modifications which are requisite for the purpose of remedying or preventing all or any of the adverse effects specified in the report as effects which could be remedied or prevented by modifications<sup>8</sup>.

If the Commission gives such a direction it must give notice<sup>9</sup> setting out the modifications proposed by the Authority, the terms of the direction and the reasons for giving it<sup>10</sup>; and must itself make such modifications of the relevant conditions<sup>11</sup> as appear to it to be requisite for the purpose of remedying or preventing:

- 213 (a) if the direction was given under head (1) above, the adverse effects specified in the report as effects which could be remedied or prevented by modifications<sup>12</sup>;
- 214 (b) if the direction was given under head (2) above, such of those adverse effects as are not remedied or prevented by the modifications made<sup>13</sup> by the Authority<sup>14</sup>.

In exercising its power under head (b) above the Commission must have regard to the matters as respects which duties are imposed<sup>15</sup> on the Authority<sup>16</sup>; and before making modifications under that power the Commission must give notice<sup>17</sup> stating that it proposes to make the modifications and setting them out<sup>18</sup>, stating the reason why it proposes to make them<sup>19</sup>, and specifying the period<sup>20</sup> within which representations or objections with respect to the proposed modifications may be made<sup>21</sup>. The Commission must consider any representations or objections which are duly made and not withdrawn<sup>22</sup>.

After making modifications under the above provisions the Commission must publish a notice<sup>23</sup> stating that the modifications have been made and setting them out, with the reasons for making them<sup>24</sup>.

Certain provisions of the Enterprise Act 2002 apply<sup>25</sup>, with specified modifications, for the purposes of any investigation by the Commission with regard to the exercise of its functions under the above provisions<sup>26</sup>.

1 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12. Under the Utilities Act 2000, specialist members of the Commission must be appointed to exercise its functions under the Water Industry Act 1991 s 17P: see **COMPETITION** vol 18 (2009) PARA 9.

2 I.e a notice under the Water Industry Act 1991 s 17O(6)(a): see PARA 160. As to the meaning of 'modifications' see PARA 141 note 20. The Secretary of State may, within this period of four weeks after the date on which the Commission is given a notice under the Water Industry Act 1991 s 17O(6) (see PARA 160) and on the application of the Commission, direct that the period for giving a direction under s 17P(1) (and, accordingly,

the period mentioned in s 17O(8) (see PARA 160)), is to be extended by 14 days: s 17P(2) (ss 17P, 17Q added by the Water Act 2003 s 56, Sch 4 paras 1, 2). As to the Secretary of State see PARA 15 note 1.

3 As to the Water Services Regulation Authority see PARA 109.

4 Water Industry Act 1991 s 17P(1)(a) (as added: see note 2).

5 Water Industry Act 1991 s 17P(1)(b) (as added: see note 2).

6 Water Industry Act 1991 s 17P(1) (as added: see note 2).

7 le the notice under the Water Industry Act 1991 s 17O(6)(a): see PARA 160.

8 Water Industry Act 1991 s 17P(3) (as added: see note 2).

9 A notice under the Water Industry Act 1991 s 17P(4)(a) or (6) (see the text to notes 17-22) must be given: (1) by publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications (s 17P(7)(a) (as added: see note 2)); (2) by serving a copy of the notice on the Authority, the holder of the licence in question or, as the case may be, the relevant licence holders, the Consumer Council for Water, the Secretary of State, the Welsh Ministers, and the Chief Inspector of Drinking Water (s 17P(7)(b)(i)-(vi) (as so added)); Government of Wales Act 2006 Sch 11 para 32). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'relevant licence holder' see PARA 158 note 18. As to the Consumer Council for Water see PARA 115. As to the Chief Inspector of Drinking Water see PARA 126. Functions under the Water Industry Act 1991 s 17P which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

For the purposes of the law relating to defamation, absolute privilege will attach to any notice under the Water Industry Act 1991 s 17P(4)(a), (6) or (8) (see the text to notes 23-24): s 17Q(1) (as so added). In giving any notice under s 17P(4)(a) or (6), or publishing any notice under s 17P(8), the Commission must, however, have regard to the following considerations before disclosing any information: s 17Q(2) (as so added). The first consideration is the need to exclude from disclosure, so far as practicable, any information whose disclosure the Commission thinks is contrary to the public interest: s 17Q(3) (as so added). The second consideration is the need to exclude from disclosure, so far as practicable: (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates (s 17Q(4)(a) (as so added)); or (b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests (s 17Q(4)(b) (as so added)). The third consideration is the extent to which the disclosure of the information mentioned in head (a) or head (b) above is necessary for the purposes of the notice: s 17Q(5) (as so added). As to absolute privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq.

10 Water Industry Act 1991 s 17P(4)(a) (as added: see note 2).

11 As to the meaning of 'relevant condition' see PARA 158 note 24.

12 Water Industry Act 1991 s 17P(4)(b)(i) (as added: see note 2).

13 le under the Water Industry Act 1991 s 17O(8)(b): see PARA 160.

14 Water Industry Act 1991 s 17P(4)(b)(ii) (as added: see note 2). Where, in consequence of a reference under s 17K(2) (see PARA 158), the Commission modifies under s 17P(4)(b) the standard conditions of retail licences or combined licences, the Authority must make (as nearly as may be) the same modifications of those conditions for the purposes of their incorporation in licences of that description granted after that time, and publish the modifications made for those purposes in such manner as it considers appropriate: s 17P(11) (as so added). Where, in consequence of a reference under s 17K(2), the Commission modifies under s 17P(4)(b) the standard conditions of retail licences or combined licences, the Authority may make such incidental or consequential modifications as it considers necessary or expedient of any conditions of licences of that description: s 17P(10) (as so added). As to the standard conditions see PARA 155. As to the meanings of 'retail licence' and 'combined licence' see PARA 152.

15 le by the Water Industry Act 1991 Pt I (ss 1-5).

16 Water Industry Act 1991 s 17P(5) (as added: see note 2).

17 As to such notices see note 9.

18 Water Industry Act 1991 s 17P(6)(a) (as added: see note 2).

19 Water Industry Act 1991 s 17P(6)(b) (as added: see note 2).

20 le not being less than 28 days from the date of publication of the notice.

21 Water Industry Act 1991 s 17P(6)(c) (as added: see note 2).

22 Water Industry Act 1991 s 17P(6) (as added: see note 2).

23 As to such notices see note 9.

24 Water Industry Act 1991 s 17P(8) (as added: see note 2). The modification under s 17P of part of a standard condition of a particular licence in consequence of a reference under s 17K(1) (see PARA 158) does not prevent any other part of the condition from continuing to be regarded as a standard condition for the purposes of Pt II Ch 1A (ss 17A-17R): s 17P(9) (as so added).

25 The following provisions of the Enterprise Act 2002 Pt 3 (ss 22-130) (see **COMPETITION** vol 18 (2009) PARAS 173-275) apply, with the modifications mentioned in the Water Industry Act 1991 s 17Q(7), (8) (see below), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under s 17P, as they apply for the purposes of any investigation on references under the Enterprise Act 2002 Pt 3: (1) s 109 (attendance of witnesses and production of documents etc); (2) s 110 (enforcement of powers under section 109: general); (3) s 111 (penalties); (4) s 112 (penalties: main procedural requirements); (5) s 113 (payments and interest by instalments); (6) s 114 (appeals in relation to penalties); (7) s 115 (recovery of penalties); and (8) s 116 (statement of policy): Water Industry Act 1991 s 17Q(6)(a)-(h) (as added: see note 2). The Enterprise Act 2002 s 110, in its application by virtue of head (2) above, has effect as if: (a) s 100(2) were omitted; (b) in s 110(4), for the words 'the publication of the report of the Commission on the reference concerned' there were substituted 'the publication by the Commission of a notice under section 17P(8) of the Water Industry Act 1991 in connection with the reference concerned or, if no direction has been given by the Commission under section 17P(1) of that Act in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period'; and (c) in s 110(9) the words from 'or section' to 'section 65(3))' were omitted: Water Industry Act 1991 s 17Q(7) (as so added). The Enterprise Act s 111(5)(b), in its application by virtue of head (7) above, has effect as if for s 111(5)(b)(ii) there were substituted: '(ii) if earlier, the day on which a notice is published by the Commission under section 17P(8) of the Water Industry Act 1991 in connection with the reference concerned or, if no direction is given by the Commission under section 17P(1) of that Act in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period.': Water Industry Act 1991 s 17Q(8) (as so added). Provisions of the Enterprise Act 2002 Pt 3 which have effect for the purposes of ss 109-116 of that Act (including, in particular, provisions relating to offences and the making of orders) will, for the purposes of the application of those sections by virtue of heads (1)-(8) above, have effect in relation to those sections as so applied (s 17Q(9) (as so added)); and accordingly, corresponding provisions of the Water Industry Act 1991 do not have effect in relation to those sections as so applied (s 17Q(10) (as so added)).

26 See the Water Industry Act 1991 s 17Q(6) (as added: see note 2).



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## **162. Modification of water supply licences by order under other enactments.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup>, the Competition Commission<sup>2</sup> or the Secretary of State<sup>3</sup> (the 'relevant authority') makes a relevant order<sup>4</sup>, the order may also provide for the modification<sup>5</sup> of:

- 215 (1) the conditions of a particular retail licence or combined licence<sup>6</sup>; or
- 216 (2) the standard conditions<sup>7</sup> of retail licences or combined licences<sup>8</sup>,

to such extent as may appear to the relevant authority to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order<sup>9</sup>.

The modification under head (1) above of part of a standard condition of a particular licence does not prevent any other part of the condition from continuing to be regarded as a standard condition for the relevant statutory purposes<sup>10</sup>.

Where at any time the relevant authority modifies under head (2) above the standard conditions of retail licences or combined licences, the relevant authority:

- 217 (a) must also make, as nearly as may be, the same modifications of those conditions for the purposes of their incorporation in licences of that description granted after that time<sup>11</sup>; and where it so modifies such conditions for the purposes of their incorporation in licences, the relevant authority must publish those modifications in such manner as it considers appropriate<sup>12</sup>; and
- 218 (b) may, after consultation with the Water Services Regulation Authority<sup>13</sup>, make such incidental or consequential modifications as the relevant authority considers necessary or expedient of any conditions of licences of that description granted before that time<sup>14</sup>.

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

2 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

3 As to the Secretary of State see PARA 15 note 1.

4 'Relevant order' means: (1) an order under the Enterprise Act 2002 s 75, 83 or 84 or Sch 7 para 5, 10 or 11 (see **COMPETITION** vol 18 (2009) PARA 219 et seq) where: (a) one or more than one of the enterprises which have, or may have, ceased to be distinct enterprises was engaged in the carrying on of activities authorised or regulated by a retail licence or combined licence; or (b) one or more than one of the enterprises which will or may cease to be distinct enterprises is engaged in the carrying on of activities authorised or regulated by a retail licence or combined licence; or (2) an order under s 160 or 161 (see **COMPETITION** vol 18 (2009) PARAS 302-303) where the feature, or combination of features, of the market in the United Kingdom for goods or services which prevents, restricts or distorts competition relates to activities authorised or regulated by a retail licence or combined licence: Water Industry Act 1991 s 17R(2) (s 17R added by the Water Act 2003 s 56, Sch 4 paras 1, 2). Expressions used in the Water Industry Act 1991 s 17R(2) and in the Enterprise Act 2002 Pt 3 (ss 22-130) or Pt 4 (ss 131-184) (see **COMPETITION** vol 18 (2009) PARAS 173-318) have the same meaning in the Water Industry Act 1991 s 17R(2) as in that Part: Water Industry Act 1991 s 17R(6) (as so added). As to the meanings of 'retail licence' and 'combined licence' see PARA 152. As to the meaning of 'United Kingdom' see PARA 22 note 5.

5 As to the meaning of 'modification' see PARA 141 note 20.

- 6 Water Industry Act 1991 s 17R(1)(a) (as added: see note 4).
- 7 As to the standard conditions see PARA 155.
- 8 Water Industry Act 1991 s 17R(1)(b) (as added: see note 4).
- 9 Water Industry Act 1991 s 17R(1) (as added: see note 4).
- 10 Water Industry Act 1991 s 17R(3) (as added: see note 4). The statutory purposes referred to in the text are the purposes of Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.
- 11 Water Industry Act 1991 s 17R(4)(a) (as added: see note 4).
- 12 See the Water Industry Act 1991 s 17R(5) (as added: see note 4).
- 13 As to the Water Services Regulation Authority see PARA 109.
- 14 Water Industry Act 1991 s 17R(4)(b) (as added: see note 4).

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## **(6) ENFORCEMENT AND INSOLVENCY**

### **(i) Enforcement Orders**

#### **163. Duty to make enforcement orders.**

Subject as provided<sup>1</sup>, where in the case of any company holding an appointment as a relevant undertaker<sup>2</sup> or a water supply licence<sup>3</sup> the Secretary of State<sup>4</sup> or, in certain cases relating to Wales, the Welsh Ministers<sup>5</sup>, or the Water Services Regulation Authority<sup>6</sup> is satisfied:

- 219 (1) that that company is contravening<sup>7</sup>:
- 23
- 26. (a) any condition of the company's appointment or licence in relation to which they are the enforcement authority<sup>8</sup>; or
- 27. (b) any statutory or other requirement which is enforceable under these provisions and in relation to which they are the enforcement authority<sup>9</sup>; or
- 24
- 220 (2) that that company is likely to contravene any such condition or requirement<sup>10</sup>,

they must by a final enforcement order<sup>11</sup> make such provision as is requisite for the purpose of securing compliance with that condition or requirement<sup>12</sup>.

Subject as aforesaid, where the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority is satisfied:

- 221 (i) in the case of any company holding an appointment as a relevant undertaker, that the company is causing or contributing to a contravention of a condition or requirement such as is referred to in head (1)(a) or (b) above by a company holding a water supply licence<sup>13</sup>, or is likely to cause or contribute to any such contravention<sup>14</sup>; or
- 222 (ii) in the case of any company holding a water supply licence, that the company is causing or contributing to a contravention of a condition or requirement such as is referred to in head (1)(a) or (b) above by a company holding an appointment as a relevant undertaker<sup>15</sup>, or is likely to cause or contribute to any such contravention<sup>16</sup>,

they must by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement<sup>17</sup>.

Subject to certain exceptions<sup>18</sup>, where in the case of any company holding an appointment as a relevant undertaker or a water supply licence, it appears to the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority as mentioned in any of the heads above<sup>19</sup>, and that it is requisite that a provisional enforcement order be made<sup>20</sup>, they may (instead of taking steps towards the making of a final order) by a provisional enforcement order make such provision as appears to them requisite for the purpose of securing compliance with the condition or requirement in question<sup>21</sup>. Where<sup>22</sup> the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority has made a provisional enforcement order, they must confirm it, with or without modifications, if: (A) they are satisfied that the company to which the

order relates (aa) is contravening any condition or statutory or other requirement in relation to which they are the enforcement authority<sup>23</sup>; or (bb) is likely to contravene any such condition or requirement<sup>24</sup>; or (cc) is causing or contributing to a contravention of any such condition or requirement<sup>25</sup>; or (dd) is likely to cause or contribute to any such contravention<sup>26</sup>; and (b) the provision made by the order (with any modifications) is requisite for the purpose of securing compliance with that condition or requirement<sup>27</sup>.

An enforcement order:

- 223 (AA) must require the company to which it relates (according to the circumstances of the case) to do, or not to do, such things as are specified in the order or are of a description so specified<sup>28</sup>;
- 224 (BB) takes effect at such time, being the earliest practicable time, as is determined by or under the order<sup>29</sup>; and
- 225 (CC) may be revoked at any time by the enforcement authority who made it<sup>30</sup>.

Where any act or omission constitutes a contravention of a condition of an appointment as a relevant undertaker or of a condition of a water supply licence or of a statutory or other requirement enforceable under the above provisions<sup>31</sup>, or causes or contributes to a contravention of any such condition or requirement<sup>32</sup>, the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of the above provisions) are those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention<sup>33</sup>.

1    Ie subject to the Water Industry Act 1991 s 18(2) (see the text to notes 18-21) and ss 19 and 20 (see PARAS 164, 165).

2    Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3    Ie a licence under the Water Industry Act 1991 Pt I Ch 1A (ss 17A-17R): see PARA 152 et seq.

4    As to the Secretary of State see PARA 15 note 1. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of relevant undertakers see the Water Industry Act 1991 s 2; and PARA 130.

5    The functions of the Secretary of State under the Water Industry Act 1991 s 18 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

6    As to the Water Services Regulation Authority see PARA 109. As to the exercise by the Authority of its powers and duties relating to the regulation of undertakers see the Water Industry Act 1991 s 2; and PARA 130.

7    As to the meaning of 'contravention' see PARA 20 note 5.

8    Water Industry Act 1991 s 18(1)(a)(i) (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 4(1), (2)(b)).

9    Water Industry Act 1991 s 18(1)(a)(ii) (amended by the Water Act 2003 s 36(2)). For the purposes of the Water Industry Act 1991 s 18 and the following provisions of the Water Industry Act 1991 (ie ss 19-223):

- 24 (1) the statutory and other requirements which are enforceable under s 18 in relation to a company holding an appointment as a relevant undertaker or a water supply licence are such of the requirements of any enactment or of any subordinate legislation as are imposed in consequence of that appointment or licence, and are made so enforceable by that enactment or subordinate legislation (s 18(6)(a) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 4(1), (6)(a)));
- 25 (2) the Authority is the enforcement authority in relation to the conditions of such an appointment or licence (Water Industry Act 1991 s 18(6)(b) (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 4(1), (6)(b))); and
- 26 (c) the enforcement authority in relation to each of the statutory and other requirements so enforceable is the Secretary of State (or, where appropriate, the Welsh Ministers), the Authority or either of them, according to whatever provision is made by the enactment or subordinate legislation by which the requirement is made so enforceable (Water Industry Act 1991 s 18(6)(c) (amended by the Water Act 2003 s 36(2))).

As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'subordinate legislation' see PARA 21 note 36.

10 Water Industry Act 1991 s 18(1)(b) (amended by the Water Act 2003 s 49(1), (2)(a)).

11 'Final enforcement order' means an order under the Water Industry Act 1991 s 18 other than a provisional enforcement order; 'provisional enforcement order' means an order under s 18 which, if not previously confirmed in accordance with s 18(4) (see the text to notes 22-27), will cease to have effect at the end of such period (not exceeding three months) as is determined by or under the order; and 'enforcement order' means a final enforcement order or a provisional enforcement order: s 18(7). As to the meaning of 'month' see PARA 23 note 10.

12 Water Industry Act 1991 s 18(1) (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 4(1), (2)(a)). As to the procedure for enforcement orders see PARA 165. As to the validity of orders see PARA 167. As to the effect of an order see PARA 168. As to the power to acquire information for enforcement purposes see PARA 169. The Water Services Regulation Authority must enter details of every final enforcement order, every provisional enforcement order made or confirmed and every revocation of such a final or provisional enforcement order in the register maintained by it: see the Water Industry Act 1991 s 195; and PARA 178.

13 Water Industry Act 1991 s 18(1A)(a)(i) (s 18(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 4(1), (3)).

14 Water Industry Act 1991 s 18(1A)(a)(iii) (as added: see note 13).

15 Water Industry Act 1991 s 18(1A)(b)(i) (as added: see note 13).

16 Water Industry Act 1991 s 18(1A)(b)(ii) (as added: see note 13).

17 See the Water Industry Act 1991 s 18(1A) (as added: see note 13).

18 Ie subject to the Water Industry Act 1991 s 19: see PARA 164.

19 Water Industry Act 1991 s 18(2)(a) (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 4(1), (4)(b)).

20 Water Industry Act 1991 s 18(2)(b). In determining for these purposes whether it is requisite that a provisional enforcement order be made, the Secretary of State, Welsh Ministers or, as the case may be, the Authority must have regard, in particular, to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of any condition or of any statutory or other requirement enforceable under s 18, is likely to be done, or omitted to be done, before a final enforcement order may be made: s 18(3) (amended by the Water Act 2003 s 36(2)). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'damage' see PARA 129 note 7.

21 Water Industry Act 1991 s 18(2) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 4(1), (4)(a)).

22 Ie subject to the Water Industry Act 1991 ss 19 and 20: see PARAS 164, 165.

23 Water Industry Act 1991 s 18(4)(a)(i) (amended by the Water Act 2003 s 36(2)).

24 Water Industry Act 1991 s 18(4)(a)(ii) (substituted by the Water Act 2003 s 49(1), (2)(b)).

25 Water Industry Act 1991 s 18(4)(a)(iii) (s 18(4)(a)(iii), (iv) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 4(1), (5)).

26 Water Industry Act 1991 s 18(4)(a)(iv) (as added: see note 25).

27 Water Industry Act 1991 s 18(4)(b).

28 Water Industry Act 1991 s 18(5)(a).

29 Water Industry Act 1991 s 18(5)(b).

30 Water Industry Act 1991 s 18(5)(c). As to the revocation of orders see PARA 166.

31 Water Industry Act 1991 s 18(8)(a) (s 18(8) substituted by the Water Act 2003 s 101(1), Sch 8 paras 2, 4(1), (7)).

32 Water Industry Act 1991 s 18(8)(b) (as substituted: see note 31).

33 Water Industry Act 1991 s 18(8) (as substituted: see note 31). See *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42, [2004] 1 All ER 135; *Dobson v Thames Water Utilities* [2009] EWCA Civ 28, [2009] All ER (D) 252 (Jan).

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#### **164. Circumstances in which an enforcement order need not be made.**

Subject to the Drinking Water (Undertakings) (England and Wales) Regulations 2000<sup>1</sup>, neither the Secretary of State<sup>2</sup> or, in certain cases, the Welsh Ministers<sup>3</sup>, nor the Water Services Regulation Authority<sup>4</sup> is required to make an enforcement order<sup>5</sup> in relation to any company, or to confirm a provisional enforcement order<sup>6</sup> so made, if they are satisfied<sup>7</sup>:

- 226 (1) that the contraventions<sup>8</sup> were, or the apprehended contraventions are, of a trivial nature<sup>9</sup>;
- 227 (2) that the extent to which the company caused or contributed to, or was likely to cause or contribute to, a contravention was trivial<sup>10</sup>;
- 228 (3) that the company has given, and is complying with, an undertaking to take all such steps as it appears to them for the time being to be appropriate for the company to take for the purpose of securing or facilitating compliance with the condition or requirement in question<sup>11</sup>; or
- 229 (4) that the duties imposed on them<sup>12</sup> preclude the making or, as the case may be, the confirmation of the order<sup>13</sup>.

The Authority is not required to make an enforcement order, or to confirm a provisional enforcement order, if it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998<sup>14</sup>.

Where the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority, having notified a company that they are considering the making in relation to the company of an enforcement order or the confirmation of a provisional enforcement order so made, is satisfied as mentioned in heads (1) to (4) above or, in the case of the Authority, is satisfied that the most appropriate way of proceeding is under the Competition Act 1998, they must<sup>15</sup>:

- 230 (a) serve notice<sup>16</sup> that they are so satisfied on the company<sup>17</sup>;
- 231 (b) publish a copy of the notice in such manner as they consider appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons<sup>18</sup> likely to be affected by them<sup>19</sup>; and
- 232 (c) in a case where the Secretary of State or, as the case may be, the Welsh Ministers is satisfied as mentioned in head (3) above, serve a copy of the notice and of the undertaking given for the purposes of that head on the Authority<sup>20</sup>;

but these notice requirements do not apply, in the case of any proposed order or confirmation in respect of a specified direction given<sup>21</sup>, to the extent that the Secretary of State or, where appropriate, the Welsh Ministers, directs that they should not be complied with in the interests of national security<sup>22</sup>.

1    le subject to the Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297: see note 11.

2    As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Industry Act 1991 s 19 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

4 As to the Water Services Regulation Authority see PARA 109.

5 As to the meaning of 'enforcement order' see PARA 163 note 11.

6 As to the meaning of 'provisional enforcement order' see PARA 163 note 11.

7 Water Industry Act 1991 s 19(1) (amended by SI 2000/1297; the Water Act 2003 s 36(2)).

8 As to the meaning of 'contravention' see PARA 20 note 5.

9 Water Industry Act 1991 s 19(1)(a).

10 Water Industry Act 1991 s 19(1)(aa) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 5(1), (2)).

11 Water Industry Act 1991 s 19(1)(b) (s 19(1)(b), (c), amended by the Water Act 2003 s 36(2)). The requirement to comply with an undertaking given for these purposes is treated as a statutory requirement enforceable under the Water Industry Act 1991 s 18 (see PARA 163) by the Secretary of State or, where appropriate, the Welsh Ministers; or, in accordance with a general authorisation given by the Secretary of State or where appropriate, the Welsh Ministers, by the Water Services Regulation Authority: see s 19(2) (amended by the Water Act 2003 s 36(2)). The Water Services Regulation Authority must enter details of every undertaking given to and accepted by the Secretary of State, the Welsh Ministers or the Authority for the purposes of the Water Industry Act 1991 s 19(1)(b) in the register maintained by it: see s 195; and PARA 178.

An undertaking which relates to a contravention of Water Industry Act 1991 s 68 (water quality: see PARA 374) in so far as it implements EC Directive 80/778 (OJ L229, 30.08.80, p 11) (the Drinking Water Directive) must be accepted by the relevant enforcement authority for the purposes of the Water Industry Act 1991 s 19(1)(b) only if the provisions of the Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297, regs 3-5 (see below) are complied with: reg 2. A company offering to give an undertaking must make an application in writing to the relevant enforcement authority setting out: (1) the terms of the undertaking proposed (reg 3(1)(a)); (2) details of investigations made to identify the contravention and its cause, including relevant sampling evidence (reg 3(1)(b)); (3) the reason for proposing the remedial steps specified in the undertaking, details of any alternative remedial steps considered and the reason for preferring those proposed (reg 3(1)(c)); (4) whether or not there are any alternative means for maintaining supplies to the population affected by the contravention and, if so, what they are and the reason for not using them (reg 3(1)(d)); (5) the company's estimate of the maximum deviation from the quality required by the Water Industry Act 1991 s 68 in relation to each relevant parameter which is likely to occur while remedial steps are being taken and an explanation of the basis of that estimate (Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297, reg 3(1)(e)); (6) an explanation of the measures proposed for monitoring the quality of water supplied in relation to each relevant parameter, and for preventing any danger to public health arising, while remedial steps are being taken (reg 3(1)(f)); and (7) all other information on which the company relies to support its application (reg 3(1)(g)). As to the meaning of 'writing' see PARA 22 note 1. 'Relevant sampling evidence' means details of all relevant samples taken, including the date and place at which each such sample is taken and the results of its analysis: reg 3(2). The undertaking must specify: (a) the nature of the contravention and its cause or suspected cause (reg 4(a)); (b) the water supply zone affected and the size of the population supplied (reg 4(b)); (c) the remedial steps which are to be taken and the date by which each step is to be completed (reg 4(c)); (d) the maximum deviation from the quality required by the Water Industry Act 1991 s 68 in relation to each relevant parameter which the company undertakes to ensure is not exceeded while remedial steps are being taken (Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297 reg 4(d)); and (e) the measures which are to be taken to monitor those parameters, and to prevent any danger to public health arising, during that period (reg 4(e)). 'Water supply zone' has the meaning given by the Water Supply (Water Quality) Regulations 1989, SI 1989/1147, reg 2 (revoked and replaced) (see now PARA 376 note 3): Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297, reg 1(3).

The relevant enforcement authority must be satisfied that: (i) the specified remedial steps are being and will be taken as quickly as possible and that the dates specified in the undertaking are consistent with this (reg 5(a)); (ii) there is no potential danger to human health (reg 5(b)); (iii) there are no reasonable alternative means for maintaining supplies to the population affected by the contravention (reg 5(c)); and (iv) the specified remedial



steps are the most appropriate in the circumstances of the case for remedying the contravention as quickly as possible (reg 5(d)). A relevant enforcing authority may no longer rely on an undertaking accepted under the Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297, as a means of ensuring that the contravention is remedied if it ceases to be satisfied about the matters specified in reg 5: reg 6. As to transitional provisions in respect of undertakings accepted before 14 June 2000 see reg 7. 'Relevant enforcement authority' means, in relation to a company whose area of appointment as a water undertaker is wholly or mainly in Wales or a company which is a licensed water supplier as regards licensed activities using the supply system of any such water undertaker, the Welsh Ministers; and in all other cases, the Secretary of State: reg 1(3) (definition amended by SI 2005/2035); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'licensed water supplier' see PARA 152: definition applied by the Drinking Water (Undertakings) (England and Wales) Regulations 2000, SI 2000/1297, reg 1(3) (amended by SI 2005/2035). As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'Wales' see PARA 16 note 2.

The acceptance by the Secretary of State of undertakings from water undertakers to ensure conformity with EC standards of wholesomeness was sufficient to fulfil his duty to remedy the breach by the UK of its obligation to ensure water intended for human consumption met those standards: *R v Secretary of State for the Environment, ex p Friends of the Earth* [1996] 1 CMLR 117, CA.

12    le by the Water Industry Act 1991 Pt I (ss 1-5).

13    Water Industry Act 1991 s 19(1)(c) (as amended: see note 11).

14    Water Industry Act 1991 s 19(1A) (added by the Competition Act 1998 s 54(3), Sch 10 para 13(6); and amended by the Water Act 2003 s 36(2)). As to the Competition Act 1998 see **COMPETITION** vol 18 (2009) PARA 115 et seq.

15    Water Industry Act 1991 s 19(3) (amended by the Competition Act 1998 s 54(3), Sch 10 para 13(7); Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 5(1), (3)).

16    As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

17    Water Industry Act 1991 s 19(3)(a) (s 19(3)(a)-(c) amended by the Water Act 2003 s 36(2)). The Authority must enter details of every such notice in the register maintained by it: see the Water Industry Act 1991 s 195; and PARA 178.

18    As to the meaning of 'person' see PARA 13 note 29.

19    Water Industry Act 1991 s 19(3)(b) (as amended: see note 17).

20    Water Industry Act 1991 s 19(3)(c) (as amended: see note 17).

21    le a direction given under the Water Industry Act 1991 s 208: see PARA 129.

22    Water Industry Act 1991 s 19(4). In so far as the functions under s 19(4) are transferred to the Welsh Ministers (see note 3) they are exercisable by them concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30.

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### **165. Procedure for enforcement orders.**

Before making a final enforcement order<sup>1</sup> or confirming a provisional enforcement order<sup>2</sup> the Secretary of State<sup>3</sup> or, in certain cases, the Welsh Ministers<sup>4</sup>, or the Water Services Regulation Authority<sup>5</sup> must give notice<sup>6</sup> stating that they propose to make or confirm the order and setting out the effect of the order<sup>7</sup>. Such notice must also set out:

- 233 (1) the condition or requirement for the purpose of securing compliance with which the order is to be made or confirmed<sup>8</sup>;
- 234 (2) in cases where a company is contravening or is likely to contravene<sup>9</sup> a condition or requirement<sup>10</sup>, the acts or omissions which, in their opinion, constitute or would constitute contraventions of that condition or requirement<sup>11</sup>;
- 235 (3) in cases where a company is causing or contributing to a contravention of a condition or requirement or is likely to do so<sup>12</sup>, the acts or omissions which, in their opinion, cause or contribute to or would cause or contribute to the contravention of that condition or requirement<sup>13</sup>;
- 236 (4) the other facts which, in their opinion, justify the making or confirmation of the order<sup>14</sup>; and
- 237 (5) the period<sup>15</sup> within which representations or objections with respect to the proposed order or proposed confirmation may be made<sup>16</sup>.

The Secretary of State, the Welsh Ministers or the Authority, as the case may be, must consider any representations or objections which are duly made and not withdrawn<sup>17</sup>.

Neither the Secretary of State, the Welsh Ministers nor the Authority may make a final enforcement order with modifications<sup>18</sup>, or confirm a provisional enforcement order with modifications, except<sup>19</sup> with the consent to the modifications of the company to which the order relates<sup>20</sup>, or after complying with further procedural requirements<sup>21</sup>.

As soon as practicable after making an enforcement order or confirming a provisional enforcement order, the Secretary of State or the Welsh Ministers or, as the case may be, the Authority must:

- 238 (a) serve a copy of the order on the company to which the order relates and, where this requirement applies in the case of an order made or confirmed by the Secretary of State or the Welsh Ministers, on the Authority<sup>22</sup>; and
- 239 (b) publish such a copy in such manner as they consider appropriate for the purpose of bringing the order to the attention of persons likely to be affected by it<sup>23</sup>.

The above requirements do not apply, in the case of any order in respect of a contravention of a specified direction<sup>24</sup>, to the extent that the Secretary of State or the Welsh Ministers directs that they should not be complied with in the interests of national security<sup>25</sup>.

<sup>1</sup> ie under the Water Industry Act 1991 s 18(1) or (1A): see PARA 163. As to the meaning of 'final enforcement order' see PARA 163 note 11.

2 le in a case to which the Water Industry Act 1991 s 18(4)(a)(i)-(iv) applies: see PARA 163. As to the meaning of 'provisional enforcement order' see PARA 163 note 11.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Industry Act 1991 s 20 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

5 As to the Water Services Regulation Authority see PARA 109.

6 Water Industry Act 1991 s 20(1), (1A) (s 20(1) amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 6(1), (2); Water Industry Act 1991 s 20(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 6(1), (3)). A notice under the Water Industry Act 1991 s 20(1) or (1A) must be given: (1) by publishing the notice in such manner as the Secretary of State or, where appropriate, the Welsh Ministers or, as the case may be, the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and (2) by serving a copy of the notice, and a copy of the proposed order or of the order proposed to be confirmed, on the company to which the order relates and, where the notice is given by the Secretary of State or the Welsh Ministers, on the Authority: s 20(2) (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 6(1), (4)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29.

7 Water Industry Act 1991 s 20(1)(a), (1A)(a) (s 20(1)(a), (b) amended by the Water Act 2003 s 36(2); Water Industry Act 1991 s 20(1A) as added: see note 6).

8 Water Industry Act 1991 s 20(1)(b)(i), s 20(1A)(b)(i) (s 20(1)(b) as amended: see note 7; s 20(1A) as added: see note 6).

9 As to the meaning of 'contravene' see PARA 20 note 5.

10 le in cases to which the Water Industry Act 1991 s 18(4)(a)(i) or (ii) applies: see PARA 163.

11 Water Industry Act 1991 s 20(1)(b)(ii) (amended by the Water Act 2003 s 36(2)).

12 le in cases to which the Water Industry Act 1991 s 18(4)(a)(iii) or (iv) applies: see PARA 163.

13 Water Industry Act 1991 s 20(1A)(b)(ii) (as added: see note 6).

14 Water Industry Act 1991 s 20(1)(b)(iii), s 20(1A)(b)(iii) (s 20(1)(b)(iii) amended by the Water Act 2003 s 36(2); s 20(1A) as added: see note 6).

15 le not being less than 21 days from the date of publication of the notice.

16 See the Water Industry Act 1991 s 20(1)(c), s 20(1A)(c) (s 20(1)(c) amended by the Water Act 2003 s 49(1), (3); Water Industry Act 1991 s 20(1A) as added: see note 6).

17 Water Industry Act 1991 s 20(1), s 20(1A)(1) (as added: see note 6).

18 As to the meaning of 'modifications' see PARA 141 note 20.

19 Water Industry Act 1991 s 20(3) (amended by the Water Act 2003 s 36(2)).

20 Water Industry Act 1991 s 20(3)(a).

21 Water Industry Act 1991 s 20(3)(b). The requirements are that the Secretary of State, the Welsh Ministers or, as the case may be, the Authority must: (1) serve on the company to which the order relates such notice as appears to them to be requisite of their proposal to make or confirm the order with modifications (s 20(4)(a) (amended by the Water Act 2003 s 36(2))); (2) in that notice specify the period (not being less than 21 days from the date of the service of the notice) within which representations or objections with respect to the proposed modifications may be made (Water Industry Act 1991 s 20(4)(b) (amended by the Water Act 2003 s

49(1), (3)); and (3) consider any representations or objections which are duly made and not withdrawn (Water Industry Act 1991 s 20(4)(c)).

22 Water Industry Act 1991 s 20(5)(a) (s 20(5) amended by the Water Act 2003 s 36(2)).

23 Water Industry Act 1991 s 20(5)(b) (as amended: see note 22).

24 Ie a direction under the Water Industry Act 1991 s 208: see PARA 129.

25 Water Industry Act 1991 s 20(9). In so far as the functions under s 20(9) are transferred to the Welsh Ministers (see note 4) they are exercisable by them concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30.

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## **166. Revocation of enforcement orders.**

An enforcement order<sup>1</sup> may be revoked at any time by the enforcement authority who made it<sup>2</sup>.

Before revoking an enforcement order, other than an unconfirmed provisional order<sup>3</sup>, the Secretary of State<sup>4</sup> or, in certain cases, the Welsh Ministers<sup>5</sup>, or the Water Services Regulation Authority<sup>6</sup> must give notice<sup>7</sup> stating that they propose to revoke the order and setting out its effect<sup>8</sup>, and specifying the period<sup>9</sup> within which representations or objections with respect to the proposed revocation may be made<sup>10</sup>. The Secretary of State, the Welsh Ministers, or as the case may be, the Authority must consider any representations or objections which are duly made and not withdrawn<sup>11</sup>.

If, after giving such a notice, the Secretary of State, the Welsh Ministers, or as the case may be, the Authority decides not to revoke the order to which it relates, they must give notice of that decision<sup>12</sup>.

These procedural requirements do not apply, in the case of any order in respect of a contravention<sup>13</sup> of a specified direction<sup>14</sup>, to the extent that the Secretary of State or the Welsh Ministers direct that they should not be complied with in the interests of national security<sup>15</sup>.

1 As to the meaning of 'enforcement order' see PARA 163 note 11.

2 See the Water Industry Act 1991 s 18(5)(c); and PARA 163.

3 As to the meaning of 'provisional enforcement order' see PARA 163 note 11.

4 As to the Secretary of State see PARA 15 note 1.

5 The functions of the Secretary of State under the Water Industry Act 1991 s 20 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

6 As to the Water Services Regulation Authority see PARA 109.

7 A notice under the Water Industry Act 1991 s 20(6) or (7) (see the text to note 12) must be given by publishing it in such manner as the Secretary of State, the Welsh Ministers or, as the case may be, the Water Services Regulation Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them; and by serving a copy of it on the company to which the order relates and, where the notice is given by the Secretary of State or the Welsh Ministers, on the Authority: s 20(8) (amended by the Water Act 2003 s 36(2)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29.

8 Water Industry Act 1991 s 20(6)(a) (amended by the Water Act 2003 s 36(2)).

9 ie not being less than 28 days from the date of publication of the notice.

10 Water Industry Act 1991 s 20(6)(b).

- 11 Water Industry Act 1991 s 20(6) (amended by the Water Act 2003 s 36(2)).
- 12 Water Industry Act 1991 s 20(7) (amended by the Water Act 2003 s 36(2)). As to such notice see note 7.
- 13 As to the meaning of 'contravention' see PARA 20 note 5.
- 14 Ie a direction under the Water Industry Act 1991 s 208: see PARA 129.
- 15 Water Industry Act 1991 s 20(9). In so far as the functions under s 20(9) are transferred to the Welsh Ministers (see note 5) they are exercisable by them concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30.

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### **167. Validity of enforcement orders.**

If the company to which an enforcement order<sup>1</sup> relates is aggrieved by the order and desires to question its validity on the ground that:

- 240 (1) its making or confirmation was not within the statutory powers<sup>2</sup>; or
- 241 (2) that any of the procedural requirements<sup>3</sup> have not been complied with in relation to it<sup>4</sup>,

the company may, within 42 days from the date of service on it of a copy of the order, make an application to the High Court<sup>5</sup>.

On any such application the High Court may, if satisfied that the making of the order was not within those powers or that the interests of the company have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order<sup>6</sup>.

Except as provided above, the validity of an enforcement order may not be quashed in any legal proceedings whatsoever<sup>7</sup>.

1 As to the meaning of 'enforcement order' see PARA 163 note 11.

2 Water Industry Act 1991 s 21(1)(a). The statutory powers referred to are those of s 18: see PARA 163.

3 ie any of the requirements of the Water Industry Act 1991 s 20: see PARAS 165, 166.

4 Water Industry Act 1991 s 21(1)(b).

5 Water Industry Act 1991 s 21(1). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

6 Water Industry Act 1991 21(2).

7 Water Industry Act 1991 s 21(3). As to judicial review of decisions expressed in this way to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

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### **168. Effect of enforcement order.**

The obligation to comply with an enforcement order<sup>1</sup> is a duty owed to any person<sup>2</sup> who may be affected by a contravention<sup>3</sup> of the order<sup>4</sup>. Any breach of the duty so owed to any person which causes that person to sustain loss or damage<sup>5</sup> is actionable at his suit<sup>6</sup>; but in any proceedings brought against any company in pursuance of this provision, other than proceedings in respect of a contravention consisting in a breach of the duty to supply wholesome water<sup>7</sup>, it is a defence for the company to show that it took all reasonable steps and exercised all due diligence to avoid contravening the order<sup>8</sup>.

Without prejudice to any right which a person may have by virtue of these provisions to bring civil proceedings in respect of any contravention or apprehended contravention of an enforcement order, compliance with any such order is also enforceable by the relevant enforcement authority<sup>9</sup> in civil proceedings for an injunction or any other appropriate relief<sup>10</sup>.

1 As to the meaning of 'enforcement order' see PARA 163 note 11.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'contravention' see PARA 20 note 5.

4 Water Industry Act 1991 s 22(1).

5 As to the meaning of 'damage' see PARA 129 note 7.

6 Water Industry Act 1991 s 22(2).

7 I.e. the duty under the Water Industry Act 1991 s 68(1)(a) or (1A)(a): see PARA 374.

8 Water Industry Act 1991 s 22(3) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 7). As to challenges to the validity of an enforcement order see PARA 167.

9 'Relevant enforcement authority', in relation to any enforcement order, means the Secretary of State or, in certain cases, the Welsh Ministers, or the Water Services Regulation Authority, or either of them, according to who is the enforcement authority (see PARA 163 note 9) in relation to the condition or requirement compliance with which was to be secured by the order: Water Industry Act 1991 s 22(5) (amended by the Water Act 2003 s 36(2)). As to the Secretary of State see PARA 15 note 1. As to the Water Services Regulation Authority see PARA 109. The functions of the Secretary of State under the Water Industry Act 1991 s 22 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

10 Water Industry Act 1991 s 22(4).



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**169. Power to acquire information for enforcement purposes.**

Where it appears to the Secretary of State<sup>1</sup> or, in certain cases, the Welsh Ministers<sup>2</sup>, or the Water Services Regulation Authority<sup>3</sup>:

- 242 (1) in the case of a company which holds an appointment as a relevant undertaker<sup>4</sup>, that the company:
- 25
28. (a) may be contravening<sup>5</sup>, or may have contravened, any condition of the appointment or any statutory or other requirement enforceable under the relevant statutory provisions<sup>6</sup>; or
29. (b) may be causing or contributing to, or may have caused or contributed to, a contravention by a company holding a water supply licence<sup>7</sup> of any condition of the licence or any statutory or other requirement so enforceable<sup>8</sup>; or
- 26
- 243 (2) in the case of a company which holds a water supply licence, that the company:
- 27
30. (a) may be contravening, or may have contravened, any condition of the licence or any statutory or other requirement so enforceable<sup>9</sup>; or
31. (b) may be causing or contributing to, or may have caused or contributed to, a contravention by a company holding an appointment as a relevant undertaker of any condition of the appointment or any statutory or other requirement so enforceable<sup>10</sup>,
- 28

they may, for any purpose connected with such of their powers under the Water Industry Act 1991<sup>11</sup> as are exercisable in relation to that matter, serve a notice<sup>12</sup> on any person<sup>13</sup>: (i) requiring that person to produce, at a time and place specified in the notice, to the Secretary of State, Welsh Ministers or the Authority<sup>14</sup>, or any person appointed by them for the purpose<sup>15</sup>, any documents which are specified or described in the notice and are in that person's custody or under his control<sup>16</sup>; or (ii) requiring that person, if he is carrying on a business, to furnish, at the time and place and in the form and manner specified in the notice, the Secretary of State, Welsh Ministers or the Authority with such information<sup>17</sup> as may be specified or described in the notice<sup>18</sup>.

A person who, without reasonable excuse, fails to do anything required of him by such a notice is guilty of an offence<sup>19</sup>, as is a person who intentionally alters, suppresses or destroys any document which he has been required by any such notice to produce<sup>20</sup>.

If a person makes default in complying with a notice, the High Court may, on the application of the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority, make such order as the court thinks fit for requiring the default to be made good; and any such order may provide that all the costs or expenses of and incidental to the application must be borne by the person in default or by any officers of a company or other association who are responsible for its default<sup>21</sup>.

Nothing in these provisions is to be construed as restricting any power<sup>22</sup> of the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority to require a company holding

such an appointment as a relevant undertaker or a water supply licence to produce any document to them or to furnish them with any information<sup>23</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 203 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

3 As to the Water Services Regulation Authority see PARA 109.

4 As to the appointment of relevant undertakers see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

5 As to the meaning of 'contravene' see PARA 20 note 5.

6 Water Industry Act 1991 s 203(1)(a)(i) (s 203(1)(a), (b) substituted by the Water Act 2003 s 101(1), Sch 8 paras 2, 45(1), (2)). The relevant statutory provisions are those of the Water Industry Act 1991 s 18: see PARA 163.

7 Ie a licence under the Water Industry Act 1991 Pt I Ch 1A (ss 17A-17R): see PARA 152 et seq.

8 Water Industry Act 1991 s 203(1)(a)(ii) (as substituted: see note 6).

9 Water Industry Act 1991 s 203(1)(b)(i) (as substituted: see note 6).

10 Water Industry Act 1991 s 203(1)(b)(ii) (as substituted: see note 6).

11 Ie their powers under the Water Industry Act 1991 Pt II Ch II (ss 18-26): see PARAS 163-168, 170-175.

12 Such a notice must be signed by the Secretary of State, the Welsh Ministers or, as the case may be, the Authority: see the Water Industry Act 1991 s 203(2) (amended by the Water Act 2003 s 36(2)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

13 Water Industry Act 1991 s 203(1) (amended by the Water Act 2003 s 36(2)). As to the meaning of 'person' see PARA 13 note 29.

14 Water Industry Act 1991 s 203(2)(a)(i) (amended by the Water Act 2003 s 36(2)).

15 See the Water Industry Act 1991 s 203(2)(a)(ii) (amended by the Water Act 2003 s 36(2)).

16 Water Industry Act 1991 s 203(2)(a) (amended by the Water Act 2003 s 36(2)). No person may be required to produce any documents which he could not be compelled to produce in civil proceedings in the High Court: Water Industry Act 1991 s 203(3). As to the production of documents in civil proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

17 As to the meaning of 'information' see PARA 117 note 13.

18 Water Industry Act 1991 s 203(2)(b) (amended by the Water Act 2003 s 36(2)). No person may be required, in complying with any requirement for the furnishing of information, to give any information which he could not be compelled to give in evidence in civil proceedings in the High Court: see the Water Industry Act 1991 s 203(3). As to evidence in civil proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARA 749 et seq.

19 Water Industry Act 1991 s 203(4). The penalty for such offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: s 203(4). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185. As to fines see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 139 et seq.

20 Water Industry Act 1991 s 203(5). The penalty for such offence is, on summary conviction, a fine not exceeding the statutory maximum, or, on conviction on indictment, a fine: s 203(5). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 PARA 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

21 Water Industry Act 1991 s 203(6) (amended by the Water Act 2003 s 36(2)). As to the recovery of expenses see PARA 131 note 6.

22 Ie under the Water Industry Act 1991 s 202 (see PARA 182) or the conditions of an appointment under Pt II Ch I (ss 6-17) (see PARA 137 et seq) or of a licence under Pt II Ch 1A (ss 17A-17R) (see PARA 152 et seq).

23 Water Industry Act 1991 s 203(7) (amended by the Water Act 2003 s 36(2)).

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## **(ii) Financial Penalties**

### **170. Powers to impose financial penalties.**

Where the Water Services Regulation Authority<sup>1</sup> is satisfied:

- 244 (1) in the case of any company holding an appointment as a relevant  
undertaker<sup>2</sup>, that the company:
- 29
32. (a) has contravened<sup>3</sup> or is contravening any condition of the appointment<sup>4</sup>;
33. (b) has caused or contributed to, or is causing or contributing to, a  
contravention by a company holding a water supply licence<sup>5</sup> of any condition of the  
licence<sup>6</sup>; or
34. (c) has failed or is failing to achieve any prescribed standard of performance<sup>7</sup>;  
or
- 30
- 245 (2) in the case of any company holding a water supply licence, that the  
company:
- 31
35. (a) has contravened or is contravening any condition of the licence<sup>8</sup>; or
36. (b) has caused or contributed to, or is causing or contributing to, a  
contravention by a company holding an appointment as a relevant undertaker of any  
condition of the appointment<sup>9</sup>,
- 32

the Authority may, subject to the statutory time limits<sup>10</sup>, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case<sup>11</sup>.

Where the Water Services Regulation Authority, the Secretary of State or the Welsh Ministers is satisfied:

- 246 (i) in the case of any company holding an appointment as a relevant undertaker,  
that the company:
- 33
37. (A) has contravened or is contravening any statutory or other requirement  
which is enforceable by an enforcement order<sup>12</sup> and in relation to which they are the  
enforcement authority<sup>13</sup>; or
38. (B) has caused or contributed to, or is causing or contributing to, a  
contravention by a company holding a water supply licence of any such  
requirement<sup>14</sup>;
- 34
- 247 (ii) in the case of any company holding a water supply licence, that the company;
- 35
39. (A) has contravened or is contravening any statutory or other requirement  
which is enforceable by an enforcement order and in relation to which they are the  
enforcement authority<sup>15</sup>; or

40. (B) has caused or contributed to, or is causing or contributing to, a contravention by a company holding an appointment as a relevant undertaker of any such requirement<sup>16</sup>,
- 36

they may<sup>17</sup> impose on the company a penalty of such amount as is reasonable in all the circumstances of the case<sup>18</sup>.

Before imposing a penalty on a company under any of the above provisions the Authority, the Secretary of State or the Welsh Ministers (the 'enforcement authority') must give notice<sup>19</sup> stating that they propose to impose a penalty and the amount of the penalty proposed to be imposed<sup>20</sup>. The notice must set out the condition, requirement or standard of performance in question<sup>21</sup>, specify the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of a penalty and the amount of the penalty proposed<sup>22</sup>, and specify the period<sup>23</sup> within which representations or objections with respect to the proposed penalty may be made<sup>24</sup>. The enforcement authority must consider any representations or objections which are duly made and not withdrawn<sup>25</sup>.

Before varying any proposal stated in such a notice<sup>26</sup>, the enforcement authority must give notice setting out the proposed variation and the reasons for it<sup>27</sup> and specifying the period<sup>28</sup> within which representations or objections with respect to the proposed variation may be made<sup>29</sup>; and the enforcement authority must consider any representations or objections which are duly made and not withdrawn<sup>30</sup>.

No penalty imposed by an enforcement authority under the above provisions may exceed 10 per cent of the turnover of the company<sup>31</sup>; and an enforcement authority must not impose a penalty under those provisions where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998<sup>32</sup>.

As soon as practicable after imposing a penalty, the enforcement authority must give notice stating that it has imposed a penalty on the company and its amount<sup>33</sup>. The company may, within 21 days of the date of service on it of such a notice, make an application to the enforcement authority for it to specify different dates by which different portions of the penalty are to be paid<sup>34</sup>. If such an application is made, in relation to a penalty, the penalty is not required to be paid until the application has been determined<sup>35</sup>.

Where a penalty imposed under the above provisions, or any portion of it, has not been paid by the date on which it is required to be paid and either no application to the court relating to the penalty has been made<sup>36</sup> during the period within which such an application can be made<sup>37</sup>, or such an application has been made and determined<sup>38</sup>, the enforcement authority may recover from the company, as a civil debt due to it, any of the penalty and any interest which has not been paid<sup>39</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 As to the meaning of 'contravene' see PARA 20 note 5.

4 Water Industry Act 1991 s 22A(1)(a)(i) (ss 22A, 22C, 22D, 22F added by the Water Act 2003 s 48(1)).

5 Ie a licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.

6 Water Industry Act 1991 s 22A(1)(a)(ii) (as added: see note 4).

7 Water Industry Act 1991 s 22A(1)(a)(iii) (as added: see note 4). The prescribed standard of performance is any standard of performance prescribed under s 38(2) (water supply: see PARA 325) or s 95(2) (sewerage services: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1014).

8 Water Industry Act 1991 s 22A(1)(b)(i) (as added: see note 4).

9 Water Industry Act 1991 s 22A(1)(b)(ii) (as added: see note 4).

10 le subject to the Water Industry Act 1991 s 22C. Where no final or provisional order has been made in relation to a contravention or failure, an enforcement authority may not impose a penalty in respect of the contravention or failure later than the end of the period of 12 months from the time of the contravention or failure, unless before the end of that period: (1) the notice under s 22A(4) (see the text to notes 19-25) relating to the penalty is served on the company under s 22A(8) (see note 19) (s 22C(1)(a) (as added: see note 4)); or (2) a notice relating to the contravention or failure is served on the company under s 203(2) (see PARA 169) (s 22C(1)(b) (as so added)). Where a final or provisional order has been made in relation to a contravention or failure, an enforcement authority may not impose a penalty in respect of the contravention or failure unless the notice relating to the penalty under s 22A(4) was served on the company under s 22A(8) (a) within three months from the confirmation of the provisional order or the making of the final order (s 22C(2)(a) (as so added)); or (b) where the provisional order is not confirmed, within six months from the making of the provisional order (s 22C(2)(b) (as so added)). As to final and provisional orders see PARA 163. As to the meaning of 'month' see PARA 23 note 10. 'Enforcement authority' means the Secretary of State, the Welsh Ministers or the Water Services Regulation Authority: see s 22A(4) (as so added); Government of Wales Act 2006 Sch 11 para 32; and the text to note 19. As to the Secretary of State see PARA 15 note 1. Functions under the Water Industry Act 1991 ss 22A, 22C, 22D, 22F which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

In a case in which the Water Industry Act 1991 s 22A(1) applies by virtue of head (1)(b) or (2)(b) in the text, or s 22A(2) applies by virtue of head (i)(b) or (ii)(b) in the text, references in s 22A(4)-(13) (see the text to notes 19-34) and s 22B (see PARA 171) and s 22C to a contravention include references to causing or contributing to a contravention: s 22A(3) (as so added).

11 Water Industry Act 1991 s 22A(1) (as added: see note 4). The power of the enforcement authority to impose a penalty under s 22A is not exercisable in respect of any contravention or failure before 1 April 2005, being the date of the commencement of s 22A: see s 22A(10) (as so added); Water Act 2003 (Commencement No 4, Transitional Provisions and Savings) Order 2005, SI 2005/968, art 2(i). As to the duty on each enforcement authority to prepare and publish, and to have regard to, a statement of policy with respect to the imposition of penalties and the determination of their amount see the Water Industry Act 1991 s 22B; and PARA 171. As to appeals against penalties see PARA 172. As to the requirement that details of penalties imposed be entered in the register maintained by the Water Services Regulation Authority see s 195; and PARA 178. Details of the Authority's strategy for the regulation of the water industry, and notices of penalties imposed by the Authority are published on the Ofwat website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

12 le which is enforceable under the Water Industry Act 1991 s 18: see PARA 163.

13 Water Industry Act 1991 s 22A(2)(a)(i) (as added: see note 4). As to the enforcement authority in this context see PARA 163 note 9.

14 Water Industry Act 1991 s 22A(2)(a)(ii) (as added: see note 4).

15 Water Industry Act 1991 s 22A(2)(b)(i) (as added: see note 4). As to the enforcement authority in this context see PARA 163 note 9.

16 Water Industry Act 1991 s 22A(2)(b)(ii) (as added: see note 4).

17 le subject to the Water Industry Act 1991 s 22C: see note 10.

18 Water Industry Act 1991 s 22A(2) (as added: see note 4). See also note 11.

19 Any notice required to be given under the Water Industry Act 1991 s 22A must be given: (1) by publishing the notice in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them (s 22A(8)(a) (as added: see note 4)); (2) by serving a copy of the notice on the company (s 22A(8)(b) (as so added)); (3) by serving a copy of the notice on the Consumer Council for Water (s 22A(8)(c) (as so added)); and (4) where the notice is given by the Secretary of State or the Welsh Ministers, by serving a copy of the notice on the Authority (s 22A(8)(d) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'person' see PARA 13 note 29. As to the Consumer Council for Water see PARA 115.

- 20 Water Industry Act 1991 s 22A(4)(a) (as added: see note 4).
- 21 Water Industry Act 1991 s 22A(4)(b) (as added: see note 4).
- 22 Water Industry Act 1991 s 22A(4)(c) (as added: see note 4).
- 23 Ie not being less than 21 days from the date of publication of the notice.
- 24 Water Industry Act 1991 s 22A(4)(d) (as added: see note 4).
- 25 Water Industry Act 1991 s 22A(4) (as added: see note 4).
- 26 Ie a notice under the Water Industry Act 1991 s 22A(4)(a): see the text to notes 19-20.
- 27 Water Industry Act 1991 s 22A(5)(a) (as added: see note 4). As to such notice see note 19.
- 28 Ie not being less than 21 days from the date of publication of the notice.
- 29 Water Industry Act 1991 s 22A(5)(b) (as added: see note 4).
- 30 Water Industry Act 1991 s 22A(5) (as added: see note 4).
- 31 Water Industry Act 1991 s 22A(11) (as added: see note 4). The turnover of the company is to be determined in accordance with provisions specified in an order made, after consulting the Welsh Ministers by the Secretary of State: see s 22A(11) (as so added); Government of Wales Act 2006 Sch 11 para 32. The power of the Secretary of State to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Water Industry Act 1991 s 22A(12) (as so added). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the order made see the Water Industry (Determination of Turnover for Penalties) Order 2005, SI 2005/477.
- 32 Water Industry Act 1991 s 22A(13) (as added: see note 4). As to the Competition Act 1998 see **COMPETITION** vol 18 (2009) PARA 115 et seq.
- 33 Water Industry Act 1991 s 22A(6)(a) (as added: see note 4). The notice must set out the condition, requirement or standard of performance in question (s 22A(6)(b) (as so added)); specify the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of the penalty and its amount (s 22A(6)(c) (as so added)); and specify a date, no earlier than the end of the period of 42 days from the date of service of the notice on the company, by which the penalty is required to be paid (s 22A(6)(d) (as so added)). See also note 19.
- 34 Water Industry Act 1991 s 22A(7) (as added: see note 4).
- 35 Water Industry Act 1991 s 22D(2) (as added: see note 4). If the enforcement authority grants an application under s 22A(7) in relation to a penalty but any portion of the penalty is not paid by the date specified in relation to it by the enforcement authority under that provision, the enforcement authority may where it considers it appropriate require so much of the penalty as has not already been paid to be paid immediately: s 22D(3) (as so added).
- 36 Ie under the Water Industry Act 1991 s 22E: see PARA 172.
- 37 Water Industry Act 1991 s 22F(a) (as added: see note 4).
- 38 Water Industry Act 1991 s 22F(b) (as added: see note 4).
- 39 Water Industry Act 1991 s 22F (as added: see note 4). If the whole or any part of a penalty is not paid by the date by which it is required to be paid, the unpaid balance from time to time carries interest at the rate for the time being specified in the Judgments Act 1838 s 17 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1149): Water Industry Act 1991 s 22D(1) (as so added).

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Statement of policy with respect to penalties.

### **171. Statement of policy with respect to penalties.**

Each enforcement authority<sup>1</sup> must prepare and publish<sup>2</sup> a statement of policy with respect to the imposition of penalties and the determination of their amount<sup>3</sup>. An enforcement authority may revise its statement of policy and where it does so must publish the revised statement<sup>4</sup>. An enforcement authority must undertake such consultation as it considers appropriate when preparing or revising its statement of policy<sup>5</sup>.

In deciding whether to impose a penalty, and in determining the amount of any penalty, in respect of a contravention<sup>6</sup> or failure an enforcement authority must have regard to its statement of policy most recently published at the time when the contravention or failure occurred<sup>7</sup>.

1 As to the meaning of 'enforcement authority' see PARA 170 note 10.

2 Publication under the Water Industry Act 1991 s 22B must be in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters contained in the statement of policy to the attention of persons likely to be affected by them: s 22B(4) (s 22B added by the Water Act 2003 s 48(1)). As to the meaning of 'person' see PARA 13 note 29. Statements of policy are available in the case of the Secretary of State on the Department of Environment, Food and Rural Affairs website at [www.defra.gov.uk](http://www.defra.gov.uk); and in the case of the Water Services Regulation Authority on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

3 Water Industry Act 1991 s 22B(1) (as added: see note 2). As to the power to impose financial penalties see PARA 170.

4 Water Industry Act 1991 s 22B(3) (as added: see note 2). See also note 2.

5 Water Industry Act 1991 s 22B(5) (as added: see note 2).

6 As to the meaning of 'contravention' in this context see PARA 170 note 10. As to the meaning of 'contravention' generally see PARA 20 note 5.

7 Water Industry Act 1991 s 22B(2) (as added: see note 2).



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## **172. Appeals in relation to penalties.**

If the company on which a penalty is imposed<sup>1</sup> is aggrieved by:

- 248 (1) the imposition of the penalty<sup>2</sup>;
- 249 (2) the amount of the penalty<sup>3</sup>; or
- 250 (3) the date by which the penalty is required to be paid, or the different dates by which different portions of the penalty are required to be paid<sup>4</sup>,

the company may make an application to the High Court<sup>5</sup>.

On any such application, where the court considers it appropriate to do so in all the circumstances of the case and is satisfied of one or more of the specified grounds, the court: (a) may quash the penalty<sup>6</sup>; (b) may substitute a penalty of such lesser amount as the court considers appropriate in all the circumstances of the case<sup>7</sup>; or (c) in the case of an application under head (3) above, may substitute for the date or dates imposed by the enforcement authority an alternative date or dates<sup>8</sup>. The specified grounds are:

- 251 (i) that the imposition of the penalty was not within the power<sup>9</sup> of the enforcement authority<sup>10</sup>;
- 252 (ii) that any of the requirements as to the service of notices<sup>11</sup> have not been complied with in relation to the imposition of the penalty and the interests of the company have been substantially prejudiced by the non-compliance<sup>12</sup>; or
- 253 (iii) that it was unreasonable of the enforcement authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid<sup>13</sup>.

If an application is made under these provisions in relation to a penalty, the penalty is not required to be paid until the application has been determined<sup>14</sup>. Where the court substitutes a penalty of a lesser amount it may require the payment of interest on the substituted penalty at such rate, and from such date, as it considers just and equitable<sup>15</sup>. Where the court specifies as a date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application, it may require the payment of interest on the penalty, or portion, from that date at such rate as it considers just and equitable<sup>16</sup>.

Except as provided by these provisions, the validity of a penalty may not be questioned by any legal proceedings whatever<sup>17</sup>.

<sup>1</sup> As to the imposition of penalties see PARA 170. As to statements of policy with respect to penalties see PARA 171.

<sup>2</sup> Water Industry Act 1991 s 22E(1)(a) (s 22E added by the Water Act 2003 s 48(1)).

<sup>3</sup> Water Industry Act 1991 s 22E(1)(b) (as added: see note 2).

<sup>4</sup> Water Industry Act 1991 s 22E(1)(c) (as added: see note 2).

5 Water Industry Act 1991 s 22E(1), (9) (as added: see note 2). Such an application must be made: (1) within 42 days from the date of service on the company of a notice under s 22A(6) (see PARA 170) (s 22E(2)(a) (as so added)); or (2) where the application relates to a decision of an enforcement authority on an application by the company under s 22A(7) (see PARA 170), within 42 days from the date the company is notified of the decision (s 22E(2)(b) (as so added)). As to the meaning of 'enforcement authority' see PARA 170 note 10. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

6 Water Industry Act 1991 s 22E(3)(a) (as added: see note 2).

7 Water Industry Act 1991 s 22E(3)(b) (as added: see note 2).

8 Water Industry Act 1991 s 22E(3)(c) (as added: see note 2).

9 le under the Water Industry Act 1991 s 22A: see PARA 170.

10 Water Industry Act 1991 s 22E(4)(a) (as added: see note 2).

11 le the requirements of the Water Industry Act 1991 s 22A(4)-(6) or (8): see PARA 170.

12 Water Industry Act 1991 s 22E(4)(b) (as added: see note 2).

13 Water Industry Act 1991 s 22E(4)(c) (as added: see note 2).

14 Water Industry Act 1991 s 22E(5) (as added: see note 2).

15 Water Industry Act 1991 s 22E(6) (as added: see note 2).

16 Water Industry Act 1991 s 22E(7) (as added: see note 2).

17 Water Industry Act 1991 s 22E(8) (as added: see note 2). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

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### **(iii) Special Administration Orders**

#### **173. Meaning of 'special administration order'.**

A special administration order is an order of the High Court made<sup>1</sup> in relation to a company holding an appointment as a relevant undertaker<sup>2</sup> or which is a qualifying licensed water supplier<sup>3</sup> and directing that, during the period for which the order is in force, the affairs, business and property<sup>4</sup> of the company be managed, by a person<sup>5</sup> appointed by the High Court<sup>6</sup>: (1) for the achievement of the purposes of such an order<sup>7</sup>; and (2) in a manner which protects the respective interests of the members and creditors of the company<sup>8</sup>.

The purposes of a special administration order made in relation to any company holding an appointment as a relevant undertaker are<sup>9</sup>:

- 254 (a) the transfer to another company, or (as respects different parts of the area to which the company's appointment relates, or different parts of its undertaking) to two or more different companies, as a going concern, of so much of the company's undertaking as it is necessary to transfer in order to ensure that the functions<sup>10</sup> which have been vested in the company by virtue of its appointment may be properly carried out<sup>11</sup>; and
- 255 (b) the carrying out of those functions pending the making of the transfer and the vesting of those functions in the other company or companies (whether by virtue of the transfer or of an appointment or variation which replaces the former company as a relevant undertaker)<sup>12</sup>.

The purposes of a special administration order made in relation to any company which is a qualifying licensed water supplier are:

- 256 (i) the transfer to another company or companies, as a going concern, of so much of the company's undertaking as it is necessary to transfer in order to ensure that activities relating to the introduction or introductions of water<sup>13</sup> may be properly carried on<sup>14</sup>; and
- 257 (ii) the carrying on of those activities pending the making of the transfer<sup>15</sup>.

Specified provisions of the Insolvency Act 1986 are applied, with modifications, to special administration orders made under the above provisions<sup>16</sup>.

1    le made under the Water Industry Act 1991 s 24 (see PARA 174) or s 25 (see PARA 175). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

2    le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3    As to the meaning of 'qualifying licensed water supplier' see PARA 154 note 2.

4    'Business' includes a trade or profession; and 'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether

present or future or vested or contingent, arising out of, or incidental to, property: Insolvency Act 1986 s 436; definitions applied by the Water Industry Act 1991 s 23(5). As to the meaning of 'land' see PARA 14 note 21.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Water Industry Act 1991 s 23(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 8(1), (2)).

7 Water Industry Act 1991 s 23(1)(a).

8 Water Industry Act 1991 s 23(1)(b).

9 Water Industry Act 1991 s 23(2) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 8(1), (3)). The Water Industry Act 1991 Sch 2 (see PARA 154) has effect for enabling provision to be made with respect to cases in which a company is replaced by another as a relevant undertaker without an appointment or variation under Pt II Ch 1 (ss 6-17) in pursuance of a special administration order: see s 23(4)(a) (s 23(4) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 8(1), (5)).

10 As to the meaning of 'functions' see PARA 133 note 5.

11 Water Industry Act 1991 s 23(2)(a).

12 Water Industry Act 1991 s 23(2)(b).

13 Ie as mentioned in the Water Industry Act 1991 s 23(6)(b): see PARA 154 note 2.

14 Water Industry Act 1991 s 23(2A)(a) (s 23(2A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 8(1), (4)).

15 Water Industry Act 1991 s 23(2A)(b) (as added: see note 14). Schedule 2 (see PARA 154) has effect for enabling provision to be made with respect to cases in which a company carries on activities relating to the introduction or introductions of water mentioned in s 23(6)(b) formerly carried on by another company in pursuance of a special administration order: see s 23(4)(b) (as amended: see note 9).

16 See the Water Industry Act 1991 s 23(3), Sch 3 (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 52).

## **UPDATE**

### **173-176 Special administration orders**

See the Water Industry (Special Administration) Rules 2009, SI 2009/2477, which relate to the petition and the special administration order (rr 7-18); the special administrator (rr 19-25); conduct of the special administration (rr 26-42); meetings (rr 43-59); proxies and company representation (rr 60-67); court procedure and practice (rr 68-108); and examination of persons in special administration proceedings (rr 109-117).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/4. ORGANISATION OF THE WATER INDUSTRY/(6) ENFORCEMENT AND INSOLVENCY/(iii) Special Administration Orders/174. Special administration orders made on special petitions.

#### **174. Special administration orders made on special petitions.**

If, on an application made to the High Court<sup>1</sup> by petition presented by:

- 258 (1) the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup>; or
- 259 (2) with the Secretary of State's or, where appropriate, the Welsh Ministers' consent, by the Water Services Regulation Authority<sup>4</sup>,

the court is satisfied in relation to any company which holds an appointment as a relevant undertaker<sup>5</sup> that any one or more of the specified grounds is satisfied in relation to that company, the court may make a special administration order<sup>6</sup> in relation to that company<sup>7</sup>.

If on an application made to the High Court by petition presented:

- 260 (a) by the Secretary of State (after consulting the Welsh Ministers)<sup>8</sup>; or
- 261 (b) with the consent of the Secretary of State (after consulting the Welsh Ministers), the Water Services Regulation Authority<sup>9</sup>,

the court is satisfied in relation to any company which is a qualifying licensed water supplier<sup>10</sup> that any one or more of the specified grounds is satisfied in relation to that company, that court may make a special administration order in relation to that company<sup>11</sup>.

The specified grounds are, in relation to any company:

- 262 (i) that there has been, is or is likely to be such a contravention<sup>12</sup> by the company of any principal duty<sup>13</sup>, not being a contravention in respect of which a notice has been served in relation to the proposed making of an enforcement order<sup>14</sup>, as is serious enough to make it inappropriate for the company to continue to hold its appointment or licence<sup>15</sup>;
- 263 (ii) that there has been, is or is likely to be such a contravention by the company of the provisions of any enforcement order which is not for the time being the subject-matter of proceedings<sup>16</sup>, and if it is a provisional enforcement order has been confirmed<sup>17</sup>, as is serious enough to make it inappropriate for the company to continue to hold its appointment or licence<sup>18</sup>;
- 264 (iii) in the case of a company which is a qualifying licensed water supplier, that action taken by the company has caused a contravention by a water undertaker of any principal duty<sup>19</sup> and that action is serious enough to make it inappropriate for the company to continue to hold its licence<sup>20</sup>;
- 265 (iv) that the company is or is likely to be unable to pay its debts<sup>21</sup>;
- 266 (v) that, in a case in which the Secretary of State has certified that it would be appropriate<sup>22</sup> for him to petition for the winding up of the company<sup>23</sup>, it would be just and equitable<sup>24</sup>, for the company to be wound up if it did not hold an appointment as a relevant undertaker or was not a qualifying licensed water supplier<sup>25</sup>; or
- 267 (vi) in the case of a company holding an appointment as a relevant undertaker, that the company is unable or unwilling adequately to participate in arrangements certified by the Secretary of State, the Welsh Ministers or the Authority to be

necessary by reason of or in connection with, a proposal for the making<sup>26</sup> of any appointment or variation replacing a company as a relevant undertaker<sup>27</sup>.

Notice<sup>28</sup> of any petition for a special administration order must be given forthwith to the prescribed persons and in the prescribed manner<sup>29</sup>, and no such petition may be withdrawn except with the leave of the High Court<sup>30</sup>. Specified provisions of the Insolvency Act 1986<sup>31</sup> apply, with modifications, to the hearing and effect of such petitions<sup>32</sup>.

1 As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

2 Water Industry Act 1991 s 24(1)(a). As to the Secretary of State see PARA 15 note 1.

3 Functions under the Water Industry Act 1991 s 24, except for functions under s 24(2)(d) (see head (v) in the text), were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, but not in relation to any licensed water suppliers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; Water Act 2003 s 100(2)(b)(x)). Such functions are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

4 Water Industry Act 1991 s 24(1)(b) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

5 I.e. an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

6 As to the meaning of 'special administration order' see PARA 173.

7 Water Industry Act 1991 s 24(1). The Water Services Regulation Authority must enter in the register maintained by it details of every special administration order made and every discharge of such an order: see s 195; and PARA 178.

8 Water Industry Act 1991 s 24(1A)(a) (s 24(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 9(1), (2)). Functions under the Water Industry Act 1991 s 24(1A) which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

9 Water Industry Act 1991 s 24(1A)(b) (as added: see note 8); Government of Wales Act 2006 Sch 11 para 32.

10 As to the meaning of 'qualifying licensed water supplier' see PARA 154 note 2.

11 Water Industry Act 1991 s 24(1A) (as added: see note 8). See also note 7.

12 As to the meaning of 'contravention' see PARA 20 note 5.

13 'Principal duty' means: (1) in relation to a company holding an appointment as a relevant undertaker, a requirement imposed on the company by the Water Industry Act 1991 s 37 (see PARA 319) or s 94 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1010) (s 24(7)(a) (s 24(7) substituted by the Water Act 2003 s 101(1), Sch 8 paras 2, 9(1), (4))); (2) in relation to a company which is a qualifying licensed water supplier, any condition of its licence or any statutory requirement imposed on it in consequence of its licence (Water Industry Act 1991 s 24(7)(b) (as so substituted)).

14 I.e. a notice under the Water Industry Act 1991 s 19(3): see PARA 164. As to the meaning of 'enforcement order' see PARA 163 note 11.

15 Water Industry Act 1991 s 24(2)(a) (s 24(2) amended, (2)(bb) added, by the Water Act 2003 s 101(1), Sch 8 paras 2, 9(1), (3)).

16 Water Industry Act 1991 s 24(2)(b)(i). The proceedings referred to are such as may be brought by virtue of s 21(1): see PARA 167.

17 Water Industry Act 1991 s 24(2)(b)(ii). As to the meaning of 'provisional enforcement order' see PARA 163 note 11.

18 Water Industry Act 1991 s 24(2)(b) (as amended: see note 15).

19 Water Industry Act 1991 s 24(2)(bb)(i) (as added: see note 15).

20 Water Industry Act 1991 s 24(2)(bb)(ii) (as added: see note 15).

21 Water Industry Act 1991 s 24(2)(c). For these purposes, a company is unable to pay its debts if: (1) it is a limited company which is deemed to be so unable under the Insolvency Act 1986 s 123 (definition of inability to pay debts: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1226) (Water Industry Act 1991 s 24(6)(a)); or (2) it is an unregistered company which is deemed, by virtue of any of Insolvency Act 1986 ss 222-224, to be so unable for the purposes of s 221 (winding up of unregistered companies: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1151) (Water Industry Act 1991 s 24(6)(b)). As to the meaning of 'limited company' see PARA 137 note 7.

22 Ie but for the Water Industry Act 1991 s 25: see PARA 175.

23 Ie under the Companies Act 1985 s 440 (petition by the Secretary of State following inspectors' report etc) (repealed); see now the Insolvency Act 1986 s 124A and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444.

24 Ie as mentioned in the Insolvency Act 1986 s 124A.

25 Water Industry Act 1991 s 24(2)(d) (as amended: see note 15); Interpretation Act 1978 s 17(2)(a).

26 Ie by virtue of the Water Industry Act 1991 s 7(4)(c): see PARA 138.

27 Water Industry Act 1991 s 24(2)(e) (as amended (see note 15); and further amended by the Water Act 2003 s 36(2)).

28 As to the meaning of 'notice' see PARA 22 note 1.

29 Ie to such persons and in such manner as may be prescribed by rules made under the Insolvency Act 1986 s 411: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041. As to the meaning of 'person' see PARA 13 note 29.

30 Water Industry Act 1991 s 24(3).

31 See the Insolvency Act 1986 s 8, Sch B1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.

32 See the Water Industry Act 1991 s 24(4), (5) (which applies the Insolvency Act 1986 ss 9-10, now replaced by s 8, Sch B1).

## UPDATE

### 173-176 Special administration orders

See the Water Industry (Special Administration) Rules 2009, SI 2009/2477, which relate to the petition and the special administration order (rr 7-18); the special administrator (rr 19-25); conduct of the special administration (rr 26-42); meetings (rr 43-59); proxies and company representation (rr 60-67); court procedure and practice (rr 68-108); and examination of persons in special administration proceedings (rr 109-117).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/4. ORGANISATION OF THE WATER INDUSTRY/(6) ENFORCEMENT AND INSOLVENCY/(iii) Special Administration Orders/175. Restrictions on winding up and insolvency proceedings.

### **175. Restrictions on winding up and insolvency proceedings.**

On an application made to any court for the winding up of a company<sup>1</sup> which holds an appointment as a relevant undertaker<sup>2</sup> or is a qualifying licensed water supplier<sup>3</sup>, the court must not make a winding-up order in relation to the company<sup>4</sup>, but, where an application for such an order is made to the court and it is satisfied that it would be appropriate to make such an order if the company were not a company holding such an appointment or a qualifying licensed water supplier, the court must instead make a special administration order<sup>5</sup> in relation to the company<sup>6</sup>.

Where a company holds an appointment as a relevant undertaker or is a qualifying licensed water supplier<sup>7</sup>: (1) the company must not be wound up voluntarily<sup>8</sup>; (2) no administration order may be made<sup>9</sup> in relation to it<sup>10</sup>; and (3) no step may be taken by any person<sup>11</sup> to enforce a security over its property<sup>12</sup> except where that person has served 14 days' notice<sup>13</sup> of his intention to take that step on the Secretary of State<sup>14</sup> or, in certain cases, on the Welsh Ministers<sup>15</sup>, and on the Water Services Regulation Authority<sup>16</sup>.

1 As to the winding up of a company see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 1 et seq.

2 I.e. an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 Water Industry Act 1991 s 25 (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 10(a)). As to the meaning of 'qualifying licensed water supplier' see PARA 154 note 2.

4 Water Industry Act 1991 s 25(a).

5 As to the meaning of 'special administration order' see PARA 173.

6 Water Industry Act 1991 s 25(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 10(b)).

7 Water Industry Act 1991 s 26(1) (amended by the Water Act 2003, s 101(1), Sch 8 paras 2, 11).

8 Water Industry Act 1991 s 26(1)(a).

9 I.e. under the Insolvency Act 1986 s 8, Sch B1: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.

10 Water Industry Act 1991 s 26(1)(b).

11 As to the meaning of 'person' see PARA 13 note 29.

12 As to the meaning of 'property' see PARA 173 note 4; 'security' means any mortgage, charge, lien or other security: Insolvency Act 1986 s 248(b); definitions applied by the Water Industry Act 1991 s 26(2).

13 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

14 As to the Secretary of State see PARA 15 note 1.

15 Functions under the Water Industry Act 1991 s 26 were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, but not in relation to any licensed water suppliers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(x)). Such functions are now exercisable by the Welsh



Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

16 Water Industry Act 1991 s 26(1) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

## **UPDATE**

### **173-176 Special administration orders**

See the Water Industry (Special Administration) Rules 2009, SI 2009/2477, which relate to the petition and the special administration order (rr 7-18); the special administrator (rr 19-25); conduct of the special administration (rr 26-42); meetings (rr 43-59); proxies and company representation (rr 60-67); court procedure and practice (rr 68-108); and examination of persons in special administration proceedings (rr 109-117).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/4. ORGANISATION OF THE WATER INDUSTRY/(6) ENFORCEMENT AND INSOLVENCY/(iii) Special Administration Orders/176. Government financial assistance where special administration orders made.

#### **176. Government financial assistance where special administration orders made.**

Where a special administration order<sup>1</sup> is for the time being in force in relation to a company, the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> may, with the consent of the Treasury<sup>4</sup>: (1) make to the company grants or loans of such sums as appear to him or them to be appropriate for the purpose of facilitating the achievement of the purposes of the order<sup>5</sup>; and (2) agree to indemnify the person<sup>6</sup> appointed to achieve the purposes of the order in respect of liabilities incurred and loss or damage sustained by that person in connection with the carrying out of his functions under the order<sup>7</sup>. The terms and conditions on which a grant is made to any company under these provisions may require the whole or a part of the grant to be repaid to the Secretary of State or the Welsh Ministers if there is a contravention<sup>8</sup> of the other terms and conditions on which the grant is made<sup>9</sup>. Any loans which the Secretary of State or the Welsh Ministers make to a company must be repaid to him or them at such times and by such methods, and interest on the loans must be paid to him or them at such rates and at such times, as he or they may with the consent of the Treasury from time to time direct<sup>10</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers may also, with the consent of the Treasury, guarantee, in such manner and on such conditions as he or they may think fit, the repayment of the principal of, the payment of interest on and the discharge of any other financial obligation in connection with any sum which is borrowed from any person by a company in relation to which a special administration order is in force at the time when the guarantee is given<sup>11</sup>. If any sums are paid out in fulfilment of a guarantee to which these provisions apply, the relevant company<sup>12</sup> must make to the Secretary of State or, as appropriate, the Welsh Ministers, at such times and in such manner as he or they may from time to time direct<sup>13</sup>, payments of such amounts as he or they may so direct towards repayment of the sums so paid out<sup>14</sup> and payments of interest, at such rate as he or they may so direct, on what is outstanding for the time being in respect of sums so paid out<sup>15</sup>.

1 As to the meaning of 'special administration order' see PARA 173.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Industry Act 1991 ss 153, 154 were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, but not in relation to any licensed water supplier: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(x)). These functions are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the meaning of 'Treasury' see PARA 108 note 6.

5 Water Industry Act 1991 s 153(1)(a).

6 As to the meaning of 'person' see PARA 13 note 29.

7 Water Industry Act 1991 s 153(1)(b).

8 As to the meaning of 'contravention' see PARA 20 note 5.

9 Water Industry Act 1991 s 153(3)(a). Section 153(3)(a), (b) (see the text to note 10) is without prejudice to any provision applied in relation to the company by Sch 3 (see PARA 173): s 153(3).

10 Water Industry Act 1991 s 153(3)(b). See also note 9.

11 Water Industry Act 1991 s 153(2). Immediately after such a guarantee is given, the Secretary of State must lay a statement of the guarantee before each House of Parliament: s 154(1), (2). Where any sum is paid out for fulfilling such a guarantee, the Secretary of State must, as soon as possible after the end of each financial year, beginning with that in which the sum is paid out and ending with that in which all liability in respect of the principal of the sum and in respect of the interest on it is finally discharged, lay before each House of Parliament a statement relating to that sum: s 154(3). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. In relation to this duty as it falls on the Welsh Ministers the documents must be laid before the National Assembly for Wales: see the Government of Wales Act 2006 s 86; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the meaning of 'financial year' see PARA 111 note 2.

12 'Relevant company' in relation to a guarantee means the company which borrowed the sums in respect of which the guarantee was given: Water Industry Act 1991 s 154(7).

13 The consent of the Treasury is required for the giving of such a direction: Water Industry Act 1991 s 154(5).

14 Water Industry Act 1991 s 154(5)(a). Section 154(5) is without prejudice to any provision applied in relation to the relevant company by Sch 3 (see PARA 173): s 154(5).

15 Water Industry Act 1991 s 154(5)(b). See also note 14.

## **UPDATE**

### **173-176 Special administration orders**

See the Water Industry (Special Administration) Rules 2009, SI 2009/2477, which relate to the petition and the special administration order (rr 7-18); the special administrator (rr 19-25); conduct of the special administration (rr 26-42); meetings (rr 43-59); proxies and company representation (rr 60-67); court procedure and practice (rr 68-108); and examination of persons in special administration proceedings (rr 109-117).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/4. ORGANISATION OF THE WATER INDUSTRY/ (7) INFORMATION/177. Public access to information.

## **(7) INFORMATION**

### **177. Public access to information.**

The public has a general right of access to information held by public authorities<sup>1</sup>. The public also has a specific right, subject to certain exceptions, of access to environmental information<sup>2</sup>, and public authorities must take steps to progressively make available environmental information to the public<sup>3</sup>. Additionally provision is made in the Water Industry Act 1991 and the Water Resources Act 1991 for certain information concerning the water industry and the provision of water services to be publicly available<sup>4</sup>.

1     le under the Freedom of Information Act 2000; see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 583 et seq.

2     As to the meaning of 'environmental information' see PARA 680.

3     See the Environmental Information Regulations 2004, SI 2004/3391; and PARAS 680-681.

4     See PARAS 178-184.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/4. ORGANISATION OF THE WATER INDUSTRY/ (7) INFORMATION/178. Register to be maintained by the Water Services Regulation Authority.

### **178. Register to be maintained by the Water Services Regulation Authority.**

The Water Services Regulation Authority<sup>1</sup> must maintain a register, at such premises and in such form as it may determine, for the purposes of the specified statutory provisions<sup>2</sup>. Subject to any direction given by the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup> that a provision should not be entered<sup>5</sup>, the Authority must cause to be entered in the register the provisions of<sup>6</sup>:

- 268 (1) every appointment of a relevant undertaker<sup>7</sup>, every termination or transfer of any such appointment, every variation of the area for which any company holds any such appointment and every modification of the conditions of any such appointment<sup>8</sup>;
- 269 (2) every water supply licence<sup>9</sup>, every variation or revocation of any such licence and every modification of the conditions of any such licence<sup>10</sup>;
- 270 (3) every direction, consent or determination given or made under any such appointment by the Secretary of State or, where appropriate, the Welsh Ministers, the Competition Commission<sup>11</sup> or the Authority itself<sup>12</sup>;
- 271 (4) every direction, consent or determination given or made under any such licence by the Secretary of State, the Authority, the Welsh Ministers or the Environment Agency<sup>13</sup>;
- 272 (5) every determination<sup>14</sup> made by the Authority in respect of a supply of water<sup>15</sup>;
- 273 (6) every final enforcement order made, every provisional enforcement order made or confirmed, and every revocation of such a final or provisional enforcement order<sup>16</sup>;
- 274 (7) every undertaking given to and accepted by the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority for the purposes of compliance with a condition or requirement<sup>17</sup>, and every notice<sup>18</sup> in respect of a decision not to take enforcement action<sup>19</sup>;
- 275 (8) every special administration order and every discharge of such an order<sup>20</sup>;
- 276 (9) every penalty imposed<sup>21</sup> and every notice<sup>22</sup> in respect of the imposition of a penalty<sup>23</sup>;
- 277 (10) every designation<sup>24</sup> made by the Authority as to a strategic or a collective strategic supply of water<sup>25</sup>;
- 278 (11) any guidance given<sup>26</sup> to the Authority by the Secretary of State or, where appropriate, the Welsh Ministers<sup>27</sup>.

The contents of the register must be available for inspection by the public at such times and subject to such payment as may be specified in an order<sup>28</sup> made by the Secretary of State or where appropriate, the Welsh Ministers<sup>29</sup>. Any person<sup>30</sup> may, on payment of such fee as may be specified in the order<sup>31</sup>, require the Authority to supply him with a copy of, or extract from, the contents of any part of the register, being a copy or extract which is certified by the Authority to be a true copy or extract<sup>32</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 Water Industry Act 1991 s 195(1) (amended by the Water Industry Act 1999 s 15(1), Sch 3 para 4(1), (2); the Water Act 2003 s 36(2)). The statutory specified provisions are those of the Water Industry Act 1991 Pt II (ss 6-36) (see PARA 137 et seq) and s 143 (see PARA 421).

3 As to the Secretary of State see PARA 15 note 1.

4 Functions under the Water Industry Act 1991 s 195 were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, but not in relation to any licensed water suppliers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(x)). Such functions are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

5 If it appears to the Secretary of State or, where appropriate, the Welsh Ministers, that the entry of any provision in the register would be against the public interest, he or they may direct the Authority not to enter that provision in the register; and the Authority must comply with any such direction: Water Industry Act 1991 s 195(3) (amended by the Water Act 2003 s 36(2)). Before giving such a direction which relates to a licensed water supplier, the Secretary of State must consult the Welsh Ministers: Water Industry Act 1991 s 195(3AA) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 42(1), (5)); Government of Wales Act 2006 Sch 11 para 32. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

6 Water Industry Act 1991 s 195(2) (amended by the Water Act 2003 s 36(2)).

7 Ie every appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

8 Water Industry Act 1991 s 195(2)(a).

9 Ie every licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.

10 Water Industry Act 1991 s 195(2)(aa) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 42(1), (2)).

11 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

12 Water Industry Act 1991 s 195(2)(b) (amended by SI 1999/506; the Water Act 2003 s 36(2)).

13 Water Industry Act 1991 s 195(2)(bb) (s 195(2)(bb), (bc) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 42(1), (3)); Government of Wales Act 2006 Sch 11 para 32. As to the Environment Agency see PARA 17.

14 Ie under the Water Industry Act 1991 s 17E (see PARA 152) or s 66D(1) (see PARA 341).

15 Water Industry Act 1991 s 195(2)(bc) (as added: see note 13).

16 Water Industry Act 1991 s 195(2)(c). As to the enforcement orders see the Water Industry Act 1991 s 18; and PARA 163. As to the meanings of 'final enforcement order' and 'provisional enforcement order' see PARA 163 note 11.

17 Ie an undertaking under the Water Industry Act 1991 s 19(1)(b): see PARA 164.

18 Ie under the Water Industry Act 1991 s 19(3): see PARA 164.

19 Water Industry Act 1991 s 195(2)(d) (amended by the Water Act 2003 ss 36(2), 48(2), 101(2), Sch 9 Pt 2).

20 Water Industry Act 1991 s 195(2)(e). As to the meaning of 'special administration order' see PARA 173.

21 Ie under the Water Industry Act 1991 s 22A(1) or (2): see PARA 170.

22 Ie under the Water Industry Act 1991 s 22A(6): see PARA 170.

23 Water Industry Act 1991 s 195(2)(f) (added by the Water Act 2003 s 48(2)).

24 Ie under the Water Industry Act 1991 s 66G (see PARA 344) or s 66H (see PARA 345).

25 Water Industry Act 1991 s 195(2)(g) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 42(1), (4)).

26 le under the Water Industry Act 1991 s 143(7): see PARA 421.

27 Water Industry Act 1991 s 195(3A) (added by the Water Industry Act 1999 s 15(1), Sch 3 para 4(1), (3)).

28 The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Water Industry Act 1991 s 195(6). As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. By virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), the Director General of Water Services' Register (Inspection and Charges) Order 1989, SI 1989/1154, has effect as if so made: see notes 29, 31.

29 Water Industry Act 1991 s 195(4). The register must be open for public inspection without charge between the hours of 9.30 am and 1 pm and 2 pm and 4.30 pm on Monday to Friday of each week except when the Authority's office is closed on public or other holidays or by reason of an emergency or industrial action: see the Director General of Water Services' Register (Inspection and Charges) Order 1989, SI 1989/1154, art 2 (amended by SI 2005/2035).

30 As to the meaning of 'person' see PARA 13 note 29.

31 The fee payable for a certified copy of, or extract from, the contents of any part of the register is a fee calculated at the rate of £1 for any number of pages of the copy or extract supplied up to and including ten and 10 pence for each additional page: Director General of Water Services' Register (Inspection and Charges) Order 1989, SI 1989/1154, art 3.

32 Water Industry Act 1991 s 195(5) (amended by the Water Act 2003 s 36(2)).

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### **179. Maps of waterworks.**

It is the duty<sup>1</sup> of every water undertaker<sup>2</sup> to keep records<sup>3</sup> of the location of:

- 279 (1) every resource main<sup>4</sup>, water main<sup>5</sup> or discharge pipe<sup>6</sup> which is for the time being vested in the undertaker<sup>7</sup>; and
- 280 (2) any other underground works, other than a service pipe<sup>8</sup>, which are for the time being vested in that undertaker<sup>9</sup>.

It is also the duty<sup>10</sup> of every water undertaker to keep records of the location and, in the case of a water main other relevant particulars<sup>11</sup>, of:

- 281 (a) every water main in relation to which a declaration of vesting has been made by the undertaker<sup>12</sup> but has not taken effect<sup>13</sup>; and
- 282 (b) every water main which is the subject of any agreement to make such a declaration which has been entered into by, or on behalf of, the undertaker<sup>14</sup>.

Likewise it is the duty<sup>15</sup> of the Environment Agency<sup>16</sup> to keep records of the location of:

- 283 (i) every resource main or discharge pipe<sup>17</sup> which is for the time being vested in the Agency<sup>18</sup>; and
- 284 (ii) any other underground works which are for the time being vested in the Agency<sup>19</sup>.

It is the duty of every water undertaker and the Agency to secure that the contents of any records for the time being kept by it under these provisions are available, at all reasonable times, for inspection by the public free of charge at an office of the undertaker or, as the case may be, the Agency<sup>20</sup>; and any information<sup>21</sup> so required to be made available must be made available in the form of a map<sup>22</sup>.

For the purpose of determining whether any failure to make a modification<sup>23</sup> of any records kept under these provisions constitutes a breach of the duty imposed by heads (1) and (2), or (a) and (b), or (i) and (ii) above, that duty must be taken to require any modification of the records to be made as soon as reasonably practicable after the completion of the works which make the modification necessary; and where records so kept are modified, the date of the modification and of the completion of the works making the modification necessary must be incorporated in the records<sup>24</sup>.

The duties of a water undertaker under these provisions are enforceable<sup>25</sup> by the Secretary of State<sup>26</sup> or, in relation to Wales, the Welsh Ministers<sup>27</sup>.

1    Ie be subject to the Water Industry Act 1991 s 198(4) (see the text to notes 23-24) and (5) (transitional provisions).

2    As to the meaning of 'water undertaker' see PARA 137 note 4.

3    As to the meaning of 'records' see PARA 117 note 13.



4 'Resource main' means, subject to the Water Industry Act 1991 s 219(2) (meaning of 'pipe': see PARA 138 note 11), any pipe, not being a trunk main, which is or is to be used for the purpose of: (1) conveying water from one source of supply to another, from a source of supply to a regulating reservoir or from a regulating reservoir to a source of supply; or (2) giving or taking a supply of water in bulk: s 219(1); Water Resources Act 1991 s 186(1) (definition applied by s 195(7)). As to the meanings of 'trunk main' and 'supply of water in bulk' see PARA 138 note 11.

5 As to the meaning of 'water main' see PARA 138 note 11.

6 As to the meaning of 'discharge pipe' see PARA 466 note 6: definition applied by the Water Industry Act 1991 s 198(8).

7 Water Industry Act 1991 s 198(1)(a).

8 Subject to the Water Industry Act 1991 s 219(2) (see PARA 138 note 11) and to s 51E(3) (see PARA 338 note 6), 'service pipe' means so much of a pipe which is, or is to be, connected with a water main for supplying water from that main to any premises as is or is to be subject to water pressure from that main, or would be so subject but for the closing of some valve, and includes part of any service pipe: s 219(1) (definition amended by the Water Act 2003 s 92(6)).

9 Water Industry Act 1991 s 198(1)(b).

10 Ie subject to the Water Industry Act 1991 s 198(4): see the text to notes 23-24.

11 The other relevant particulars of a water main are, in addition to its location, particulars of whether it is a water main in relation to which a declaration has been made under the Water Industry Act 1991 Pt III Ch II (ss 40-66) (see PARA 330 et seq) or a water main which is the subject of an agreement to make such a declaration: s 198(1B) (s 198(1A), (1B) added by the Water Act 2003 s 92(5)).

12 Ie under the Water Industry Act 1991 Pt III Ch II (ss 40-66): see PARA 330 et seq.

13 Water Industry Act 1991 s 198(1A)(a) (as added: see note 11).

14 Water Industry Act 1991 s 198(1A)(b) (as added: see note 11).

15 Ie subject to the Water Resources Act 1991 s 195(4) (see the text to notes 23-24) and (5) (transitional provisions).

16 As to the Environment Agency see PARA 17.

17 As to the meaning of 'discharge pipe' see PARA 466 note 6: definition applied by the Water Resources Act 1991 s 195(7).

18 Water Resources Act 1991 s 195(1)(a) (s 195(1)-(3) amended by the Environment Act 1995 s 120, Sch 22 para 128).

19 Water Resources Act 1991 s 195(1)(b) (as amended: see note 18).

20 Water Industry Act 1991 s 198(2); Water Resources Act 1991 s 195(2) (as amended: see note 18).

21 As to the meaning of 'information' see PARA 117 note 13.

22 See the Water Industry Act 1991 s 198(3); Water Resources Act 1991 s 195(3) (as amended: see note 18). Copies of maps supplied by a water undertaker sometimes contain a 'disclaimer' stamp. As to the effectiveness of such disclaimer stamps see the Unfair Contract Terms Act 1977 s 2 (see **CONTRACT** vol 9(1) (Reissue) PARA 822); and *Post Office v Hampshire County Council* [1980] QB 124, [1979] 2 All ER 818, CA; *British Gas v Derbyshire County Council* (1984, unreported).

23 As to the meaning of 'modification' see PARA 141 note 20.

24 Water Industry Act 1991 s 198(4) (amended by the Water Act 2003 s 92(5)); Water Resources Act 1991 s 195(4).

25 Ie under the Water Industry Act 1991 s 18: see PARA 163.

26 As to the Secretary of State see PARA 15 note 1. As to the duty of a sewerage undertaker to keep sewer maps and to provide them to local authorities see ss 199, 200; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1009.

27 Water Industry Act 1991 s 198(7). The functions of the Secretary of State under the Water Industry Act 1991 s 198 were transferred to the National Assembly for Wales in relation to any water undertaker whose area is wholly or mainly in Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. Such functions are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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### **180. Publication of information and advice.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may arrange for the publication, in such form and in such manner as he or they considers appropriate, of such information<sup>3</sup>:

- 285 (1) relating to any matter which is connected with the carrying out by a company holding an appointment as a relevant undertaker<sup>4</sup> of the functions<sup>5</sup> of such an undertaker<sup>6</sup>; or
- 286 (2) relating to any matter which is connected with the carrying on by a company holding a water supply licence<sup>7</sup> of the activities authorised by the licence<sup>8</sup>,

as it may appear to him or them to be in the public interest to publish<sup>9</sup>.

The Water Services Regulation Authority<sup>10</sup> may arrange for the publication, in such form and in such manner as it considers appropriate, of such information and advice as it may appear to it to be expedient to give to any customer or potential customer<sup>11</sup> of a company holding an appointment as a relevant undertaker or a water supply licence<sup>12</sup>.

In arranging for the publication of any such information or advice the Secretary of State or, where appropriate, the Welsh Ministers, or the Authority must have regard to the need for excluding, so far as that is practicable:

- 287 (a) any matter which relates to the affairs of an individual, where the publication of that matter would or might, in the opinion of the Secretary of State or the Welsh Ministers or, as the case may be, the Authority, seriously and prejudicially affect the interests of that individual<sup>13</sup>; and
- 288 (b) any matter which relates specifically to the affairs of a particular body of persons<sup>14</sup>, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of the Secretary of State or the Welsh Ministers or, as the case may be, the Authority, seriously and prejudicially affect the interests of that body<sup>15</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 201 were transferred to the National Assembly for Wales in relation to: (1) any water or sewerage undertaker whose area is wholly or mainly in Wales; (2) any licensed water supplier so far as relating to licensed activities using the supply system of any such undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the meaning of 'information' see PARA 117 note 13.

4 Ie an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

- 5 As to the meaning of 'functions' see PARA 133 note 5.
- 6 Water Industry Act 1991 s 201(1)(a) (s 201(1) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 43(1), (2)).
- 7 ie a licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.
- 8 Water Industry Act 1991 s 201(1)(b) (as amended: see note 6).
- 9 Water Industry Act 1991 s 201(1) (as amended: see note 6).
- 10 As to the Water Services Regulation Authority see PARA 109.
- 11 As to the meaning of 'customer or potential customer' see PARA 118 note 7.
- 12 Water Industry Act 1991 s 201(2) (amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 43(1), (3)). The Office of Fair Trading must consult the Authority before publishing under the Enterprise Act 2002 s 6 (see **COMPETITION** vol 18 (2009) PARA 7) any information or advice which may be published by the Authority under the Water Industry Act 1991 s 201(2): s 201(4) (added by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (9); and amended by the Water Act 2003 s 36(2)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6. Information for consumers is available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 13 Water Industry Act 1991 s 201(3)(a) (s 201(3) amended by the Water Act 2003 s 36(2)).
- 14 As to the meaning of 'person' see PARA 13 note 29.
- 15 Water Industry Act 1991 s 201(3)(b) (as amended: see note 13).

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### **181. Publication of reasons for decisions.**

As soon as reasonably practicable after making a specified decision, the Water Services Regulation Authority<sup>1</sup>, the Secretary of State<sup>2</sup> or the Welsh Ministers<sup>3</sup> must publish a notice<sup>4</sup> stating the reasons for the decision in such manner as they consider appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons<sup>5</sup> likely to be interested<sup>6</sup>. The specified decisions are:

- 289 (1) the modification<sup>7</sup> of the conditions of an appointment as a relevant undertaker<sup>8</sup> or the variation of the area to which an appointment relates<sup>9</sup>;
- 290 (2) the modification of the conditions of a water supply licence<sup>10</sup>;
- 291 (3) the termination of such an appointment or the revocation of such a licence<sup>11</sup>;
- 292 (4) the giving of any directions or consent in pursuance of a condition included<sup>12</sup> in such an appointment or in such a licence<sup>13</sup>;
- 293 (5) the determination of a question referred in pursuance of a condition included<sup>14</sup> in such an appointment or in such a licence<sup>15</sup>;
- 294 (6) the making of a determination<sup>16</sup> in relation to a supply of water<sup>17</sup>; and
- 295 (7) the making of a final enforcement order, the making or confirmation of a provisional enforcement order<sup>18</sup> or the revocation of a final order or of a provisional order which has been confirmed<sup>19</sup>.

These provisions do not, however, apply in relation to a decision of the Authority resulting in any provision which the Authority was directed<sup>20</sup> not to enter in the register it is required<sup>21</sup> to keep<sup>22</sup>.

A person preparing a notice under the above provisions must have regard to the need for excluding, so far as that is practicable, any matter which relates to the affairs of a particular individual or body of persons, corporate or unincorporate, where he considers that publication of that matter would or might seriously and prejudicially affect the interests of that individual or body<sup>23</sup>; and a person publishing such a notice must serve<sup>24</sup> a copy on the company holding the appointment or licence to which the decision relates<sup>25</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the Secretary of State see PARA 15 note 1.

3 Functions under the Water Industry Act 1991 s 195A which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the meaning of 'notice' see PARA 22 note 1.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Water Industry Act 1991 s 195A(2) (s 195A added by the Water Act 2003 s 51).

7 As to the meaning of 'modification' see PARA 141 note 20.

- 8     le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.
- 9     Water Industry Act 1991 s 195A(1)(a) (as added: see note 6).
- 10    Water Industry Act 1991 s 195A(1)(b) (as added: see note 6). A water supply licence is a licence under Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.
- 11    Water Industry Act 1991 s 195A(1)(c) (as added: see note 6).
- 12    le, in the case of an appointment as relevant undertaker, by virtue of the Water Industry Act 1991 s 12(1) (see PARA 142) or, in the case of a water supply licence, by virtue of s 17(3)(a) or (b) (see PARA 155).
- 13    Water Industry Act 1991 s 195A(1)(d) (as added: see note 6).
- 14    le, in the case of an appointment as relevant undertaker, by virtue of the Water Industry Act 1991 s 12(2) (see PARA 142) or, in the case of a water supply licence, by virtue of s 17G(3)(c) (see PARA 155).
- 15    Water Industry Act 1991 s 195A(1)(e) (as added: see note 6).
- 16    le under the Water Industry Act 1991 s 17E (see PARA 152) or s 66D(1) (see PARA 341).
- 17    Water Industry Act 1991 s 195A(1)(f) (as added: see note 6).
- 18    As to the meanings of 'final enforcement order' and 'provisional enforcement order' see PARA 163 note 11.
- 19    Water Industry Act 1991 s 195A(1)(g) (as added: see note 6).
- 20    le under the Water Industry Act 1991 s 195(3): see PARA 178.
- 21    le the register required to be kept under the Water Industry Act 1991 s 195: see PARA 178.
- 22    Water Industry Act 1991 s 195A(5) (as added: see note 6).
- 23    Water Industry Act 1991 s 195A(4) (as added: see note 6).
- 24    As to the service of documents see PARA 22.
- 25    Water Industry Act 1991 s 195A(3) (as added: see note 6).

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**182. Duties to furnish the Secretary of State, Welsh Ministers and others with information.**

It is the duty of a company holding an appointment as a relevant undertaker<sup>1</sup> to furnish the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> with all such information<sup>4</sup> as they may reasonably require which is connected with, or with any proposals relating to, the carrying out by that company of the functions<sup>5</sup> of a relevant undertaker<sup>6</sup>, or is material to the carrying out by the Secretary of State or, where appropriate, the Welsh Ministers of any of his or their statutory<sup>7</sup> functions<sup>8</sup>.

Similarly, it is the duty of a company holding a water supply licence<sup>9</sup> to furnish the Secretary of State or, where appropriate, the Welsh Ministers with all such information as they may reasonably require relating to any matter which is connected with, or with any proposals relating to, the carrying on by that company of the activities authorised by the licence<sup>10</sup>, or which is material to the carrying out by the Secretary of State or the Welsh Ministers of any of his or their statutory<sup>11</sup> functions<sup>12</sup>.

Information required under these provisions must be furnished in such form and manner, and be accompanied or supplemented by such explanations, as the Secretary of State or, as the case may be, the Welsh Ministers may reasonably require<sup>13</sup>; and includes information which, although it is not in the possession of that company or would not otherwise come into the possession of that company, is information which it is reasonable to require that company to obtain<sup>14</sup>.

The obligations of a relevant undertaker or a licensed water supplier under these provisions are enforceable<sup>15</sup> by the Secretary of State or, where appropriate, the Welsh Ministers<sup>16</sup>.

The National Consumer Council<sup>17</sup> may serve a notice on a water undertaker, sewerage undertaker or licensed water supplier requiring it to provide information to the Council<sup>18</sup>. Where a water undertaker, sewerage undertaker or licensed water supplier fails to comply with such a notice, the Council may refer the failure to the Water Services Regulation Authority which must determine whether the person concerned is entitled to refuse to comply with the notice<sup>19</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the appointment of such undertakers see PARA 137 et seq.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Industry Act 1991 s 202 were transferred to the National Assembly for Wales in relation to: (1) any water or sewerage undertaker whose area is wholly or mainly in Wales; (2) any licensed water supplier so far as relating to licensed activities using the supply system of any such undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the meaning of 'information' see PARA 117 note 13.

5 As to the meaning of 'functions' see PARA 133 note 5.

6 Water Industry Act 1991 s 202(1)(a).

7 I.e. functions under the Water Industry Act 1991, any of the other consolidation Acts or the Water Act 1989: Water Industry Act 1991 s 202(1)(b). 'The other consolidation Acts' means the Water Resources Act 1991, the Statutory Water Companies Act 1991, so much of the Land Drainage Act 1991 as confers functions on the Secretary of State or the Welsh Ministers with respect to the Environment Agency, and the Water Consolidation (Consequential Provisions) Act 1991: Water Industry Act 1991 s 202(6) (amended by the Environment Act 1995 s 120(1), Sch 22 para 120).

8 Water Industry Act 1991 s 202(1)(b). A requirement for the purposes of s 202 must be contained in a direction which may: (1) describe the information to be furnished in such manner as the Secretary of State or, where appropriate, the Welsh Ministers, considers appropriate (s 202(4)(a)); (2) require the information to be furnished on a particular occasion, in particular circumstances or from time to time (s 202(4)(b)); and (3) be given to a particular company, to companies of a particular description or to all the companies holding appointments under Pt II Ch I (ss 6-17) (see PARA 137 et seq) or licences under Pt II Ch 1A (ss 17A-17R) (see PARA 152 et seq) (s 202(4)(c) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 44(1), (3))).

9 I.e. a licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.

10 Water Industry Act 1991 s 202(1A)(a) (s 202(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 44(1), (2)).

11 I.e. functions under the Water Industry Act 1991, any of the other consolidation Acts or the Water Act 1989: Water Industry Act 1991 s 202(1A)(b) (as added: see note 10).

12 Water Industry Act 1991 s 202(1A)(b) (as added: see note 10). See also note 8.

13 Water Industry Act 1991 s 202(2).

14 Water Industry Act 1991 s 202(3).

15 I.e. under the Water Industry Act 1991 s 18: see PARA 163.

16 Water Industry Act 1991 s 202(5) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 44(1), (4)).

17 As to the National Consumer Council see **SALE OF GOODS AND SUPPLY OF SERVICES**.

18 See the Consumers, Estate Agents and Redress Act 2007 s 24; and **SALE OF GOODS AND SUPPLY OF SERVICES**. The information specified or described in such a notice must be information the Council requires for the purpose of exercising its functions: see s 24(2).

19 See the Consumers, Estate Agents and Redress Act 2007 s 25; and **SALE OF GOODS AND SUPPLY OF SERVICES**. If the Authority determines that the person concerned is not entitled to refuse to comply with the notice, it must direct that person to comply with it: see s 25(5). An obligation imposed by virtue of s 25(5) on a water undertaker, sewerage undertaker or licensed water supplier is enforceable by the Authority under the Water Industry Act 1991 s 18 (see PARA 163): Consumers, Estate Agents and Redress Act 2007 s 25(7).



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### **183. General restrictions on disclosure of information.**

Subject to certain exceptions<sup>1</sup>, no information<sup>2</sup> with respect to any particular business which has been obtained by virtue of any of the provisions of the Water Act 1989, Water Industry Act 1991 or the Water Resources Act 1991 and relates to the affairs of any individual or to any particular business may, during the lifetime of the individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person<sup>3</sup> for the time being carrying on that business<sup>4</sup>. Nothing in this prohibition is, however, to be construed as limiting the matters which may be published<sup>5</sup> in the form of information and advice by the Secretary of State or, where appropriate, the Welsh Ministers, or by the Water Services Regulation Authority<sup>6</sup>, or which may be included in, or made public as part of, a report of the Environment Agency<sup>7</sup>, the Water Services Regulation Authority, the Consumer Council for Water<sup>8</sup> or any regional committee of that Council<sup>9</sup>, or by the Competition Commission<sup>10</sup> under any relevant statutory provision<sup>11</sup>, or as applying to any information which has been so published or has been made public as part of such a report or to any information exclusively of a statistical nature<sup>12</sup>.

Any person who discloses any information in contravention of these provisions is guilty of an offence<sup>13</sup>.

Nothing in the above provisions precludes the disclosure of information if the disclosure is: (1) of information relating to a matter connected with the carrying out of the functions of a water undertaker or sewerage undertaker<sup>14</sup> or with the carrying on by a licensed water supplier<sup>15</sup> of activities under its licence, and is made by one Minister of the Crown or government department to another; or (2) for the purpose of enabling or assisting any public or other authority<sup>16</sup> for the time being designated for these purposes by an order<sup>17</sup> made by the Secretary of State or, where appropriate, the Welsh Ministers, to discharge any functions specified in the order<sup>18</sup>. Furthermore, there is an obligation to disclose certain environmental information<sup>19</sup>.

Information obtained by the Water Services Regulation Authority in the exercise of functions which are exercisable concurrently with the Office of Fair Trading<sup>20</sup> under Part I of the Competition Act 1998<sup>21</sup> is subject to the provisions of the Enterprise Act 2002 with regard to information<sup>22</sup> and not to the provisions set out above<sup>23</sup>.

1 The exceptions are as follows:

27 (1) under the Water Act 1989, the restrictions set out in the text do not apply to any disclosure of information which is made (a) for the purpose of facilitating the carrying out by the Secretary of State, the Environment Agency, the Scottish Environment Protection Agency, the Water Services Regulation Authority, the Consumer Council for Water, the Competition Commission or a local authority of any of his, its or, as the case may be, their functions by virtue of the 1989 Act or any of the water consolidation Acts, the Environment Act 1995 or the Water Act 2003; (b) for the purpose of facilitating the performance by a water undertaker or a sewerage undertaker or company holding a licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) (see PARA 152 et seq) of any of the duties imposed on it by or under the 1989 Act or any of the water consolidation Acts; (c) in pursuance of any duty imposed the Water Resources Act 1991 s 197(1) (a) or (2) (see PARA 191) or s 203(1), (1A), (2) or (2A) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 346) or of any arrangements made by the Water Services Regulation Authority under the Water Industry Act 1991 s 29(6) (see PARA 122) or s 27H (see PARA 121); (d) for the purpose of facilitating the carrying out by any Minister of the Crown, the Office of Fair Trading, the Competition Commission, the Office of Communications, the Civil Aviation Authority,

the Gas and Electricity Markets Authority or a local weights and measures authority in England and Wales, of any of his, its or, as the case may be, their functions under any of the specified enactments or instruments; (e) for the purpose of enabling or assisting the Secretary of State, the Treasury or the Financial Services Authority to exercise any powers conferred by or under the Financial Services and Markets Act 2000 or by the enactments relating to companies or insolvency; (f) for the purpose of enabling or assisting any inspector appointed under enactments relating to companies to carry out his functions; (g) for the purpose of enabling an official receiver to carry out his functions under the enactments relating to insolvency or for the purpose of enabling or assisting a recognised professional body for the purposes of the Insolvency Act 1986 s 391 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 14) to carry out its functions as such; (h) for the purpose of facilitating the carrying out by the Health and Safety Commission or the Health and Safety Executive of any of its functions under any enactment or of facilitating the carrying out by any enforcing authority, within the meaning of the Health and Safety at Work etc Act 1974 Pt I (ss 1-54) (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 375), of any functions under a relevant statutory provision, within the meaning of that Act (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 502); (i) for the purpose of facilitating the carrying out by the Comptroller and Auditor General of any of his functions under any enactment; (j) in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings; (k) for the purposes of any civil proceedings brought under or by virtue of the Water Act 1989, any of the water consolidation Acts, the Environment Act 1995, the Water Act 2003 or any of the specified enactments or instruments or of any arbitration under any of those Acts; or (l) in pursuance of a Community obligation: Water Act 1989 s 174(2) (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 50; the Enterprise Act 2002 s 278(1), Sch 25 para 19(1), (2)(a); the Communications Act 2003 s 406(1), Sch 17 para 96(1), (2); the Water Act 2003 s 101(1), Sch 7 Pt 2 para 26, Sch 8 para 1; and by virtue of the Utilities Act 2000 s 3(2); SI 1996/593; SI 1999/506; SI 2001/3649). The specified enactments and instruments for these purposes are: the Trade Descriptions Act 1968; the Fair Trading Act 1973; the Consumer Credit Act 1974; the Estate Agents Act 1979; the Competition Act 1980; the Telecommunications Act 1984; the Airports Act 1986; the Gas Act 1986; the Consumer Protection Act 1987; the Electricity Act 1989; the Competition Act 1998; the Transport Act 2000 Pt I (ss 1-107); the Enterprise Act 2002; the Communications Act 2003; any subordinate legislation made for the purpose of securing compliance with European Parliament and EC Council Directive 2005/29 (OJ L149, 11.6.2005, p 22) concerning unfair business-to-consumer commercial practices in the internal market; and any subordinate legislation made for the purpose of securing compliance with European Parliament and EC Council Directive 2006/114 (OJ L376 27.12.2006 p 21) concerning misleading and comparative advertising: Water Act 1989 s 174(3) (amended by the Competition Act 1998 ss 54(3), 74(3), Sch 10 para 11, Sch 14 Pt I; the Enterprise Act 2002 s 278(1), Sch 25 para 19(1), (2)(b); the Communications Act 2003 s 406(1), Sch 17 para 96(1), (3); SI 2001/4050; SI 2008/1277). 'The water consolidation Acts' means the Water Resources Act 1991, the Water Industry Act 1991, the Statutory Water Companies Act 1991, the Land Drainage Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991: Water Act 1989 s 174(8) (added by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 50);

- 28 (2) under the Water Industry Act 1991, the restrictions do not apply to any disclosure of information which is made: (a) for the purposes of facilitating the carrying out by any of the persons or bodies mentioned in head (1)(a) above, the Welsh Ministers or a county council, of any of his, its or, as the case may be, their functions by virtue of the Water Industry Act 1991, any of the other consolidation Acts, the Water Act 1989, the Environmental Protection Act 1990 Pt I (ss 1-28) or Pt IIA (ss 78A-78YC) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 159 et seq; **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 761 et seq), the Environment Act 1995, regulations under the Pollution Prevention and Control Act 1999 s 2 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 186), or the Water Act 2003; (b) for the purpose of facilitating the performance by a relevant undertaker of any of the duties imposed on it by or under the Water Industry Act 1991, any of the other consolidation Acts, the Water Act 1989 or the Water Act 2003 or by a licensed water supplier of any of the duties imposed on it by or under the Water Industry Act 1991; (c) in pursuance of any such arrangements made by the Water Services Regulation Authority as are mentioned in head (1)(c) above or of any such duty as is mentioned in that head; (d) for the purpose of facilitating the carrying out by any person mentioned in Sch 15 Pt I (see below) of any of his functions under any of the enactments or instruments specified in Sch 15 Pt II (see below); (e) for the purposes described in head (1)(e)-(i) above; (f) in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings; (g) for the purposes of any civil proceedings brought under or by virtue of the Water Industry Act 1991, any of the other consolidation Acts, the Water Act 1989, the Water Act 2003 or any of the enactments or instruments specified in the Water Industry Act 1991 Sch 15 Pt II, or of any arbitration under the Water Industry Act 1991, any of the other consolidation Acts, the Water Act 1989 or the Water Act 2003; or (h) in pursuance of a Community obligation: Water Industry Act 1991 s 206(3) (amended by the

Environment Act 1995 s 120, Sch 22 para 121(2); the Pollution Prevention and Control Act 1999 s 6(1), (2), Sch 2, para 7, Sch 3; the Water Act 2003 s 101(1), Sch 7 Pt 2 para 27(1), (5), Sch 8 paras 2, 47; SI 1999/506; SI 2001/3649; SI 2008/960). As to the meaning of 'Community obligation' see the European Communities Act 1972 s 1, Sch 1 Pt II; Interpretation Act 1978 s 5, Sch 1. The persons mentioned in the Water Industry Act 1991 Sch 15 Pt I to whom disclosure may be made are: any Minister of the Crown, the OFT, the Competition Commission, the Office of Communications, the Civil Aviation Authority, the Gas and Electricity Markets Authority, the Office of Rail Regulation, local weights and measures authority in England and Wales: Sch 15 Pt I (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (12)(a); the Communications Act 2003 s 406(1), Sch 17 para 112(1), (2); the Railways and Transport Safety Act 2003 s 16(5), Sch 2 Pt 2 para 19(l); by virtue of the Utilities Act 2000 s 3(2); SI 1999/506). The specified enactments etc in respect of which disclosure may be made correspond to those specified in the Water Act 1989 s 174(3) (see head (1) above), with the addition of the Railways Act 1993 and the Railways Act 2005: see the Water Industry Act 1991 Sch 15 Pt II (amended by the Railways Act 1993 s 152, Sch 12 para 30(b); the Competition Act 1998 ss 54(3), 74(3), Sch 10 para 13(10), Sch 14 Pt I; the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (12)(b); the Communications Act 2003 s 406(1), Sch 17 para 112(1), (3); SI 2001/4050; the Railways Act 2005 s 59(1), Sch 12 para 10; SI 2008/1277). For these purposes, 'the other consolidation Acts' means the Water Resources Act 1991, the Statutory Water Companies Act 1991, the Land Drainage Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991: Water Industry Act 1991 s 206(10);

- 29 (3) under the Water Resources Act 1991, the restrictions do not apply to any disclosure of information which is made: (a) for the purpose of facilitating the carrying out by any of the persons or bodies mentioned in head (1)(a) above and the Welsh Ministers of their functions by virtue of the Water Resources Act 1991, any of the other consolidation Acts, the Water Act 1989, the Environmental Protection Act 1990 Pt I or Pt IIA, the Environment Act 1995, regulations under the Pollution Prevention and Control Act 1999 s 2, or the Water Act 2003; (b) for the purpose of facilitating the performance by a water undertaker or sewerage undertaker or company holding a licence under the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) of any of the duties imposed on it by or under the Water Resources Act 1991, any of the other consolidation Acts, the Water Act 1989 or the Water Act 2003; (c) in pursuance of any duty imposed as described in head (1)(c) above or any such arrangements as are there described; (d) for the purpose of facilitating the carrying out by any person mentioned in the Water Resources Act 1991 Sch 24 Pt I (see below) of any of his functions under any of the enactments or instruments specified in Sch 24 Pt II (see below); (e) for the purposes described in head (1)(e)-(i) above; (f) in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings; (g) for the purposes of any civil proceedings brought under or by virtue of the Water Resources Act 1991, any of the other consolidation Acts, the Water Act 1989, the Water Act 2003 or any of the enactments or instruments specified in the Water Resources Act 1991 Sch 24 Pt II, or of any arbitration under the Water Resources Act 1991, any of the other consolidation Acts, the Water Act 1989 or the Water Act 2003; or (h) in pursuance of a Community obligation: Water Resources Act 1991 s 204(2) (amended by the Environment Act 1995 s 120, Sch 22 para 173(2); the Pollution Prevention and Control Act 1999 s 6(1), (2), Sch 2 para 8, Sch 3; the Water Act 2003 s 101(1), Sch 7 Pt 2 para 28, Sch 8 para 53; SI 1999/506; SI 2001/3649). The persons to whom disclosure may be made under the Water Resources Act 1991 Sch 24 Pt I correspond to those to whom disclosure may be made under the Water Industry Act 1991 Sch 15 Pt I (see head (2) above) with the addition of the Coal Authority; and the specified enactments correspond to those specified under Sch 15 Pt II (see head (2) above) with the addition of the Coal Industry Act 1994: see the Water Resources Act 1991 Sch 24 Pts I, II (amended by the Coal Industry Act 1994, s 67, Sch 9, para 43(2)(b); the Competition Act 1998, ss 54(3), 74(3), Sch 10, para 14(a), Sch 14, Pt I; the Enterprise Act 2002 s 278(1), Sch 25 para 26; the Communications Act 2003 s 406(1), Sch 17 para 115(1), (2); the Railways and Transport Safety Act 2003 s 16(5), Sch 2 Pt 2 para 19(m); by virtue of the Utilities Act 2000 s 3(2); SI 1999/506; SI 2001/4050; the Railways Act 2005 s 59(1), Sch 12 para 11; SI 2008/1277). 'The other consolidation Acts' means the Water Industry Act 1991, the Statutory Water Companies Act 1991, the Land Drainage Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991: Water Resources Act 1991 s 204(7);
- 30 (4) the Water Resources Act 1991 s 204 has effect in relation to information obtained by virtue of the provisions of the Land Drainage Act 1991 so far as they relate to functions exercisable by or in relation to the Environment Agency as it has effect in relation to the information obtained as mentioned in the Water Resources Act 1991 s 204: Land Drainage Act 1991 s 70 (amended by the Environment Act 1995 s 120, Sch 22 para 191).

The functions of the Secretary of State under the Water Industry Act 1991 s 206 (with the exception of s 206(3)(e): ie the exercise any powers conferred by or under the Financial Services and Markets Act 2000 or by the enactments relating to companies or insolvency) and the Water Resources Act 1991 s 204, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh

Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

2 As to the meaning of 'information' see PARA 117 note 13.

3 As to the meaning of 'person' see PARA 13 note 29.

4 Water Industry Act 1991 s 206(1); Water Resources Act 1991 s 204(1); Water Act 1989 s 174(1). For additional restrictions on the disclosure of information given to a sewerage undertaker under the Water Industry Act 1991 s 204 (information to sewerage undertakers with respect to trade effluent discharges) or Pt IV Ch III (ss 118-141) see s 206(2), (9); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1057.

5 le under the Water Industry Act 1991 s 38A (levels of performance: see PARA 326), s 95A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1016) or under s 201 (see PARA 180).

6 As to the Water Services Regulation Authority see PARA 109.

7 As to the Environment Agency see PARA 17.

8 As to the Consumer Council for Water see PARA 115.

9 As to regional committees see PARA 117.

10 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARAS 9-12.

11 le: (1) in the case of the Water Act 1989 s 174(1), any provision of the water consolidation Acts or of the Environment Act 1995 (Water Act 1989 s 174(4) (amended by the Water Consolidation (Consequential Provisions) Act 1991 Sch 1 para 50; and by virtue of the Environment Act 1995 ss 2, 3)); (2) in the case of the Water Industry Act 1991 s 206(1) and the Water Resources Act 1991 s 204(1), any provision of those Acts, of the Environmental Protection Act 1990 Pt I (ss 1-28) or Pt IIA (ss 78A-78YC) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 159 et seq; **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 761 et seq), of the Environment Act 1995, of regulations under the Pollution Prevention and Control Act 1999 s 2 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 186), or of the Water Act 2003: Water Industry Act 1991 s 206(4)(a) (amended by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 27; the Environment Act 1995 Sch 22 para 121(3); the Pollution Prevention and Control Act 1999 s 6(1), (2), Sch 2 para 7, Sch 3; the Water Act 2003 s 101(1), Sch 7 Pt 2 para 27(1), (5)(b); SI 1999/506); Water Resources Act 1991 s 204(3)(a), (b) (amended by the Environment Act 1995 Sch 22 paras 128, 173(3); the Pollution Prevention and Control Act 1999 s 6(1), (2), Sch 2 para 8, Sch 3; the Water Act 2003 s 101(1), Sch 7 Pt 2 para 28(1), (3)(b); SI 1999/506).

12 Water Act 1989 s 174(4); Water Industry Act 1991 s 206(4)(b); Water Resources Act 1991 s 204(3)(c).

13 Water Act 1989 s 174(5); Water Industry Act 1991 s 206(7); Water Resources Act 1991 s 204(6). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum; or, on conviction on indictment, imprisonment for a term not exceeding two years, or a fine, or both: Water Act 1989 s 174(5)(a), (b); Water Industry Act 1991 s 206(8); Water Resources Act 1991 s 204(6)(a), (b). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185. As to fines see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 139 et seq.

14 As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

15 As to the meaning of 'licensed water supplier' see PARA 152.

16 As to the meaning of 'public authority' see PARAS 118 note 17, and 469 note 19.

17 The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament; and where such an order designates an authority for the purposes of head (2) in the text, the order may impose conditions subject to which the disclosure of information is permitted by virtue of that head and otherwise restrict the circumstances in which disclosure is so permitted: Water Act 1989 s 174(7); Water Industry Act 1991 s 206(6); Water Resources Act 1991 s 204(5). As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

18 Water Act 1989 s 174(6) (amended by the Water Act 2003 s 101(1), Sch 8 para 1(1), (4)); Water Industry Act 1991 s 206(5) (amended by the Water Act 2003 Sch 8 paras 2, 47(1), (4)); Water Resources Act 1991 s 204(4) (amended by the Water Act 2003 Sch 8, para 53(1), (3)(c)). At the date at which this title states the law, no such order had been made.

19 See PARA 680.

20 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

21 Ie under the Competition Act 1998 Pt I (ss 1-60): see **COMPETITION** vol 18 (2009) PARA 115 et seq. As to the Authority's functions with regard to competition see PARA 132.

22 Ie the Enterprise Act 2002 Pt 9 (ss 237-247): see **COMPETITION** vol 18 (2009) PARAS 326-335.

23 Water Industry Act 1991 s 206(9A) (added by the Competition Act 1998, s 54(3), Sch 10 para 13(9); amended by the Enterprise Act 2002 s 278(1), Sch 25 para 25(1), (10)).

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#### **184. Provision of false information; in general.**

If any person<sup>1</sup>, in furnishing any information<sup>2</sup> or making any application under or for the purposes of any provision of the Water Act 1989, the Water Industry Act 1991, the Water Resources Act 1991 or of certain provisions of the Water Act 2003<sup>3</sup>, makes any statement which he knows to be false in a material particular or recklessly makes any statement which is false in a material particular, he is guilty of an offence<sup>4</sup>.

Proceedings for such an offence under the Water Act 1989 or the Water Industry Act 1991 may not be instituted except by or with the consent of the Secretary of State<sup>5</sup> (or, in the case of the Water Industry Act 1991, the Welsh Ministers<sup>6</sup>) or of the Director of Public Prosecutions<sup>7</sup>.

Other specific offences in connection with false information are dealt with elsewhere in this title<sup>8</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'information' see PARA 117 note 13.

3 In the Water Act 2003 s 3, s 4, or s 10: see PARAS 216, 226.

4 Water Act 1989 s 175(1); Water Industry Act 1991 s 207(1); Water Resources Act 1991 s 206(1) (substituted by the Environment Act 1995 s 112, Sch 19 para 5; and amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 11). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum; or, on conviction on indictment, a fine (or in the case of such an offence under the Water Resources Act 1991 a fine or imprisonment for a term not exceeding two years); Water Act 1989 s 175(1)(a), (b); Water Industry Act 1991 s 207(1)(a), (b); Water Resources Act 1991 s 206(5) (substituted by the Environment Act 1995 s 112, Sch 19, para 5(5)). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185. As to fines see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 139 et seq.

5 As to the Secretary of State see PARA 15 note 1.

6 The functions of the Secretary of State under the Water Industry Act 1991 s 207(2), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales to be exercised concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7 Water Act 1989 s 175(2); Water Industry Act 1991 s 207(2) (amended by SI 2002/794). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

8 See eg the Water Resources Act 1991 s 206(3); and PARA 248.

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### **185. Offences by bodies corporate.**

Where a body corporate is guilty of an offence under the Water Act 1989, the Water Industry Act 1991, the Water Resources Act 1991 or specified provisions of the Water Act 2003<sup>1</sup> and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity<sup>2</sup>, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly<sup>3</sup>. Where the affairs of a body corporate are managed by its members, the above provisions apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate<sup>4</sup>.

1    le an offence under the Water Act 2003 s 4: see PARA 216.

2    As to 'neglect' by such a person see *Hirschler v Birch* (1987) 151 JP 396, DC. See also *Woodhouse v Walsall Metropolitan Borough Council* [1994]1 BCLC 435, which considered the degree of severity necessary to bring a person within these provisions; such a person must be in real authority and have the power and responsibility to take corporate decisions.

3    Water Act 1989 s 177(1); Water Industry Act 1991 s 210(1); Water Resources Act 1991 s 217(1) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 12).

4    Water Act 1989 s 177(2); Water Industry Act 1991 s 210(2); Water Resources Act 1991 s 217(2). Without prejudice to s 217(1), (2), where the commission by any person of an offence under the water pollution provisions of the Water Resources Act 1991 is due to the act or default of some other person, that other person may be charged with and convicted of the offence whether or not proceedings for the offence are taken against the first-mentioned person: s 217(3). As to the meaning of 'water pollution provisions' see PARA 479 note 16. As to the meaning of 'person' see PARA 13 note 29.

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**186. No general judicial disqualification.**

No judge of any court or justice of the peace<sup>1</sup> is disqualified from acting in relation to any proceedings to which a relevant undertaker<sup>2</sup> is a party by reason only that he is or may become liable to pay a charge to that undertaker in respect of any service that is not the subject matter of the proceedings<sup>3</sup>.

1 As to justices of the peace see **MAGISTRATES** vol 29(2) (Reissue) PARA 501 et seq.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 Water Industry Act 1991 s 212.



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## 5. WATER RESOURCES

### (1) INTRODUCTION

#### 187. Meaning of 'water resources' and related terms.

The term 'water resources' is not defined in the Water Resources Act 1991 but may be taken to mean water contained in sources of supply<sup>1</sup>. 'Source of supply' means: (1) any inland waters<sup>2</sup> except<sup>3</sup> any which are discrete waters<sup>4</sup>; or (2) any underground strata<sup>5</sup> in which water is or at any time may be contained<sup>6</sup>.

1 As to earlier definitions see the Water Resources Act 1963 ss 2(1), 135(1) (repealed).

2 'Inland waters' means the whole or any part of: (1) any river, stream or other watercourse (within the meaning of the Water Resources Act 1991 Pt II Ch II (ss 24-72): see below), whether natural or artificial and whether tidal or not; (2) any lake or pond, whether natural or artificial, or any reservoir or dock, in so far as the lake, pond, reservoir or dock does not fall within head (1) above; and (3) any channel, creek, bay, estuary or arm of the sea as does not fall within head (1) or (2) above: s 221(1). This definition is applied for the purposes of the Water Industry Act 1991: see s 219(1).

References in the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 214 et seq) to a 'watercourse' do not include references: (a) to any sewer or part of a sewer vested in a sewerage undertaker, a local authority or joint planning board, the new towns residuary body or a development corporation for a new town, or a harbour board within the meaning of the Railway and Canal Traffic Act 1888; (b) to any adit or passage constructed in connection with a well, borehole or other similar work for facilitating the collection of water in the well, borehole or work: Water Resources Act 1991 s 72(2) (amended by the Housing and Regeneration Act 2008 s 56, Sch 8 para 60(1), (2)). 'Sewer' has, subject to the Water Resources Act 1991 s 221(2) below, the same meaning as in the Water Industry Act 1991 (see PARA 138 note 11): Water Resources Act 1991 s 221(1). References in the Water Resources Act 1991 to a 'pipe', including references to a main, a drain or a sewer, include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and, accordingly, references to the 'laying of a pipe' include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another: s 221(2). 'Drain' has, subject to s 221(2) above, the same meaning as in the Water Industry Act 1991 (see PARA 138 note 11): Water Resources Act 1991 s 221(1). 'Accessories', in relation to a main, sewer or other pipe, includes any manholes, ventilating shafts, inspection chambers, settling tanks, wash-out pipes, pumps, ferrules or stopcocks for the main, sewer or other pipe, or any machinery or other apparatus which is designed or adapted for use in connection with the use or maintenance of the main, sewer or other pipe or of another accessory for it, but does not include any electronic communications apparatus unless it (i) is or is to be situated inside or in the close vicinity of the main, sewer or other pipe or inside or in the close vicinity of another accessory for it; and (ii) is intended to be used only in connection with the use or maintenance of the main, sewer or other pipe or of another accessory for it; and in this definition 'stopcock' has the same meaning as in the Water Industry Act 1991 (see PARA 138 note 11): Water Resources Act 1991 s 221(1) (definition amended by the Communications Act 2003 s 406(1), Sch 17 para 113). As to sewerage undertakers see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 999 et seq. 'Local authority' means the council of any county, county borough, district or London borough or the Common Council of the City of London: Water Resources Act 1991 s 221(1) (definition amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(6)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. 'Joint planning board' has the same meaning as in the Town and Country Planning Act 1990 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 30): Water Resources Act 1991 s 221(1). 'New towns residuary body' means, in relation to England, the Homes and Communities Agency so far as exercising functions in relation to anything transferred (or to be transferred) to it as mentioned in the Housing and Regeneration Act 2008 s 52(1)(a)-(d) (see **TOWN AND COUNTRY PLANNING**), and, in relation to Wales, the Welsh Ministers so far as exercising functions in relation to anything transferred (or to be transferred) to them as mentioned in the New Towns Act 1981 s 36(1)(a)(i)-(iii) (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue)).

PARA 1384): Water Resources Act 1991 s 72(2A) (amended by the Housing and Regeneration Act 2008 s 56, Sch 8 para 60(1), (3)). As to development corporations for a new town see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1322. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

In the Water Resources Act 1991 generally, 'watercourse' includes (subject to s 72(2) (see above) and s 113(1) (see PARA 573 note 10)) all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and passages through which water flows, except mains and other pipes which (A) belong to the Environment Agency or a water undertaker; or (B) are used by a water undertaker or any other person for the purpose only of providing a supply of water to any premises: s 221(1) (definition amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The definition in the Water Industry Act 1991 is identical save that it is not made subject to the Water Resources Act 1991 ss 72(2), 113(1): see the Water Industry Act 1991 s 219(1) (definition amended by the Environment Act 1995 s 120(1), Sch 22 para 125). As to the Environment Agency see PARA 17. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'person' see PARA 13 note 29. As to whether the term 'watercourse' includes an estuary see *R v Falmouth and Truro Port Health Authority, ex p South West Water Ltd* [2001] QB 445, [2000] 3 All ER 306, CA (decided under the Public Health Act 1936 s 259(1)(a) (statutory nuisances: see **NUISANCE** vol 78 (2010) PARA 156)).

3 le without prejudice to the Water Resources Act 1991 s 221(3) in its application to head (2) in the text: see note 5.

4 'Discrete waters' means inland waters so far as they comprise: (1) a lake, pond or reservoir which does not discharge to any other inland waters; or (2) one of a group of two or more lakes, ponds or reservoirs (whether near to or distant from each other) and of watercourses or mains connecting them, where none of the inland waters in the group discharges to any inland waters outside the group: Water Resources Act 1991 s 221(1).

5 'Underground strata' means strata subjacent to the surface of any land: Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1). Any reference in the Water Resources Act 1991 to water contained in underground strata is a reference to water so contained otherwise than in a sewer, pipe, reservoir, tank or other underground works constructed in any such strata; but for the purposes of the Act water for the time being contained in: (1) a well, borehole or similar work, including any adit or passage constructed in connection with the well, borehole or work for facilitating the collection of water in the well, borehole or work; or (2) any excavation into underground strata, where the level of water in the excavation depends wholly or mainly on water entering it from those strata, must be treated as water contained in the underground strata into which the well, borehole or work was sunk or, as the case may be, the excavation was made: s 221(3). As to the meaning of 'land' see PARA 14 note 21.

6 Water Resources Act 1991 s 221(1).

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## **188. Water conservation.**

The Secretary of State, in relation to England<sup>1</sup>, and the Welsh Ministers, in relation to Wales<sup>2</sup>, must, where appropriate, take steps to encourage the conservation of water<sup>3</sup>. After the period of three years beginning with 1 April 2003<sup>4</sup>, and after each succeeding period of three years, the Secretary of State must prepare a report about the steps taken by him under this duty, and about any such steps which he proposes to take<sup>5</sup>. The Welsh Ministers may make an order requiring the preparation by them of corresponding reports, and such an order may make provision about when, or in relation to what periods, they are to be prepared<sup>6</sup>. Each such report must, if prepared by the Secretary of State, be laid before Parliament<sup>7</sup>, and if prepared by the Welsh Ministers, be laid before, and published by, the National Assembly for Wales<sup>8</sup>.

The Environment Agency<sup>9</sup> has a general duty to take all such action as it may from time to time consider necessary or expedient, in accordance with any directions given to it by the Secretary of State<sup>10</sup>, for the purpose of conserving, redistributing or otherwise augmenting water resources in England and Wales and of securing the proper use of water resources in England and Wales, including the efficient use of those resources<sup>11</sup>. However, nothing in this provision is to be construed as relieving any water undertaker<sup>12</sup> of the obligation to develop water resources for the purpose of performing any duty imposed on it<sup>13</sup> by virtue of its general duty to maintain a water supply system<sup>14</sup>. The provisions of the Water Resources Act 1991 relating to the functions of the Agency in connection with water resources<sup>15</sup> do not apply to certain inland waters<sup>16</sup>. In carrying out its functions in relation to water resources the Agency is subject to certain environmental duties<sup>17</sup>.

Without prejudice to its general powers of enforcement<sup>18</sup>, it is the Environment Agency's duty to enforce the provisions relating to the abstraction and impounding of water<sup>19</sup> and the related water resources provisions<sup>20</sup>. No proceedings for any offence under any of those provisions may, however, be instituted except by the Agency or by, or with the consent of, the Director of Public Prosecutions<sup>21</sup>.

In exercising its functions and conducting its affairs, each public authority<sup>22</sup> must take into account, where relevant, the desirability of conserving water supplied or to be supplied to premises<sup>23</sup>. Relevant undertakers<sup>24</sup> are also under a general duty to further water conservation<sup>25</sup>.

1 Water Act 2003 s 81(2)(a). As to the Secretary of State see PARA 15 note 1. As to the meaning of 'England' see PARA 19 note 8.

2 Water Act 2003 s 81(2)(b); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Act 2003 ss 81, 83 (see the text to notes 22-23) were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Water Act 2003 s 81(1).

4 I.e. the date when the Water Act 2003 s 81 came into force: see s 81(3). Section 81 came into force on 1 April 2004 in relation to England and on 11 November 2004 in relation to Wales: see the Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, art 3(u); the Water Act 2003 (Commencement No 2) (Wales) Order 2004, SI 2004/2916, art 2(d).

5 Water Act 2003 s 81(3).

6 Water Act 2003 s 81(4); Government of Wales Act 2006 Sch 11 para 32. As to the making of orders see PARA 21. At the date at which this volume states the law no such order had been made.

7 Water Act 2003 s 81(5)(a). Such reports are available on the Department of Environment, Food and Rural Affairs website at [www.defra.gov.uk](http://www.defra.gov.uk). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

8 Water Act 2003 s 81(5)(b); Government of Wales Act 2006 Sch 11 para 32. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 3 para 9; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

9 As to the Environment Agency see PARA 17.

10 le under the Environment Act 1995 s 40: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 74.

11 See the Environment Act 1995 s 6(2) (amended by the Water Act 2003 s 72); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 76.

12 As to the meaning of 'water undertaker' see PARA 137 note 4.

13 le by virtue of the Water Industry Act 1991 s 37(1): see PARA 319.

14 Environment Act 1995 s 6(2).

15 le the provisions of the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 214 et seq) and the related water resource provisions so far as they relate to other functions of the Agency: Environment Act 1995 s 6(3). In relation to the Water Resources Act 1991 Pt II Ch II, the 'related water resources provisions' means the provisions of: (1) ss 21-23 (including s 21(6), Sch 5) (see PARA 209 et seq), s 120 (see PARA 189), ss 125-130 (see PARA 274 et seq), s 158 (see PARA 461), s 189 (see PARA 268), ss 199-201 (see PARA 193 et seq), ss 206(3), 209(3) (see PARA 248 note 12), s 211(1) (see PARA 709), s 216 (see the text to notes 18-21), and Sch 25 para 1 (see PARA 709); and (2) the Environment Act 1995 ss 41, 42 (charging schemes) as they have effect by virtue of s 41(1)(a) (licences under the Water Resources Act 1991 Pt II Ch II: see PARA 273); and the Environment Act 1995 s 53(1), (2) (inquiries and other hearings: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 89); Water Resources Act 1991 s 221(1) (definition substituted by the Environment Act 1995 s 120(1), Sch 22 para 177(1), (9)); definition applied by the Environment Act 1995 s 6(8).

16 Environment Act 1995 s 6(3). The provisions mentioned in the text do not apply to so much of any inland waters as: (1) are part of the River Tweed; (2) are part of the River Esk or River Sark at a point where either of the banks of the river is in Scotland; or (3) are part of any tributary stream of the River Esk or the River Sark at a point where either of the banks of the tributary stream is in Scotland, except so much of those inland waters as are in England: s 6(3) (amended by the Water Act 2003 s 73). 'The River Tweed' means 'the river' within the meaning of the Tweed Fisheries Amendment Act 1859 as amended by byelaws: Environment Act 1995 s 6(8). The Environment Act 1995 s 6(3) also applies to the Water Act 2003 ss 3, 4 (see PARA 216) and such of the related water resources provisions as apply in relation to those sections by virtue of s 33(2) (see below), as it applies to the provisions referred to in the Environment Act 1995 s 6(3): s 6(3A) (added by the Water Act 2003 s 101(1), Sch 7 Pt 1 para 15(1), (2)).

The relevant Water Resources Act 1991 ('WRA') provisions apply to, or in relation to, the following sections of the Water Act 2003 (the 'applicable sections') as they apply to (or in relation to) the Water Resources Act 1991 Pt II (ss 20-81) or, as the case may be, Pt II Ch II: (a) the Water Act 2003 s 3 (existing impounding works: see PARA 216); (b) s 4 (existing impounding works (works notices): see PARA 216); and (c) s 10 (orders under the Water Resources Act 1991 s 33 (repealed): see PARA 226): Water Act 2003 s 33(1). Accordingly, in the relevant WRA provisions: (i) references to the Water Resources Act 1991 Pt II, or to Pt II Ch II, are to be read as if the applicable sections were included in that Part or that Chapter; (ii) references to the related water resources provisions are to be read as if those provisions meant, in relation to the applicable sections, the relevant WRA provisions other than the Water Resources Act 1991 s 222 (see PARA 20); and (iii) references to the Secretary of State are to be read as references to the appropriate authority (as defined, in each case, in the applicable section in question): Water Act 2003 s 33(2). The 'relevant WRA provisions' are the following provisions of the Water Resources Act 1991: (A) s 120 (contributions between the Agency and certain other authorities: see PARA 189); (B) s 158 (works agreements for water resources purposes: see PARA 461); (C) s 201 (power to require information in respect of water resources functions), as substituted by the Water Act 2003 s 70 (see PARA 195); (D) the Water Resources Act 1991 s 216 (enforcement; powers and duties: see the text to notes 18-21); (E) s 222 (Crown application) (see PARA 20), as in force immediately before the substitution made by the Environment Act 1995 Sch 21 para 2(4) and for so long as the substituted Water Resources Act 1991 s 222 does not apply to Pt II: Water Act 2003 s 33(3). The Water Resources Act 1991 s 220 (provisions relating to service of documents:

see PARA 22) applies to documents required or authorised by virtue of any of the applicable sections to be served on any person as it applies to documents required or authorised to be served by virtue of the Water Resources Act 1991: Water Act 2003 s 33(4). References in the Water Resources Act 1991 to the functions (generally) of the Environment Agency are to be read as including the Agency's functions under the applicable sections: Water Act 2003 s 33(5). As to the meaning of 'person' see PARA 13 note 29.

17 As to these duties see PARA 675 et seq.

18 Ie its powers of enforcement in relation to the other provisions of the Water Resources Act 1991 other than s 216.

19 Ie the Water Resources Act 1991 Pt II Ch II (ss 24-76): see PARA 214 et seq.

20 Water Resources Act 1991 s 216(1), (3) (s 216(1), (2) amended by the Environment Act 1995 s 120, Sch 22 para 128).

21 Water Resources Act 1991 s 216(2) (as amended: see note 20). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

22 For these purposes, 'public authority' means any of the following: (1) a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975); (2) a government department; (3) the Welsh Ministers; (4) a local authority (within the meaning of the Local Government Act 1972 s 270(1): see **LOCAL GOVERNMENT** vol 69 (2009) PARA 23); (5) a person holding an office (a) under the Crown; (b) created or continued in existence by a public general Act; or (c) the remuneration in respect of which is paid out of money provided by Parliament; (6) a statutory undertaker (being any person who, by virtue of the Town and Country Planning Act 1990 s 262 (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1009) is or is deemed to be a statutory undertaker for any purpose); and (7) any other public body of any description: Water Act 2003 s 83(2); Government of Wales Act 2006 Sch 11 para 32. 'Minister of the Crown' means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council: Ministers of the Crown Act 1975 s 8(1). As to the meaning of 'United Kingdom' see PARA 22 note 5. As to the meaning of 'Treasury' see PARA 108 note 6. As to the Defence Council see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 443-447. As to the Board of Trade see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 505; **TRADE AND INDUSTRY** vol 97 (2010) PARA 802.

23 Water Act 2003 s 83(1).

24 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

25 See the Water Industry Act 1991 s 3(2); and PARA 676.

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### **189. Contributions between the Environment Agency and certain other authorities.**

Where, on the application of a navigation authority<sup>1</sup>, harbour authority<sup>2</sup> or conservancy authority<sup>3</sup>, it appears to the Environment Agency<sup>4</sup> that any works constructed or maintained by the applicant have made, or will make, a beneficial contribution towards the fulfilment of the purposes of the Agency's water resources functions<sup>5</sup>, the Agency must contribute towards the expenditure incurred, or to be incurred, by the applicants in constructing or maintaining those works<sup>6</sup>. Similarly, where on the Agency's application it appears to a navigation, harbour or conservancy authority that any works constructed or maintained by the Agency in the carrying out of its water resources functions have made, or will make, a beneficial contribution towards the carrying out of the functions of the authority to which the application is made, that authority must contribute to the Agency towards the expenditure incurred, or to be incurred, by it in constructing or maintaining those works<sup>7</sup>. The sums to be paid by way of contribution and the terms and conditions on which they are to be paid are such as the Agency and the authority concerned may agree to be appropriate<sup>8</sup>.

If, on any such application, the Agency or other authority to which the application is made refuses to make a contribution<sup>9</sup>, or if the parties are unable to agree as to the sums to be contributed or the terms and conditions on which they are to be contributed<sup>10</sup>, the Agency or other authority concerned may refer the matter in dispute to the Secretary of State<sup>11</sup> or, in relation to Wales, to the Welsh Ministers<sup>12</sup>. On such a reference, the Secretary of State or, where appropriate, the Welsh Ministers may either determine the matter themselves<sup>13</sup> or refer it for determination to an arbitrator appointed for the purpose<sup>14</sup>. Where any decision has been made by the Secretary of State or the Welsh Ministers, or by an arbitrator, the decision is final and a contribution must be made<sup>15</sup> in accordance with the decision<sup>16</sup>.

Any expenditure incurred by a navigation, harbour or conservancy authority in paying any contribution under these provisions must be defrayed in the like manner as any corresponding expenditure<sup>17</sup> of that authority; and that authority has the same powers for the purpose of raising money required for paying any such contribution as it would have for the purpose of raising money required for defraying any corresponding expenditure of that authority<sup>18</sup>.

1 'Navigation authority' means any person who has a duty or power under any enactment to work, maintain, conserve, improve or control any canal or other inland navigation, navigable river, estuary, harbour or dock: Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1); Land Drainage Act 1991 s 72(1) (definition amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 91(b)). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'enactment' see PARA 14 note 31. As to rights of navigation see PARA 688 et seq. As to inland waterways and canals see PARA 713 et seq.

2 'Harbour authority' (except in the flood defence provisions of Water Resources Act 1991) means a person who is a harbour authority as defined in the Merchant Shipping Act 1995 s 151 for the purposes of Pt VI Ch II of that Act (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1212) and is not a navigation authority: Water Resources Act 1991 s 221(1) (definition amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 90); Water Industry Act 1991 s 219(1) (definition amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 89); Land Drainage Act 1991 s 72(1) (definition amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 91(b)). As to the meaning of 'flood defence provisions' see PARA 20 note 2.

3 'Conservancy authority' means any person who has a duty or power under any enactment to conserve, maintain or improve the navigation of a tidal water and is not a navigation authority or harbour authority: Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1); Land Drainage Act 1991 s 72(1) (definition

amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 91(b)). As to navigation in tidal waters see PARA 689 et seq.

4 As to the Environment Agency see PARA 17.

5 References in the Water Resources Act 1991 s 120 to the water resources functions of the Agency are references to its functions under Pt II (ss 20-81) (see PARA 196 et seq) or under any provisions not contained therein which are related water resources provisions in relation to Pt II Ch II (ss 24-72): s 120(8) (s 120(1)-(4), (7), (8) amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the meaning of 'related water resources provisions' see PARA 188 note 15. The water resources functions of the Agency must be exercised so as to secure compliance with the Water Framework Directive: see the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(1), (3), Sch 2; and PARA 198.

6 Water Resources Act 1991 s 120(1) (as amended: see note 5).

7 Water Resources Act 1991 s 120(2) (as amended: see note 5).

8 Water Resources Act 1991 s 120(3) (as amended: see note 5). This provision is expressed to be subject to the provisions of s 120(4)-(7): see the text to notes 9-18.

9 Water Resources Act 1991 s 120(4)(a) (as amended: see note 5).

10 See the Water Resources Act 1991 s 120(4)(b) (as amended: see note 5).

11 As to the Secretary of State see PARA 15 note 1.

12 Water Resources Act 1991 s 120(4) (as amended: see note 5). The functions of the Secretary of State under the Water Resources Act 1991 s 120, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

13 Water Resources Act 1991 s 120(5)(a).

14 Water Resources Act 1991 s 120(5)(b). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

15 Ie as if the sums, terms or conditions so determined had been agreed to be appropriate as mentioned in the Water Resources Act 1991 s 120(3): see the text to note 8.

16 Water Resources Act 1991 s 120(5). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

17 For these purposes, references to corresponding expenditure of a navigation, harbour or conservancy authority, in relation to the payment of a contribution in respect of any works, are references to expenditure incurred by the authority in performing the functions in respect of which it is claimed by the Agency that the works have made, or will make, such a beneficial contribution as is mentioned in the Water Resources Act 1991 s 120(2) (see the text to note 7): s 120(7) (as amended: see note 5).

18 Water Resources Act 1991 s 120(6).

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## **190. Regulation by the Secretary of State and the Welsh Ministers.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may make regulations or orders with regard to water resources<sup>3</sup>. For example, they may make regulations in relation to applications for licences<sup>4</sup>, appeals with respect to licence decisions<sup>5</sup>, and the form and contents of licences<sup>6</sup>; and may make orders in relation to the abstraction of small quantities of water and the compulsory registration of protected rights<sup>7</sup>, the definition of 'spray irrigation'<sup>8</sup>, and droughts<sup>9</sup>. This is not an exhaustive list.

The water resources functions of the Secretary of State and the Welsh Ministers must be exercised so as to secure compliance with the Water Framework Directive<sup>10</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Most of the functions of the Secretary of State under the Water Resources Act 1991, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. The transfer of functions in relation to specific provisions is stated in the paragraphs where those provisions are covered in detail. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations and orders see PARA 21.

4 See the Water Resources Act 1991 s 34(2); and PARA 230.

5 See the Water Resources Act 1991 s 45(1); and PARA 245.

6 See the Water Resources Act 1991 s 46(1); and PARA 248.

7 See the Water Resources Act 1991 ss 27A(4), 39B(7), Sch 6; and PARA 222.

8 See the Water Resources Act 1991 s 72(5); and PARA 262.

9 See the Water Resources Act 1991 s 73; and PARA 308.

10 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(1), (3), Sch 2; and PARA 198.



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## **(2) ASSESSMENT OF WATER RESOURCES**

### **(i) General Management Functions and Information**

#### **191. Provision of information about water resources, etc.**

It is the duty of the Environment Agency<sup>1</sup>: (1) to collate and publish information<sup>2</sup> from which assessments can be made of the actual and prospective demand for water, and of actual and prospective water resources<sup>3</sup>, in England and Wales<sup>4</sup>; and (2) so far as it considers it appropriate to do so, to collaborate with others in collating and publishing such information or any similar information in relation to places outside England and Wales<sup>5</sup>.

It is also the duty of the Agency to provide a water undertaker<sup>6</sup> with all such information about the flow, level or volume of any inland waters<sup>7</sup> or any water contained in underground strata<sup>8</sup>, about rainfall or any fall of snow, hail or sleet or about the evaporation of any water<sup>9</sup>, as is in the possession of the Agency and is reasonably requested by the undertaker for purposes connected with the carrying out of its functions<sup>10</sup>. Every water undertaker is under a corresponding duty to provide the Agency with all such information as is in the undertaker's possession and is reasonably requested by the Agency for purposes connected with the carrying out of any of its functions<sup>11</sup>. The Agency has an additional duty to provide reasonable facilities to all persons<sup>12</sup> for the inspection of the contents of any records<sup>13</sup> kept by the Agency and containing such information<sup>14</sup>, and for the taking of copies of, or of extracts from, any such records<sup>15</sup>.

Information provided to a water undertaker or to the Agency under the above provisions must be provided in such form and in such manner and at such times as the undertaker or, as the case may be, the Agency may reasonably require<sup>16</sup>. Information or facilities so provided to the Agency, to a water undertaker, to a local authority<sup>17</sup> or joint planning board<sup>18</sup> or National Park Authority<sup>19</sup> or to an internal drainage board<sup>20</sup>, must be provided free of charge; and facilities for inspection or copying provided by the Agency<sup>21</sup> to other persons may be provided on terms requiring the payment by persons making use of the facilities of such reasonable charges as the Agency may determine<sup>22</sup>.

Where records of the flow, level or volume of any inland waters, other than discrete waters<sup>23</sup>, are kept by a person other than a water undertaker, the Agency has the right at all reasonable times<sup>24</sup> to inspect the contents of any of those records<sup>25</sup> and to take copies of, or of extracts from, the contents of any of those records<sup>26</sup>; and any person who, without reasonable excuse, refuses or fails to permit the Agency to exercise this right is guilty of an offence<sup>27</sup>.

1 Water Resources Act 1991 s 188 (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the Environment Agency see PARA 17. Reports prepared by the Agency are available on its website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

2 As to the meaning of 'information' see PARA 117 note 13. As to restrictions on the disclosure of information see the Water Resources Act 1991 s 204; and PARA 183. As to the giving of false information see PARA 184. As to information about underground water see s 198; and PARA 192.

3 As to the meaning of 'water resources' see PARA 187.

- 4 Water Resources Act 1991 s 188(a). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.
- 5 Water Resources Act 1991 s 188(b).
- 6 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 7 As to the meaning of 'inland waters' see PARA 187 note 2.
- 8 As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.
- 9 See the Water Resources Act 1991 s 197(7).
- 10 Water Resources Act 1991 s 197(1)(a) (s 197(1)-(5) amended by the Environment Act 1995 s 120, Sch 22 para 128). The duties of the Agency under the Water Resources Act 1991 s 197(1) extend to information provided to or obtained by the Agency under s 197(2) (see the text to note 11) or (3) (see the text to notes 23-27): s 197(4) (as so amended).
- 11 Water Resources Act 1991 s 197(2) (as amended: see note 10). The duties of a water undertaker under s 197(2) are enforceable under the Water Industry Act 1991 s 18 (see PARA 163) by the Secretary of State or, in relation to Wales, by the Welsh Ministers: Water Resources Act 1991 s 197(6). The functions of the Secretary of State under the Water Resources Act 1991 s 197, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 12 As to the meaning of 'person' see PARA 13 note 29.
- 13 As to the meaning of 'records' see PARA 117 note 13.
- 14 Water Resources Act 1991 s 197(1)(b)(i) (as amended: see note 10).
- 15 Water Resources Act 1991 s 197(1)(b)(ii). See also note 10.
- 16 Water Resources Act 1991 s 197(4) (as amended: see note 10).
- 17 As to the meaning of 'local authority' see PARA 187 note 2.
- 18 As to the meaning of 'joint planning board' see PARA 187 note 2.
- 19 As to National Park Authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.
- 20 As to internal drainage boards see PARA 569 et seq.
- 21 Ie under the Water Resources Act 1991 s 197(1): see the text to notes 12-15.
- 22 Water Resources Act 1991 s 197(5) (as amended (see note 10); and further amended by virtue of SI 1995/2803, SI 1996/1243).
- 23 As to the meaning of 'discrete waters' see PARA 187 note 4.
- 24 The time during which the premises in question are open for business purposes will ordinarily be deemed reasonable: see *Davies v Winstanley* (1930) 144 LT 433.
- 25 Water Resources Act 1991 s 197(3)(a).
- 26 Water Resources Act 1991 s 197(3)(b).
- 27 Water Resources Act 1991 s 197(3) (as amended: see note 10). The penalty for such offence is, on summary conviction, a fine not exceeding level 1 on the standard scale: s 197(3). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

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## **192. Information about underground water.**

Any person<sup>1</sup> who, for the purpose of searching for or abstracting<sup>2</sup> water, proposes to sink a well or borehole intended to reach a depth of more than 15.24 metres below the surface must, before he begins to do so, give notice<sup>3</sup> to the Natural Environment Research Council of his intention to do so<sup>4</sup>. Any person sinking any such well or borehole as is mentioned above must:

- 296 (1) keep a journal<sup>5</sup> of the progress of the work and, on completion or abandonment of the work, send a complete copy of the journal to the Natural Environment Research Council<sup>6</sup>;
- 297 (2) send to that council particulars of any test made of the flow of water before completion or abandonment of the work<sup>7</sup>;
- 298 (3) allow any person authorised by that council for the purpose, on production of some duly authenticated document showing his authority, at all reasonable times to exercise any of the following rights<sup>8</sup>: (a) to have free access to the well or borehole<sup>9</sup>; (b) to inspect the well or borehole and the material extracted from it<sup>10</sup>; (c) to take specimens of any such material and of water abstracted from the well or borehole<sup>11</sup>; and (d) to inspect and take copies of or extracts from the journal required to be kept under these provisions<sup>12</sup>.

Where the person sinking a well or borehole on any land<sup>13</sup> is not the occupier<sup>14</sup> of the land, the obligation imposed on that person by virtue of head (3) above is the obligation of the occupier as well<sup>15</sup>. Where any person contracts to sink any well or borehole on land belonging to or occupied by another<sup>16</sup>, and the carrying out of the work is under the control of the contractor<sup>17</sup>, the contractor and no other person is deemed to be the person sinking the well or borehole<sup>18</sup>.

Any person who fails to comply with an obligation imposed on him by the above provisions is guilty of an offence<sup>19</sup>.

The person sinking any such well or borehole as is mentioned above or, if it is a different person, the owner<sup>20</sup> or occupier of the land on which any such well or borehole is sunk, may by notice to the Natural Environment Research Council require that council to treat as confidential any copy of, or extract from, the journal required to be kept<sup>21</sup> or any specimen taken in exercise of the rights specified in head (3) above<sup>22</sup>. The council must not, without the consent of the person giving the notice, allow any matter to which any such notice relates to be published or shown to any person who is not an officer of that council or of a department of the Secretary of State<sup>23</sup> or, in relation to Wales, the Welsh Ministers<sup>24</sup>; but this does not prohibit any matter from being published or shown to any person in so far as it contains or affords information as to water resources and supplies<sup>25</sup>. If at any time that council gives notice to any person that in its opinion his consent for these purposes is being unreasonably withheld, that person may, within three months<sup>26</sup> after the giving of the notice, appeal to the High Court for an order restraining that council from acting as if consent had been given<sup>27</sup>, and if either no such appeal is brought within that period, or the court does not make such an order after hearing the appeal, the council may proceed as if consent had been given<sup>28</sup>. Any person who fails to comply with any obligation imposed on him by these provisions is guilty of an offence<sup>29</sup>.

If any person who is admitted to any premises in compliance with head (3) above discloses to any person any information<sup>30</sup> obtained by him there with regard to any manufacturing process

or trade secret, then unless the disclosure is in performance of his duty he is guilty of an offence<sup>31</sup>.

If, in keeping any record<sup>32</sup> or journal or in furnishing any information which he is required to keep or furnish under any of the above provisions, any person knowingly or recklessly makes any statement which is false in a material particular, he is guilty of an offence<sup>33</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 'Abstraction', in relation to water contained in any source of supply, means the doing of anything whereby any of that water is removed from that source of supply, whether temporarily or permanently, including anything whereby the water is so removed for the purpose of being transferred to another source of supply; and 'abstract' is to be construed accordingly: Water Resources Act 1991 s 221(1). As to the meaning of 'source of supply' see PARA 187. Although the statutory meaning of 'abstraction' is wide, it applies only to direct, and not indirect, abstraction; and thus did not apply eg to induced flows from a canal to the inland water where a direct abstraction was taking place: *British Waterways Board v National Rivers Authority* (1992) Times, 4 August, CA.

3 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

4 Water Resources Act 1991 s 198(1) (amended by virtue of the Units of Measurement Regulations 1995, SI 1995/1804, reg 3). As to the Natural Environment Research Council see the Science and Technology Act 1965; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 970. As to the exemption of test borings from the requirement of a licence under the Water Resources Act 1991 Pt II Ch II (ss 20-72) see s 32(3), (4); and PARA 224.

5 The journal must include measurements of: (1) the strata passed through (Water Resources Act 1991 s 198(3)(a)); and (2) the levels at which water is struck and subsequently rests (s 198(3)(b)).

6 Water Resources Act 1991 s 198(2)(a).

7 Water Resources Act 1991 s 198(2)(b). The particulars required to be sent to the Natural Environment Research Council under this provision must specify: (1) the rate of flow throughout the test (s 198(4)(a)); (2) the duration of the test (s 198(4)(b)); (3) where practicable, the water levels during the test and afterwards until the water returns to its natural level (s 198(4)(c)); and (4) where the well or borehole is sunk in connection with an existing pumping station, the rate of pumping at the existing works during the test (s 198(4)(d)).

8 Water Resources Act 1991 s 198(2)(c). The rights are subject to s 205 (see the text to notes 20-31): s 198(5).

9 Water Resources Act 1991 s 198(5)(a).

10 Water Resources Act 1991 s 198(5)(b).

11 Water Resources Act 1991 s 198(5)(c).

12 Water Resources Act 1991 s 198(5)(d).

13 As to the meaning of 'land' see PARA 14 note 21.

14 The meaning of 'occupier' may vary according to the purposes of the legislation in which it is used, but it seems that in general a person is an occupier if he has a sufficient degree of control over the state of the premises or over the activities of the persons on them, and that, in order to be an occupier, it is not necessary for a person to have entire control over the premises, but it is sufficient for him to share the control with others: *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, HL; and see *H & N Emanuel Ltd v Greater London Council* [1971] 2 All ER 835, [1971] 2 Lloyd's Rep 36, CA; *Harris v Birkenhead Corpn* [1976] 1 All ER 341, [1976] 1 WLR 279, CA; *Jackson v Hall* [1980] AC 854, [1980] 1 All ER 177, HL. The expression 'occupier' includes a person who has a licence entitling him to possession: *Stevens v London Borough of Bromley* [1972] Ch 400, [1972] 1 All ER 712, CA; *R v Tao* [1977] QB 141, [1976] 3 All ER 65, CA. It also includes a statutory tenant: *Brown v Ministry of Housing and Local Government* [1953] 2 All ER 1385, [1953] 1 WLR 1370. It is thought not, however, to include a person whose entry on the premises was unlawful and forcible: see PARA 339 note 8.

15 Water Resources Act 1991 s 198(6).

16 Water Resources Act 1991 s 198(7)(a).

17 Water Resources Act 1991 s 198(7)(b).

18 Water Resources Act 1991 s 198(7).

19 Water Resources Act 1991 s 198(8). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale (s 198(8)(a)); and, where the offence continues after conviction, a further fine of £20 for every day during which it so continues (s 198(8)(b)). As to the standard scale see PARA 141 note 18.

20 As to the meaning of 'owner' see PARA 22 note 9.

21 Water Resources Act 1991 s 205(1)(a).

22 Water Resources Act 1991 s 205(1)(b).

23 As to the Secretary of State see PARA 15 note 1.

24 Water Resources Act 1991 s 205(2). The functions of the Secretary of State under the Water Resources Act 1991 s 205, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

25 Water Resources Act 1991 s 205(3). As to the meaning of 'water resources' see PARA 187.

26 As to the meaning of 'month' see PARA 23 note 10.

27 Water Resources Act 1991 s 205(4)(a). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

28 Water Resources Act 1991 s 205(4)(b).

29 Water Resources Act 1991 s 205(5). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale (s 205(5)(a)); and, where the offence continues after conviction, a further fine of £20 for every day during which it so continues (s 205(5)(b)).

30 As to the meaning of 'information' see PARA 117 note 13.

31 Water Resources Act 1991 s 205(6). The penalty for such an offence is: (1) on summary conviction, imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum or both (s 205(6)(a)); (2) on conviction on indictment, imprisonment for a term not exceeding three months or a fine or both (s 205(6)(b)). As to the statutory maximum see PARA 169 note 20. As from a day to be appointed heads (1) and (2) above are repealed and the penalty will be, on summary conviction, a fine not exceeding level 5 on the standard scale: s 205(6) (prospectively amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 2 para 160).

32 As to the meaning of 'records' see PARA 117 note 13.

33 Water Resources Act 1991 s 206(4). The penalty for such an offence is: (1) on summary conviction, a fine not exceeding the statutory maximum (s 206(5)(a) (s 206(5) substituted by the Environment Act 1995 s 112, Sch 19 para 5(5))); (2) on conviction on indictment, a fine or imprisonment for a term not exceeding two years, or both (Water Resources Act 1991 s 206(5)(b) (as so substituted)).

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### **193. Notice etc of mining operations which may affect water conservation.**

Where a person<sup>1</sup> proposes to construct or extend a boring for the purpose of searching for or extracting minerals<sup>2</sup>, he must, before he begins to construct or extend the boring, give to the Environment Agency<sup>3</sup> a notice<sup>4</sup> of his intention in the prescribed<sup>5</sup> form<sup>6</sup>. Where such a notice is given to the Agency by any person, the Agency may<sup>7</sup> by notice (known as a 'conservation notice'<sup>8</sup>) to that person require him, in connection with the construction, extension or use of the work to which that person's notice relates, to take such reasonable measures for conserving water as are specified in the notice<sup>9</sup>. The measures that may be specified in such a notice must be measures which, in the opinion of the Agency, will not interfere with the winning of minerals<sup>10</sup>.

Any person who contravenes the requirement above to give notice<sup>11</sup>, or fails to comply with a conservation notice given by the Agency, is guilty of an offence<sup>12</sup>.

The person on whom a conservation notice is served may, by notice<sup>13</sup> to the Secretary of State or, in relation to Wales, the Welsh Ministers, appeal against the conservation notice on either or both of the following grounds, that is to say:

- 299 (1) that the measures required by the conservation notice are not reasonable<sup>14</sup>;
- 300 (2) that those measures would interfere with the winning of minerals<sup>15</sup>.

Before determining an appeal against a conservation notice<sup>16</sup>, the Secretary of State or, where appropriate, the Welsh Ministers may, if they think fit: (a) cause a local inquiry to be held<sup>17</sup>; or (b) afford to the appellant and the Agency an opportunity of appearing before, and being heard by, a person appointed for the purpose<sup>18</sup>; and the Secretary of State or Welsh Ministers must act as mentioned in head (a) or (b) above if a request is made by the appellant or the Agency to be heard with respect to an appeal<sup>19</sup>.

On an appeal against a conservation notice the Secretary of State or, where appropriate, the Welsh Ministers may confirm, quash or vary the notice as he or they may consider appropriate<sup>20</sup>; and his or their decision on any appeal against a conservation notice is final<sup>21</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 'Minerals' is not defined in the Water Resources Act 1991. As to the meaning of the term generally see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 12.

3 As to the Environment Agency see PARA 17.

4 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

5 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Water Resources Act 1991 ss 199, 199A, and the Environment Act 1995 s 114 (see note 16) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh

Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 Water Resources Act 1991 s 199(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The notice must be given in such form as the Agency determines: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 29.

7 Is subject to the Water Resources Act 1991 s 199A: see the text to notes 13-21.

8 See the Water Resources Act 1991 s 199A(1) (s 199A added by the Water Act 2003 s 8(1), (6)).

9 Water Resources Act 1991 s 199(2) (s 199(2), (3) substituted, (2A) added, by the Water Act 2003 s 8(1), (5)(a)).

10 Water Resources Act 1991 s 199(2A) (as added: see note 9). Section 70 (see PARAS 214-215) applies to the restrictions imposed by s 199 as it applies to the restrictions imposed by ss 24 and 25 (see PARAS 214-215): s 199(3) (as substituted: see note 9).

11 Is the requirement under the Water Resources Act 1991 s 199(1): see the text to notes 1-6.

12 Water Resources Act 1991 s 199(4) (amended by the Water Act 2003 s 8(1), (5)(b)). The penalty for such an offence is: (1) on summary conviction, a fine not exceeding the statutory maximum (s 199(4)(a)); (2) on conviction on indictment, a fine (s 199(4)(b)). As to the statutory maximum see PARA 169 note 20.

13 Any notice of appeal against a conservation notice must be served within such period (not being less than 28 days from the date of service of the conservation notice) and in such manner as may be prescribed: Water Resources Act 1991 s 199A(2) (as added: see note 8). The Secretary of State or, in relation to Wales, the Welsh Ministers may by regulations make provision as to the manner in which appeals against conservation notices are to be dealt with, including provision requiring the giving of notices of, and information relating to, the making of such appeals or decisions on any such appeals: s 199A(6) (as so added). The Anti-Pollution Works Regulations 1999, SI 1999/1006, regs 3-6 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 327) apply in relation to an appeal under the Water Resources Act 1991 s 199A with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 30.

14 Water Resources Act 1991 s 199A(1)(a) (as added: see note 8).

15 Water Resources Act 1991 s 199A(1)(b) (as added: see note 8).

16 The Water Resources Act 1991 s 199A is subject to the Environment Act 1995 s 114: Water Resources Act 1991 s 199A(8) (as added: see note 8). The Secretary of State or, where appropriate, the Welsh Ministers may in relation to their functions of determining an appeal under s 199A: (1) appoint any person to exercise those functions on their behalf, with or without payment; or (2) refer any matter involved in such an appeal to such person as the Secretary of State or Welsh Ministers may appoint for the purpose, with or without payment: see the Environment Act 1995 s 114(1), (2)(a)(v), (3)(a) (s 114(2)(a)(v) amended by the Water Act 2003 s 8(7)); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65.

17 Water Resources Act 1991 s 199A(3)(a) (as added: see note 8).

18 See the Water Resources Act 1991 s 199A(3)(b) (as added: see note 8).

19 Water Resources Act 1991 s 199A(3) (as added: see note 8).

20 Water Resources Act 1991 s 199A(4) (as added: see note 8).

21 See the Water Resources Act 1991 s 199A(5) (as added: see note 8). Section 69 (validity of decisions of the Secretary of State and related proceedings: see PARA 247) applies to a decision of the Secretary of State or the Welsh Ministers on any appeal to him or them under s 199A as it applies to a decision on an appeal to him or them under Pt II Ch II (ss 24-72), taking the reference in s 69(2)(b) to that Chapter as a reference to s 199A: s 199A(7) (as so added).

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#### **194. Gauges and records kept by other persons.**

Any person<sup>1</sup> other than the Environment Agency<sup>2</sup> who proposes to install a gauge for measuring and recording the flow, level or volume of any inland waters<sup>3</sup> other than discrete waters<sup>4</sup>: (1) must give notice<sup>5</sup> to the Agency of his proposal to install the gauge<sup>6</sup>; and (2) must not begin the work of installing it before the end of the period of three months<sup>7</sup> beginning with the date of service of the notice or such shorter period as the Agency may in any particular case allow<sup>8</sup>. Not more than one month after any such work as is mentioned in head (2) above is completed, the person required to give such notice must give notice to the Agency stating where the records<sup>9</sup> obtained by means of the gauge are to be kept<sup>10</sup>. Any person who contravenes<sup>11</sup> these provisions is guilty of an offence<sup>12</sup>.

These provisions do not, however, apply to: (a) any gauge installed for the sole purpose of indicating the level of any inland waters for the benefit of persons who fish in them<sup>13</sup>; or (b) any gauge which is removed at or before the end of the period of 28 days beginning with the date on which it is installed<sup>14</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'inland waters' see PARA 187 note 2.

4 As to the meaning of 'discrete waters' see PARA 187 note 4.

5 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

6 Water Resources Act 1991 s 200(1)(a) (s 200(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 As to the meaning of 'month' see PARA 23 note 10.

8 Water Resources Act 1991 s 200(1)(b) (as amended: see note 6).

9 As to the meaning of 'records' see PARA 117 note 13.

10 Water Resources Act 1991 s 200(2) (as amended: see note 6).

11 As to the meaning of 'contravene' see PARA 20 note 5.

12 Water Resources Act 1991 s 200(4). The penalty for such an offence is, on summary conviction, a fine not exceeding level 1 on the standard scale: s 200(4). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

13 Water Resources Act 1991 s 200(3)(a).

14 Water Resources Act 1991 s 200(3)(b).



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### **195. Power to require information in respect of water resources functions.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, or the Environment Agency<sup>3</sup> may serve on any person<sup>4</sup> a notice<sup>5</sup> requiring that person to furnish him or them, within a period or at times specified in the notice and in a form and manner so specified, with such information<sup>6</sup> as is reasonably required by him or them for the purpose of carrying out any of his or their water resources functions<sup>7</sup>. A person who fails without reasonable excuse to comply with the requirements of such a notice served on him is guilty of an offence<sup>8</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 s 201, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the Environment Agency see PARA 17.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

6 The Secretary of State or, where appropriate, the Welsh Ministers, have power by regulations to make provision for restricting the information which may be so required and for determining the form in which the information is to be so required: Water Resources Act 1991 s 201(2) (s 201 substituted by the Water Act 2003 s 70). As to the meaning of 'information' see PARA 117 note 13. As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

7 Water Resources Act 1991 s 201(1) (as substituted: see note 6). References in s 201 to the water resources functions of the Secretary of State, the Welsh Ministers or the Agency are references to their functions under Pt II (ss 20-81) or under any provisions not contained in that Part which are related water resources provisions in relation to Pt II Ch II (ss 24-72): s 201(4) (as so substituted). As to the meaning of 'related water resources provisions' see PARA 188 note 15.

8 Water Resources Act 1991 s 201(3) (as substituted: see note 6). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum (s 201(3)(a) (as so substituted)) or, on conviction on indictment, a fine or imprisonment for a term not exceeding two years, or both (s 201(3)(b) (as so substituted)). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

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# **196. Water resources management schemes.**

It is the duty of the Environment Agency<sup>1</sup> so far as reasonably practicable to enter into and maintain such arrangements with water undertakers<sup>2</sup> for securing the proper management or operation of:

- 301 (1) the waters which are available to be used by water undertakers for the purposes of, or in connection with, the carrying out of their functions<sup>3</sup>; and
- 302 (2) any reservoirs, apparatus or other works which belong to, are operated by or are otherwise under the control of water undertakers for the purposes of, or in connection with, the carrying out of their functions<sup>4</sup>,

as the Agency from time to time considers appropriate for the purpose<sup>5</sup> of carrying out its water conservation functions<sup>6</sup>. Without prejudice to the power of the Agency and any water undertaker to include such provision as may be agreed between them, such arrangements may<sup>7</sup>:

- 303 (a) make provision by virtue of head (1) above with respect to the construction or installation of any reservoirs, apparatus or other works which will be used by the undertaker in the carrying out of its functions<sup>8</sup>;
- 304 (b) contain provision requiring payments to be made by the Agency to the undertaker<sup>9</sup>; and
- 305 (c) require the reference to and determination by the Secretary of State<sup>10</sup> or, in relation to Wales, by the Welsh Ministers<sup>11</sup>, or by the Water Services Regulation Authority<sup>12</sup> of questions arising under the arrangements<sup>13</sup>.

The Agency must send a copy of any such arrangements entered into by it to the Secretary of State or, where appropriate, the Welsh Ministers; and the obligations of a water undertaker by virtue of any such arrangements are enforceable<sup>14</sup> by the Secretary of State or, as the case may be, the Welsh Ministers<sup>15</sup>.

The Agency also has power to enter into and maintain such arrangements with holders of abstraction licences<sup>16</sup> other than water undertakers for securing the proper management or operation of:

- 306 (i) the waters from which they have the right by virtue of their licences to abstract water<sup>17</sup>; and
- 307 (ii) any reservoirs, apparatus or other works which are used for the purposes of or in connection with their abstractions and which belong to them, are operated by them or are otherwise under their control<sup>18</sup>,

as the Agency from time to time considers appropriate for the purpose<sup>19</sup> of carrying out its water conservation functions<sup>20</sup>. Without prejudice to the power of the Agency and any holder of an abstraction licence to include any such provision as may be agreed between them in arrangements under these provisions, such arrangements may:

- 308 (A) make provision by virtue of head (i) above with respect to the construction or installation of any reservoirs, apparatus or other works which the holder of the licence will use for the purposes of or in connection with his abstraction<sup>21</sup>;
- 309 (B) contain provision requiring payments to be made by the Agency to the holder of the licence<sup>22</sup>; and
- 310 (C) require the reference to and determination by the Secretary of State or, where appropriate, the Welsh Ministers, or the Water Services Regulation Authority of questions arising under the arrangements<sup>23</sup>.

The Agency must send a copy of any arrangements so entered into by it to the Secretary of State or, where appropriate, the Welsh Ministers<sup>24</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 Water Resources Act 1991 s 20(1)(a).

4 Water Resources Act 1991 s 20(1)(b). As to reservoirs see PARA 277 et seq.

5 le for the purpose of carrying out its functions under the Environment Act 1995 s 6(2): see PARA 188.

6 Water Resources Act 1991 s 20(1) (s 20 amended by the Environment Act 1995 s 120, Sch 22 paras 128, 132). As to the referral of such arrangements to the Secretary of State or the Welsh Ministers see PARA 197. As to the general duty of the Agency to conserve water resources see PARA 188.

7 Water Resources Act 1991 s 20(2) (as amended: see note 6).

8 Water Resources Act 1991 s 20(2)(a).

9 Water Resources Act 1991 s 20(2)(b) (as amended: see note 6).

10 As to the Secretary of State see PARA 15 note 1.

11 The functions of the Secretary of State under the Water Resources Act 1991 ss 20, 20A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. In respect of the functions of the Secretary of State under the Water Resources Act 1991 s 20(3) (see the text to notes 14-15): (1) functions so far as relating to matters concerning the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to Wales; (2) functions under that provision so far as relating to matters other than the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to those parts of Wales which are outside the catchment areas of the rivers Dee, Wye and Severn; and (3) the functions under that provision so far as relating to matters other than the construction or enlargement of reservoirs are, in relation to those parts of Wales which are within the catchment areas of the rivers Dee, Wye and Severn, exercisable by the Welsh Ministers concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

12 As to the Water Services Regulation Authority see PARA 109.

13 Water Resources Act 1991 s 20(2)(c) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 2, para 28(1), (2)).

14 le under the Water Industry Act 1991 s 18: see PARA 163.

15 Water Resources Act 1991 s 20(3) (as amended: see note 6). See also note 11.

16 In the Water Resources Act 1991 s 20A references to abstraction licences are to licences under Pt II Ch II (ss 20-72) to abstract water (see PARA 227): s 20A(4) (s 20A added by the Water Act 2003 s 28). As to the meaning of 'abstraction' see PARA 192 note 2.

- 17 Water Resources Act 1991 s 20A(1)(a) (as added: see note 16).
- 18 Water Resources Act 1991 s 20A(1)(b) (as added: see note 16).
- 19 le for the purpose of carrying out its functions under the Environment Act 1995 s 6(2): see PARA 188.
- 20 Water Resources Act 1991 s 20A(1) (as added: see note 16). As to the referral of such arrangements to the Secretary of State or the Welsh Ministers see PARA 197.
- 21 Water Resources Act 1991 s 20A(2)(a) (as added: see note 16).
- 22 Water Resources Act 1991 s 20A(2)(b) (as added: see note 16).
- 23 Water Resources Act 1991 s 20A(2)(c) (as added: see note 16).
- 24 Water Resources Act 1991 s 20A(3) (as added: see note 16).

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**197. Referral of water resources management schemes to the Secretary of State or the Welsh Ministers.**

The following provisions apply where:

- 311 (1) the Environment Agency<sup>1</sup> has sought to enter into arrangements for water resources management acceptable to it<sup>2</sup>, but is satisfied that the other party is unwilling to enter into such arrangements or to do so on terms appearing to the Agency to be reasonable<sup>3</sup>; or
- 312 (2) having entered into such arrangements, the Agency has sought to renew or vary them but is satisfied that the other party is unwilling to do so or to do so on terms appearing to the Agency to be reasonable<sup>4</sup>.

Where these provisions apply, the Agency may refer to the Secretary of State<sup>5</sup> or, in relation to Wales, the Welsh Ministers<sup>6</sup> the question, as the case may be:

- 313 (a) whether such arrangements should be entered into, and if so, on what terms<sup>7</sup>; or
- 314 (b) whether the arrangements should be renewed or varied, as the case may be, and if so, on what terms<sup>8</sup>.

If the Secretary of State or, where appropriate, the Welsh Ministers<sup>9</sup> determine that arrangements should be entered into or, as the case may be, renewed or varied, such arrangements on the terms determined by the Secretary of State or the Welsh Ministers are enforceable: (i) by civil proceedings by the Secretary of State or the Welsh Ministers for an injunction or for any other appropriate relief<sup>10</sup>; and (ii) where the other party is a water undertaker<sup>11</sup>, also by an enforcement order<sup>12</sup> by the Secretary of State or the Welsh Ministers<sup>13</sup>.

1 As to the Environment Agency see PARA 17.

2 Ie under the Water Resources Act 1991 s 20 or s 20A: see PARA 196.

3 Water Resources Act 1991 s 20B(1)(a) (s 20B added by the Water Act 2003 s 29).

4 Water Resources Act 1991 s 20B(1)(b) (as added: see note 3).

5 The functions of the Secretary of State under the Water Resources Act 1991 s 20B(2) are to be treated for the purposes of the Environment Act 1995 s 114 (delegation or reference of appeals: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65) as if they were functions to which s 114(1)(a) applied: Water Resources Act 1991 s 20B(4) (as added: see note 3). As to the Secretary of State see PARA 15 note 1.

6 The functions of the Secretary of State under the Water Resources Act 1991 s 20B, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. In respect of the functions of the Secretary of State under the Water Resources Act 1991 s 20B(3) (see the text to notes 9-13): (1) functions so far as relating to matters concerning the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to Wales; (2) functions under that provision so far as relating to matters other than the

construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to those parts of Wales which are outside the catchment areas of the rivers Dee, Wye and Severn; and (3) the functions under that provision so far as relating to matters other than the construction or enlargement of reservoirs are, in relation to those parts of Wales which are within the catchment areas of the rivers Dee, Wye and Severn, exercisable by the Welsh Ministers concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1 (amended by the Water Act 2003, s 100(4)(a)); Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

- 7 Water Resources Act 1991 s 20B(2)(a) (as added: see note 3).
- 8 Water Resources Act 1991 s 20B(2)(b) (as added: see note 3).
- 9 See note 6.
- 10 Water Resources Act 1991 s 20B(3)(a) (as added: see note 3).
- 11 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 12 Ie under the Water Industry Act 1991 s 18: see PARA 163.
- 13 Water Resources Act 1991 s 20B(3)(b) (as added: see note 3).

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## (ii) River Basin Management

### 198. The general duties.

The Secretary of State<sup>1</sup>, the Welsh Ministers<sup>2</sup> and the Environment Agency<sup>3</sup> must exercise their relevant functions<sup>4</sup> so as to secure compliance with the requirements of the Water Framework Directive<sup>5</sup>. The Secretary of State and the Welsh Ministers must also exercise their relevant functions in relation to each river basin district<sup>6</sup> so as best to secure that the requirements of the Directive for the achievement of its environmental objectives<sup>7</sup>, and in particular programmes of measures<sup>8</sup>, are co-ordinated for the whole of that district<sup>9</sup>.

The Secretary of State, the Scottish Ministers<sup>10</sup>, the Environment Agency and the Scottish Environment Protection Agency must exercise their relevant functions<sup>11</sup> so as to secure: (1) that the requirements of the Water Framework Directive for the achievement of its environmental objectives<sup>12</sup>, and in particular the programme of measures<sup>13</sup>, are co-ordinated for the whole of the Northumbria River Basin District<sup>14</sup> and the Solway Tweed River Basin District<sup>15</sup>; and (2) compliance in relation to that district with the other requirements of the Directive<sup>16</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Functions under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3 were originally vested in the National Assembly for Wales, but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the Environment Agency see PARA 17.

4 For these purposes, 'relevant functions' means functions under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, and, so far as material, the enactments listed in Sch 2 Pts 1, 2 (which relate to statutes and subordinate instruments respectively): reg 3(3). The statutes listed are: the European Communities Act 1972 s 2(2) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 359); the Salmon and Freshwater Fisheries Act 1975 (see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 845 et seq); the Food and Environment Protection Act 1985 Pt II (ss 5-15) (deposits in the sea: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 525); the Environmental Protection Act 1990 Pts I, II, IIA (ss 1-78YC) (integrated pollution control and air pollution control by local authorities; waste on land; contaminated land: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 159 et seq); the Water Industry Act 1991 Pt IV (ss 94-141) (sewerage services: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1010 et seq); the Water Resources Act 1991 Pts II-V (ss 20-116), Pts VII-IX (ss 154-225) (water resources management; control of pollution of water resources; flood defence; general control of fisheries; land and works powers; information provisions; miscellaneous and supplemental); and the Environment Act 1995 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH**): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, Sch 2 Pt 1. The subordinate instruments listed are: (1) the Sludge (Use in Agriculture) Regulations 1989, SI 1989/1263 (see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 969 et seq); (2) the Surface Waters (Dangerous Substances) (Classification) Regulations 1989, SI 1989/2286 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330); (3) the Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) Regulations 1991, SI 1991/324 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 315); (4) the Bathing Waters (Classification) Regulations 1991, SI 1991/1597 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330) and the National Rivers Authority (Bathing Waters) Directions 1992; (5) the Surface Waters (Dangerous Substances) (Classification) Regulations 1992, SI 1992/337 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330); (6) the Urban Waste Water Treatment (England and Wales) Regulations 1994, SI 1994/2841 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 336); (7) the Protection of Water Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996, SI 1996/888 (see **ENVIRONMENTAL QUALITY**

**AND PUBLIC HEALTH** vol 45 (2010) PARAS 318, 319); (8) the Surface Waters (Abstraction for Drinking Water) (Classification) Regulations 1996, SI 1996/3001 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330) and the Surface Waters (Abstraction for Drinking Water) Directions 1996; (9) the Surface Waters (Fishlife) (Classification) Regulations 1997, SI 1997/1331 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330) and the Surface Waters (Fishlife) Directions 1997; (10) the Surface Waters (Shellfish) (Classification) Regulations 1997, SI 1997/1332 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330) and the Surface Waters (Shellfish) Directions 1997; (11) the Surface Waters (Dangerous Substances) (Classification) Regulations 1997, SI 1997/2560 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330); (12) the Surface Waters (Dangerous Substances) (Classification) Regulations 1998, SI 1998/389 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330); (13) the Action Programme for Nitrate Vulnerable Zones (England and Wales) Regulations 1998, SI 1998/1202 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 319); (14) the Groundwater Regulations 1998, SI 1998/2746 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 335); (15) the Nitrate Vulnerable Zones (Additional Designations) (England) (No 2) Regulations 2002, SI 2002/2614 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 318); (16) the Bathing Waters (Classification) (England) Regulations 2003, SI 2003/1238 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330); (17) the Urban Waste Water Treatment (England and Wales) (Amendment) Regulations 2003, SI 2003/1788 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 336); (18) the Environmental Permitting (England and Wales) Regulations 2007, SI 2007/3538 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 662 et seq); and (19) the Bathing Water Regulations 2008, SI 2008/1097 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 330, 331): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, Sch 2 Pt 2 (amended by SI 2007/3538; SI 2008/1097). Heads (4) and (16) above are repealed with effect from 24 March 2015: see the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, Sch 2 Pt 2 paras 11 and 26 (prospectively repealed by SI 2008/1097).

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(1); Government of Wales Act 2006 Sch 11 para 32. The 'Water Framework Directive' means European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01), the Water Framework Directive: see the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1); and PARA 7.

6 'River basin district' means an area identified by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 4(1), being the main unit for the management of river basins for the purposes of the Water Framework Directive and being made up of a river basin or neighbouring river basins, together with associated groundwater, transitional waters and coastal water: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1). The areas shown on the deposited map are identified as river basin districts for the purposes of the regulations: reg 4(1). 'Deposited map' means the map and related information recorded on the CD-ROM which is entitled 'River Basin Districts (England and Wales) 2003', and deposited in the principal library of the Department for Environment, Food and Rural Affairs: reg 4(4). The Secretary of State, the Welsh Ministers and the Agency must ensure that the deposited map is made available to the public through their respective websites and at the relevant places: reg 4(2); Government of Wales Act 2006 Sch 11 para 32. The relevant places are: (1) in the case of the Secretary of State, the principal library of the Department for Environment, Food and Rural Affairs; (2) in the case of the Welsh Ministers, the library of the National Assembly for Wales in Cardiff; and (3) in the case of the Agency, its principal office and its principal regional offices: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 4(3); Government of Wales Act 2006 Sch 11 para 32.

The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, extend to England and Wales and apply only in relation to river basins districts identified by reg 4(1): see reg 1. 'England' includes the territorial sea adjacent to England not forming any part of Wales; and 'Wales' has the meaning given by the Government of Wales Act 2006 (ie it includes the sea adjacent to Wales out as far as the seaward boundary of the territorial sea: see s 158(1)): see the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1); Government of Wales Act 1998 s 155(1) (amended by the Government of Wales Act 2006 s 160(1), Sch 10 paras 41, 54(1), (4)). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

7 'Environmental objectives', in relation to a river basin district, means the objectives required to comply with European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 4 (environmental objectives: see PARA 7 note 26) including any objectives required to comply with art 7(2) and (3) (waters used for the abstraction of drinking water: see PARA 7): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1).

8 'Programme of measures', in relation to a river basin district, means the programme of measures required to comply with EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 11(2)-(6) (programme of measures: see PARA 7): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1).



9 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(2).

10 As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

11 'Relevant functions' means:

31 (1) in respect of the Northumbria River Basin District: (a) in relation to the Secretary of State and the Environment Agency, functions under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 5-20 (see *PARAS* 199-208) and, so far as material, the enactments listed in Sch 2 Pts 1 and 2 to those regulations (see note 4); and (b) in relation to the Scottish Ministers and the Scottish Environment Protection Agency, functions under the Water Environment and Water Services (Scotland) Act 2003 Pt 1, as applied by the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 6 (reg 2);

32 (2) in respect of the Solway Tweed River Basin District: (a) in relation to the Secretary of State and the Environment Agency, their functions under the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, Sch 1 and, so far as material, the enactments listed in Sch 2 Pt 1 and Pt 2 (which relate to statutes and subordinate instruments respectively); and (b) in relation to the Scottish Ministers and the Scottish Environment Protection Agency, their functions under Sch 1 and under the Water Environment and Water Services (Scotland) Act 2003 Pt 1 (protection of the water environment) as applied by the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 5 (reg 2(1)).

12 'Environmental objectives' is defined in the same terms as in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242 (see note 7): see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 4(2)(b); Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1).

13 'Programme of measures' is defined in the same terms as in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242 (see note 8): see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 4(2)(b); Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1).

14 'Northumbria River Basin District' means the area shown on the deposited map and identified as a river basin district for the purposes of the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245: see reg 3(1). 'Deposited map' means the map and related information recorded on the CD-ROM which is entitled 'The Northumbria River Basin District 2003' and deposited in the principal library of the Department for Environment, Food and Rural Affairs; and 'river basin district' means a district which is the main unit for the management of river basins for the purposes of the Water Framework Directive, being made up of neighbouring river basins together with associated groundwater, transitional waters and coastal water: reg 3(4). The Secretary of State, the Scottish Ministers, the Environment Agency and the Scottish Environment Protection Agency must ensure that the deposited map is made available to the public through their respective websites and at the relevant places: reg 3(2). The relevant places are (1) in the case of the Secretary of State, the principal library of the Department for Environment, Food and Rural Affairs; (2) in the case of the Scottish Ministers, the Information Centre of the Scottish Parliament; and (3) in the case of the Environment Agency and the Scottish Environment Protection Agency, their respective principal offices and principal offices for the regions in which any part of the Northumbria River Basin District lies: reg 3(3).

15 Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 4(1)(a); Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 4(a). 'Solway Tweed River Basin District' means the area shown on the deposited map and identified as a river basin district for the purposes of the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99: see reg 3(1). 'Deposited map' means the map and related information recorded on the CD-ROM which is entitled 'The Solway Tweed River Basin District 2004' and deposited in the principal library of the Department for Environment, Food and Rural Affairs: reg 3(4). The Secretary of State, the Scottish Ministers, the Environment Agency and the Scottish Environment Protection Agency must ensure that the deposited map is made available to the public through their websites and at the relevant places: reg 3(2). The relevant places are (1) in the case of the Secretary of State, the principal library of the Department for Environment, Food and Rural Affairs; (2) in the case of the Scottish Ministers, the Information Centre of the Scottish Parliament; and (3) in the case of the Environment Agency its principal office and the principal office for each of its regions, and in the case of the Scottish Environment Protection Agency its head office and each of its regional offices within the Solway Tweed River Basin District: see regs 2(1), 3(3).

16 Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 4(1)(b); Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 4(b).

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**199. Characterisation of river basin districts and economic analysis of water use therein.**

It was the duty of the Environment Agency<sup>1</sup> by 22 December 2004 to<sup>2</sup>:

- 315 (1) carry out an analysis of the characteristics of each river basin district<sup>3</sup>; and
- 316 (2) conduct a review of the impact of human activity on the status of surface water<sup>4</sup> and groundwater<sup>5</sup> in each river basin district<sup>6</sup>.

The results of such work must be periodically reviewed and updated by the Agency, initially by 22 December 2013 and thereafter by each sixth anniversary of that date<sup>7</sup>.

It was the duty of the appropriate authority<sup>8</sup> to ensure that an economic analysis of water use<sup>9</sup> in each river basin district was carried out<sup>10</sup> by 22 December 2004<sup>11</sup>. The appropriate authority must ensure that such analysis is periodically reviewed and updated, initially by 22 December 2013 and thereafter by each sixth anniversary of that date<sup>12</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>13</sup> and the Solway Tweed River Basin District<sup>14</sup>.

1 As to the Environment Agency see PARA 17.

2 In accordance with European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) Annex II (characterisation, etc of waters): see PARA 7. Information as to such work is available on the Environment Agency website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

3 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 5(1)(a). As to the meaning of 'river basin district' and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

4 As to the meaning of 'surface water' see PARA 7 note 5: definition applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1.

5 As to the meaning of 'groundwater' see PARA 7 note 8: definition applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1.

6 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 5(1)(b).

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 5(2).

8 'Appropriate authority' means: (1) in relation to a river basin district which is wholly in England, the Secretary of State; (2) in relation to a river basin district which is wholly in Wales, the Welsh Ministers; and (3) in relation to a river basin district which is partly in England and partly in Wales, the Secretary of State and the Welsh Ministers acting jointly: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1); Government of Wales Act 2006 Sch 11 para 32. As to the meanings of 'England' and 'Wales' see PARA 198 note 6. As to the Secretary of State see PARA 15 note 1. Functions under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh

Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

9 'Water use' means water services together with any other activity identified under European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 5, Annex II (see PARA 7) having a significant impact on the status of water: definition applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1. As to the meaning of 'water services' see PARA 7 note 32: definition so applied.

10 le in accordance with the European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) Annex III (economic analysis): see PARA 7.

11 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 6(1). Information as to such work is available on the Department of Environment, Food and Rural Affairs website at [www.defra.gov.uk](http://www.defra.gov.uk).

12 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 6(2).

13 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 5 and 6 (see the text to notes 1-12) apply to the whole of the Northumbria River Basin District, but in the case of reg 6 as if for each reference to the appropriate authority there were substituted a reference to the Secretary of State: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1), (2). As to the Northumbria River Basin District see PARA 198 note 14.

14 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 5 (see the text to notes 1-7) and reg 6 (see the text to notes 8-12) are imposed, in the case of those equivalent to reg 5, on the Environment Agency and the Scottish Environment Protection Agency, and in the case of those equivalent to reg 6, on the Secretary of State and the Scottish Ministers acting jointly: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 paras 1, 2. As to the Solway Tweed River Basin District see PARA 198 note 15. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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## 200. Protected areas.

The Environment Agency<sup>1</sup> must identify any bodies of water<sup>2</sup> within each river basin district<sup>3</sup> which:

- 317 (1) are used for the abstraction of water intended for human consumption<sup>4</sup> and either (a) provide more than 10 cubic metres of such water per day as an average<sup>5</sup>; or (b) serve more than 50 persons<sup>6</sup>; or
- 318 (2) are intended to be used for the abstraction of water intended for human consumption to the extent referred to in head (a) or (b) above<sup>7</sup>.

The Agency must also, for each river basin district, by 22 December 2004 have prepared<sup>8</sup>, and thereafter keep under review and up to date<sup>9</sup>, a register of the protected areas lying, whether wholly or partly, within the district<sup>10</sup>. For these purposes, 'protected area' means:

- 319 (i) a body of water which has been identified under head (1) or head (2) above<sup>11</sup>; and
  - 320 (ii) the areas and bodies of water for the time being designated or otherwise identified as requiring special protection under any Community instrument providing for the protection of surface water and groundwater or for the conservation of habitats or species<sup>12</sup> directly depending on water, or any enactment<sup>13</sup> implementing such a Community instrument, including, in particular:
- 37
- 41. (A) areas designated for the protection of economically significant aquatic species<sup>14</sup>;
  - 42. (B) bodies of water designated as recreational waters<sup>15</sup>;
  - 43. (C) nutrient-sensitive areas<sup>16</sup>; and
  - 44. (D) areas designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in the protection of the habitats or species<sup>17</sup>.
- 38

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>18</sup> and the Solway Tweed River Basin District<sup>19</sup>.

1 As to the Environment Agency see PARA 17.

2 'Body of water' means a body of groundwater or a body of surface water: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1). As to the meaning of 'body of groundwater' see PARA 7 note 16; and as to the meaning of 'body of surface water' see PARA 7 note 13: definitions applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1.

3 As to the meaning of 'river basin district', and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

4 'Water intended for human consumption' has the same meaning as in EC Council Directive 80/778 (OJ L229, 30.08.80, p 11) (repealed) (see now EC Council Directive 98/83 (OJ L330, 05.12.98, p 32)): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 7(2).

'Water intended for human consumption' means: (1) all water either in its original state or after treatment, intended for drinking, cooking, food preparation or other domestic purposes, regardless of its origin and whether it is supplied from a distribution network, from a tanker, or in bottles or containers; (2) all water used in any food-production undertaking for the manufacture, processing, preservation or marketing of products or substances intended for human consumption unless the competent national authorities are satisfied that the quality of the water cannot affect the wholesomeness of the foodstuff in its finished form: EC Council Directive 98/83, art 2(1).

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 7(1)(a)(i).

6 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 7(1)(a)(ii).

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 7(1)(b).

8 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(1)(a).

9 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(1)(b).

10 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(1).

11 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(2)(a).

12 As to the relevant European Community legislation see PARA 8.

13 As to the meaning of 'enactment' see PARA 14 note 31.

14 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(2)(b)(i).

15 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(2)(b)(ii).

16 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(2)(b)(iii).

17 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8(2)(b)(iv).

18 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 7, 8 (see the text to notes 1-17) apply to the whole of the Northumbria River Basin District: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1). As to the Northumbria River Basin District see PARA 198 note 14.

19 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 7, 8 (see the text to notes 1-17) are imposed, in the case of those equivalent to reg 7, on the Secretary of State and the Scottish Ministers acting jointly, and in the case of those equivalent to reg 8, on the Environment Agency and the Scottish Environment Protection Agency: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 paras 3, 4. As to the Solway Tweed River Basin District see PARA 198 note 15. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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## **201. Monitoring of water status.**

The Environment Agency must<sup>1</sup>:

- 321 (1) establish programmes for monitoring water status in order to establish a coherent and comprehensive overview of water status within each river basin district<sup>2</sup>; and
- 322 (2) take such other action as is necessary to give effect to the relevant monitoring provisions<sup>3</sup> of the Water Framework Directive<sup>4</sup>.

The monitoring programmes must cover:

- 323 (a) in relation to surface water<sup>5</sup>, ecological and chemical status and ecological potential<sup>6</sup>, and the volume and level or rate of flow to the extent relevant to such status and potential<sup>7</sup>;
- 324 (b) in relation to groundwater<sup>8</sup>, chemical and quantitative status<sup>9</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>10</sup> and the Solway Tweed River Basin District<sup>11</sup>.

1 The monitoring programmes required to be established under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9 were to be made operational by 22 December 2006: see reg 9(3). As to the Environment Agency see PARA 17.

2 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9(1)(a). As to the meaning of 'river basin district', and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

3 The relevant monitoring provisions are set out in the following provisions of European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) (the Water Framework Directive) Annex V (see PARA 7): (1) points 1.3-1.3.6 (monitoring of ecological status, chemical status and ecological potential for surface waters); (2) points 1.4-1.4.3 (classification and presentation of ecological status, chemical status and ecological potential); (3) points 2.2-2.2.4 (monitoring of groundwater quantitative status); (4) points 2.4-2.4.4 (monitoring of groundwater chemical status); and (5) points 2.4.5 and 2.5 (interpretation and presentation of groundwater status): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9(4).

4 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9(1)(b).

5 As to the meaning of 'surface water' see PARA 7 note 5: definition applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1.

6 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9(2)(a)(ii). As to the meaning of 'ecological status' see PARA 7 note 15: definition applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1.

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9(2)(a)(i).

8 As to the meaning of 'groundwater' see PARA 7 note 8: definition applied by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(2), Sch 1.

9 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9(2)(b). As to the meaning of 'quantitative status' see PARA 7 note 16: definition applied by reg 2(2), Sch 1.

10 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9 (see the text to notes 1-9) applies to the whole of the Northumbria River Basin District: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1). As to the Northumbria River Basin District see PARA 198 note 14.

11 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9 (see the text to notes 1-9) are imposed on the Environment Agency and the Scottish Environment Protection Agency: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 para 5. As to the Solway Tweed River Basin District see PARA 198 note 15.



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## **202. River basin management plans.**

For the purposes of the river basin management plan for a river basin district<sup>1</sup>, the Environment Agency<sup>2</sup> must, by such date as the appropriate authority<sup>3</sup> may direct, prepare and submit to the authority proposals for environmental objectives for the district<sup>4</sup> and a programme of measures<sup>5</sup> to be applied in order to achieve those objectives<sup>6</sup>. In preparing such proposals, the Agency must take account of the characterisation of, and economic analysis of water use<sup>7</sup> in, the relevant river basin district, and any review of the same, carried out<sup>8</sup>; and must take such steps as it thinks fit, or the appropriate authority may direct, to:

- 325 (1) provide opportunities for the general public and those persons<sup>9</sup> likely to be interested in or affected by its proposals to participate in discussion and the exchange of information or views in relation to the preparation of those proposals<sup>10</sup>;
- 326 (2) publicise its draft proposals to those persons<sup>11</sup>; and
- 327 (3) consult those persons in respect of those proposals<sup>12</sup>.

The appropriate authority may, having considered any proposals for environmental objectives or for a programme of measures submitted to it and any representations received by the authority in relation to those proposals: (a) approve them, or any of them, in the form submitted<sup>13</sup>; (b) approve them, or any of them, either with modifications or subject to such modifications as the authority may direct the Agency to make<sup>14</sup>; or (c) reject them, or any of them<sup>15</sup>. Where the appropriate authority rejects any proposals, it must direct the Agency to resubmit proposals, by such time, if any, as the direction may specify with modifications of such nature as the direction may specify<sup>16</sup> and any further modifications which the Agency considers appropriate<sup>17</sup>.

The appropriate authority must ensure that for each river basin district a programme of measures is established by 22 December 2009<sup>18</sup>, made operational by 22 December 2012<sup>19</sup> and periodically reviewed and where appropriate updated<sup>20</sup>, initially by 22 December 2015 and thereafter by each sixth anniversary of that date<sup>21</sup>.

The Agency must, by such date as the appropriate authority may direct, prepare and submit to the appropriate authority a river basin management plan for each river basin district<sup>22</sup>. A river basin management plan must relate to such period as the appropriate authority directs<sup>23</sup> and include the information specified in the relevant provisions of the Water Framework Directive<sup>24</sup>. The appropriate authority must ensure that each river basin management plan is published by 22 December 2009<sup>25</sup>, and periodically reviewed and where appropriate updated, initially by 22 December 2015 and thereafter by each sixth anniversary of that date<sup>26</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>27</sup> and the Solway Tweed River Basin District<sup>28</sup>.

1    le the plan which is required by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11: see the text to notes 22-26. As to the meaning of 'river basin district', and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

2    As to the Environment Agency see PARA 17.

- 3 As to the meaning of 'appropriate authority' see PARA 199 note 8.
- 4 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(1)(a). As to the meaning of 'environmental objectives' see PARA 198 note 7.
- 5 As to the meaning of 'programme of measures' see PARA 198 note 8.
- 6 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(1)(b).
- 7 le carried out under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 5 and 6: see PARA 199.
- 8 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(2)(a).
- 9 As to the meaning of 'person' see PARA 13 note 29.
- 10 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(2)(b)(i).
- 11 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(2)(b)(ii).
- 12 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(2)(b)(iii). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 13 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(3)(a).
- 14 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(3)(b). In any case falling within reg 10(3)(b) or (c) (see the text to note 15) the authority must state the reasons for its decision: see reg 10(3).
- 15 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(3)(c). See also note 14.
- 16 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(4)(a).
- 17 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(4)(b).
- 18 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(5)(a)(i). Such programmes may require strategic environmental assessment: see PARA 9.
- 19 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(5)(a)(ii).
- 20 In relation to a programme of measures that is so updated, the appropriate authority must ensure that any new or revised measures are made operational within three years of that updating: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(5)(b).
- 21 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(5)(a)(iii).
- 22 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(1). As to public participation in respect of such plans see PARA 203. As to the approval of such plans see PARA 204. Such plans may require strategic environmental assessment: see PARA 9.
- 23 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(2)(a).
- 24 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(2)(b). The relevant provisions of the Water Framework Directive (ie European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01): see PARA 7) for these purposes are: (1) art 9(2), (4) (recovery of the costs of water services); (2) Annex II point 1.3(vi) (exclusion of elements from the assessment of ecological status); (3) the following provisions of Annex V: (a) points 1.3 and 1.3.4 (confidence and precision in monitoring

surface water); (b) point 2.4.1 (confidence and precision in monitoring groundwater); and (c) points 2.4.5 and 2.5 (presentation of monitoring results for groundwater); and (4) Annex VII Pt A (elements to be covered in river basin management plans): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(3).

25 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(4)(a).

26 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(4)(b). As to the review of plans see PARA 205.

27 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 10 and 11 (see the text to notes 1-26) apply to the whole of the Northumbria River Basin District as if for each reference to the appropriate authority there were substituted a reference to the Secretary of State: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1), (2). As to the Northumbria River Basin District see PARA 198 note 14. As to the Secretary of State see PARA 15 note 1.

28 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 10 and 11 (see the text to notes 1-26) are imposed on the Environment Agency and the Scottish Environment Protection Agency or, as appropriate, the Secretary of State and the Scottish Ministers acting jointly: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 paras 6, 7. As to the Solway Tweed River Basin District see PARA 198 note 15. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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### **203. River basin management plans: public participation.**

The Environment Agency<sup>1</sup> must in respect of the production of a river basin management plan<sup>2</sup>:

- 328 (1) not less than three years before the beginning of the plan period<sup>3</sup>, publish a statement of the steps and consultation measures it is to take in connection with the preparation of the plan<sup>4</sup>, and the dates by which those steps and measures are to be taken<sup>5</sup>;
- 329 (2) not less than two years before the beginning of the plan period, publish a summary of the significant water management matters which it considers arise for consideration in relation to the river basin district<sup>6</sup>; and
- 330 (3) not less than one year before the beginning of the plan period, publish a draft plan<sup>7</sup>.

The Agency must publish any matter required by heads (1) to (3) above to be published in such manner as it considers appropriate for the purpose of bringing it to the attention of persons<sup>8</sup> likely to be affected by it and must: (a) make copies of the statement, summary or draft plan accessible to the public free of charge through its website and at its principal office and each of its principal regional offices<sup>9</sup>; (b) publish a notice<sup>10</sup>; (c) consult the relevant persons<sup>11</sup>; (d) take such steps as it thinks fit, or the appropriate authority<sup>12</sup> may direct, to provide opportunities for the general public and the relevant persons to participate in discussion and the exchange of information or views in relation to the preparation of the draft plan<sup>13</sup>; and (e) invite the public and the relevant persons to make representations in relation to the draft plan<sup>14</sup>. The relevant persons to be consulted are: the appropriate authority<sup>15</sup>; the Water Services Regulation Authority<sup>16</sup>; the appropriate nature conservation bodies<sup>17</sup>; every local authority any part of whose area is within the river basin district<sup>18</sup>; every local planning authority any part of whose area is within the river basin district<sup>19</sup>; where any part of the river basin district has been designated as a National Park, the National Park authority for that National Park<sup>20</sup>; the harbour authority for each harbour in the river basin district<sup>21</sup>; every navigation authority having functions in relation to any part of the river basin district<sup>22</sup>; every water undertaker or sewerage undertaker any part of whose area is within the river basin district<sup>23</sup>; any local fisheries committee for a sea fisheries district any part of which lies within the river basin district<sup>24</sup>; such persons as appear to the Environment Agency, in relation to the river basin district, to be representative of the interests of those carrying on any business which relies upon the water environment, to have an interest in the protection of the water environment, or to have an interest in the promotion of flood management<sup>25</sup>; and such other persons as the Agency thinks fit or the appropriate authority may direct<sup>26</sup>.

The Environment Agency must take into account any representations relating to a statement, summary or draft plan published in accordance with these provisions which are received by it within the period of six months<sup>27</sup> beginning with the date of publication or such longer period as the appropriate authority may direct<sup>28</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>29</sup> and the Solway Tweed River Basin District<sup>30</sup>.

1 As to the Environment Agency see PARA 17.

2 As to river basin management plans see PARA 202. Information as to such plans is available on the Environment Agency website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

3 'Plan period', in relation to a plan, means the period to which a direction under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(2)(a) (see PARA 202) requires it to relate: reg 12(5)(g).

4 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(1)(a)(i).

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(1)(a)(ii).

6 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(1)(b). As to the meaning of 'river basin district' see PARA 198 note 6.

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(1)(c).

8 As to the meaning of 'person' see PARA 13 note 29.

9 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(2)(a).

10 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(2)(b). The notice must: (1) state the fact of publication (reg 12(2)(b)(i)); (2) specify the arrangements made for making copies of the statement, summary or draft plan available for public inspection (reg 12(2)(b)(ii)); and (3) state that any person may make representations to the Agency in relation to the statement, summary or draft plan (reg 12(2)(b)(iii)). The notice must be published in the London Gazette (reg 12(3)(a)), and at least once in each of two successive weeks, in one or more newspapers circulating in the river basin district to which the plan relates (reg 12(3)(b)).

11 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(2)(c). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

12 As to the meaning of 'appropriate authority' see PARA 199 note 8.

13 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(2)(d).

14 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(2)(e).

15 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(a).

16 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(b) (amended by SI 2005/2035). As to the Water Services Regulation Authority see PARA 109.

17 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(c). 'Appropriate nature conservation bodies' means the Joint Nature Conservation Committee and: (1) in relation to a river basin district that is wholly in England, English Nature; (2) in relation to a river basin district that is wholly in Wales, the Countryside Council for Wales; and (3) in relation to a river basin district that is partly in England and partly in Wales, English Nature and the Countryside Council for Wales: reg 12(5)(a). English Nature has been abolished and its functions transferred to Natural England: see the Natural Environment and Rural Communities Act 2006 s 1. As to Natural England, the Countryside Council for Wales and the Joint Nature Conservation Committee see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq. As to the meanings of 'England' and 'Wales' see PARA 198 note 6.

18 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(d). 'Local authority' means the council of any county, county borough, district or London borough, the Common Council of the City of London or the Greater London Authority: reg 12(5)(c). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the Greater London Authority see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 34, 79 et seq.

19 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(e). 'Local planning authority' has the meaning given by the Town and Country Planning Act 1990 s 1 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 28): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(5)(e).

20 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(f). As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

21 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(g). 'Harbour' and 'harbour authority' have the meanings given by the Harbours Act 1964 s 57 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARAS 611, 619): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(5)(b).

22 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(h). As to the meaning of 'navigation authority' see PARA 189 note 1: definition applied by reg 12(5)(f).

23 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(i). As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

24 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(j). 'Local fisheries committee' and 'sea fisheries district' mean a local fisheries committee constituted, and a sea fisheries committee created, by an order under the Sea Fisheries Regulation Act 1966 s 1 (see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 964): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(5)(d).

25 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(k). As to flood management see PARA 556 et seq.

26 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4)(l).

27 As to the meaning of 'month' see PARA 23 note 10.

28 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(6).

29 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12 (see the text to notes 1-28) applies with modifications to the whole of the Northumbria River Basin District and as if for each reference to the appropriate authority there were substituted a reference to the Secretary of State: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1)-(3). As to the Northumbria River Basin District see PARA 198 note 14. As to the Secretary of State see PARA 15 note 1.

30 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12 (see the text to notes 1-28) are imposed on the Environment Agency and the Scottish Environment Protection Agency: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 para 8. As to the Solway Tweed River Basin District see PARA 198 note 15.

## UPDATE

### 203 River basin management plans: public participation

TEXT AND NOTE 24--SI 2003/3242 reg 12(4)(j), (5)(d) omitted: SI 2010/630 (Wales).

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## **204. Approval of river basin management plans.**

As soon as a river basin management plan<sup>1</sup> is submitted to the appropriate authority<sup>2</sup>, the Environment Agency must: (1) make copies of the plan accessible to the public free of charge through its website and at its principal office and each of its principal regional offices<sup>3</sup>; and (2) publish a notice stating the fact of submission<sup>4</sup> and specifying the arrangements made for making copies of the plan accessible to the public<sup>5</sup>.

If the appropriate authority considers in relation to a plan that further action should be taken by the Agency<sup>6</sup> in respect of public participation, the appropriate authority may direct the Agency: (a) to take such further steps in that respect as the appropriate authority may specify in the direction<sup>7</sup>; and (b) to resubmit the plan within such period, if any, as the appropriate authority may specify in the direction<sup>8</sup>. Where the appropriate authority gives a direction to the Agency under head (a) or (b) above, it must state its reasons for doing so<sup>9</sup>.

The appropriate authority may, having considered a river basin management plan submitted to it and any representations received by the authority in relation to that plan:

- 331 (i) approve it, in whole or in part, in the form submitted<sup>10</sup>;
- 332 (ii) approve it, in whole or in part, either with modifications or subject to such modifications as the appropriate authority may direct the Agency to make<sup>11</sup>; or
- 333 (iii) reject it<sup>12</sup>;

and, in any case falling within head (ii) or (iii) above, must state its reasons for doing so<sup>13</sup>.

Where the appropriate authority rejects a plan, it must direct the Agency to resubmit the plan, by such time, if any, as the direction may specify, with modifications of such nature as the direction may specify<sup>14</sup> and any further modifications which the Agency considers appropriate<sup>15</sup>. Where the appropriate authority approves a plan, the Agency must publish the approved plan in such manner as the Agency thinks fit for the purpose of bringing the plan to the attention of the general public and of those persons<sup>16</sup> likely to be interested in or affected by it and, in particular, must: (A) make copies of the approved plan accessible to the public free of charge through its website and at its principal office and each of its principal regional offices<sup>17</sup>; and (B) publish a notice stating that the plan has been approved<sup>18</sup> and specifying the arrangements made for making copies of the plan accessible to the general public<sup>19</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>20</sup> and the Solway Tweed River Basin District<sup>21</sup>.

1 As to river basin management plans see PARA 202.

2 The Environment Agency must ensure that a plan submitted to the appropriate authority is accompanied by: (1) a statement of the steps taken by the Agency to comply with the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(1) and (so far as relating to the draft plan) reg 12(2)-(4) (see PARA 203) (reg 13(2)(a)); and (2) a summary of the representations referred to in reg 12(6) (see PARA 203) and of any changes made to the plan in light of those representations (reg 13(2)(b)). As to the Environment Agency see PARA 17. As to the meaning of 'appropriate authority' see PARA 199 note 8.

3 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 13(1)(a).

4 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 13(1)(b)(i).

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 13(1)(b)(ii).

6 le under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(2)-(4): see PARA 203.

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 13(3)(a).

8 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 13(3)(b). Regulation 13 applies in relation to a river basin management plan resubmitted to the appropriate authority in accordance with such a direction as it applies to the plan as originally submitted, with the modification that, for the reference in reg 13(3) to reg 12(2)-(4) (see note 6), there is substituted a reference to reg 13: reg 13(5).

9 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 13(4).

10 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(1)(a).

11 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(1)(b).

12 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(1)(c).

13 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(1).

14 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(2)(a).

15 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(2)(b).

16 As to the meaning of 'person' see PARA 13 note 29.

17 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(3)(a).

18 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(3)(b)(i).

19 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14(3)(b)(ii). As to the review of plans see PARA 205. As to supplementary plans see PARA 206. As to the duty to have regard to plans see PARA 207.

20 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 13 and 14 (see the text to notes 1-19) apply with modifications to the whole of the Northumbria River Basin District and as if for each reference to the appropriate authority there were substituted a reference to the Secretary of State: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1), (2), (4), (5). As to the Northumbria River Basin District see PARA 198 note 14. As to the Secretary of State see PARA 15 note 1.

21 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 13 and 14 (see the text to notes 1-19) are imposed on the Environment Agency and the Scottish Environment Protection Agency or, as appropriate, the Secretary of State and the Scottish Ministers acting jointly: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 paras 9, 10. As to the Solway Tweed River Basin District see PARA 198 note 15. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.



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## **205. Review of river management plans.**

The Environment Agency<sup>1</sup> must review and update each river basin management plan<sup>2</sup> (including a revised river basin management plan): (1) by no later than six years from the date on which it was approved<sup>3</sup>; or (2) by such earlier date as the appropriate authority<sup>4</sup> may direct<sup>5</sup>. Following such a review, the Agency must prepare and submit to the appropriate authority a revised river basin management plan by such date as the appropriate authority may direct<sup>6</sup>. The revised plan must include, in addition to the matters required to be included<sup>7</sup>, specified additional information<sup>8</sup> for inclusion in updated river basin management plans<sup>9</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>10</sup> and the Solway Tweed River Basin District<sup>11</sup>.

1 As to the Environment Agency see PARA 17.

2 As to river basin management plans see PARA 202.

3 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 15(1)(a). As to the approval of plans see PARA 204.

4 As to the meaning of 'appropriate authority' see PARA 199 note 8.

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 15(1)(b).

6 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 15(2). Regulations 11(2) and (3) (see PARA 202) and 12-14 (see PARAS 203, 204) apply in relation to the preparation, submission and approval of a revised river basin management plan: reg 15(3).

7 Ie by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 11(2)(b) and (3): see PARA 202.

8 Ie the information specified in European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) Annex VII Pt B: see PARA 7.

9 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 15(4).

10 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 15 (see the text to notes 1-9) applies to the whole of the Northumbria River Basin District as if for each reference to the appropriate authority there were substituted a reference to the Secretary of State: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1), (2). As to the Northumbria River Basin District see PARA 198 note 14. As to the Secretary of State see PARA 15 note 1.

11 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 15 (see the text to notes 1-9) are imposed on the Environment Agency and the Scottish Environment Protection Agency: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 para 11. As to the Solway Tweed River Basin District see PARA 198 note 15.

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## 206. Supplementary plans.

The Environment Agency<sup>1</sup> may prepare supplementary plans for the purposes of supplementing the river basin management plan<sup>2</sup> for a river basin district<sup>3</sup>. Such a plan may, for example, relate to: (1) a particular description of body of water<sup>4</sup>; (2) a particular catchment or geographical area<sup>5</sup>; (3) a particular matter relating to, or aspect of, the water environment<sup>6</sup>; or (4) a particular description of user of water resources<sup>7</sup>.

The Agency must, in relation to the preparation of a supplementary plan, consult such of the relevant persons<sup>8</sup> and such other persons likely to be interested in or affected by that plan as it thinks fit, and must take into account any views expressed by those consulted<sup>9</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>10</sup> and the Solway Tweed River Basin District<sup>11</sup>.

1 As to the Environment Agency see PARA 17.

2 As to river basin management plans see PARA 202.

3 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16(1). As to the meaning of 'river basin district', and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

4 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16(2)(a). 'Body of water' means a body of groundwater or a body of surface water: reg 2(1). As to the meaning of 'body of groundwater' see PARA 7 note 16; and as to the meaning of 'body of surface water' see PARA 7 note 13: definitions applied by reg 2(2), Sch 1.

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16(2)(b).

6 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16(2)(c).

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16(2)(d).

8 I.e. the persons referred to in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 12(4): see PARA 203. As to the meaning of 'person' see PARA 13 note 29.

9 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16(3). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

10 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16 (see the text to notes 1-9) applies to the whole of the Northumbria River Basin District: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1). As to the Northumbria River Basin District see PARA 198 note 14.

11 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 16 (see the text to notes 1-9) are imposed on the Environment Agency and the Scottish Environment Protection Agency: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 para 12. As to the Solway Tweed River Basin District see PARA 198 note 15.

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## **207. Duty to have regard to plans.**

The Secretary of State<sup>1</sup>, the Welsh Ministers<sup>2</sup>, the Environment Agency<sup>3</sup> and each public body<sup>4</sup> must, in exercising their functions so far as affecting a river basin district<sup>5</sup>, have regard to: (1) the approved river basin management plan<sup>6</sup> for that district<sup>7</sup>; and (2) any supplementary plan<sup>8</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>9</sup> and the Solway Tweed River Basin District<sup>10</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Functions under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 17 were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 198 note 6. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the Environment Agency see PARA 17.

4 'Public body' does not include a Minister of the Crown within the meaning of the Ministers of the Crown Act 1975 (see PARA 188 note 22) or the Welsh Ministers, but it does include: (1) a person otherwise holding an office (a) under the Crown; (b) created or continued in existence by public general Act of Parliament; or (c) the remuneration in respect of which is paid out of money provided by Parliament; and (2) a statutory undertaker (being a person who by virtue of the Town and Country Planning Act 1990 s 262 is, or is deemed to be, a statutory undertaker for any purpose; see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1009): Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'river basin district', and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

6 Ie approved under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 14: see PARA 204.

7 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 17(a).

8 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 17(b). The supplementary plan referred to is one prepared under reg 16: see PARA 206.

9 The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 17 (see the text to notes 1-8) applies to the whole of the Northumbria River Basin District: see the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, reg 5(1). As to the Northumbria River Basin District see PARA 198 note 14.

10 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 17 (see the text to notes 1-9) are imposed in respect of the Solway Tweed River Basin District: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 para 13. As to the Solway Tweed River Basin District see PARA 198 note 15.

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## **208. Information, assistance and guidance.**

The Environment Agency<sup>1</sup> must make accessible to the public at its principal office:

- 334 (1) the results of the work required<sup>2</sup> in respect of the characterisation of river basin districts<sup>3</sup>;
- 335 (2) maps showing bodies of water identified<sup>4</sup> as bodies of water used for the abstraction of drinking water<sup>5</sup>;
- 336 (3) the registers<sup>6</sup> of protected areas<sup>7</sup>;
- 337 (4) the results of the programmes established<sup>8</sup> for monitoring water status<sup>9</sup>;
- 338 (5) the environmental objectives<sup>10</sup> and programmes of measures<sup>11</sup> proposed or approved<sup>12</sup>; and
- 339 (6) any supplementary plan prepared<sup>13</sup>.

Where the appropriate authority<sup>14</sup> approves, with or without modifications, proposals made by the Agency for the purposes of the river basin management plan for a river basin district<sup>15</sup>, the Agency must publish a notice stating that the proposals have been approved<sup>16</sup> and specifying the arrangements made for making the approved objectives and programme of measures accessible to the public<sup>17</sup>. The appropriate authority must make accessible to the public through its website and at its principal office the results of the economic analysis conducted<sup>18</sup> of water use in river basin districts<sup>19</sup>.

A public body<sup>20</sup> must, on being requested to do so by the Agency, provide the Agency with such information in its possession or under its control and such assistance as the Agency may reasonably seek in connection with the exercise of any of the Agency's functions under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003<sup>21</sup>.

The appropriate authority may give guidance to the Agency or to any other public body with respect to the practical implementation of the Water Framework Directive<sup>22</sup>, and the body to whom guidance is issued must have regard to it<sup>23</sup>. The appropriate authority may also give directions to any public body for the purposes of giving effect to the Directive<sup>24</sup>.

Similar obligations are imposed in relation to the Northumbria River Basin District<sup>25</sup> and the Solway Tweed River Basin District<sup>26</sup>.

1 As to the Environment Agency see PARA 17.

2 I.e. the work required by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 5: see PARA 199.

3 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(1)(a). As to the meaning of 'river basin district', and as to the application of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, see PARA 198 note 6.

4 I.e. under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 7: see PARA 200.

5 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(1)(b). As to the meaning of 'body of water' see PARA 206 note 4.

- 6     le prepared under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 8: see PARA 200.
- 7     Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(1)(c).
- 8     le under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 9: see PARA 201.
- 9     Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(1)(d).
- 10    As to the meaning of 'environmental objectives' see PARA 198 note 7.
- 11    As to the meaning of 'programme of measures' see PARA 198 note 8.
- 12    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(1)(e). As to the proposal and approval of environmental objectives and programmes of measures see reg 10; and PARA 202.
- 13    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(1)(f). As to supplementary plans see reg 16; and PARA 206.
- 14    As to the meaning of 'appropriate authority' see PARA 199 note 8.
- 15    le proposals under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 10(1): see PARA 202.
- 16    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(2)(a).
- 17    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(2)(b).
- 18    le the results of the analysis conducted under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 6: see PARA 199.
- 19    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 18(3).
- 20    As to the meaning of 'public body' see PARA 207 note 4.
- 21    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 19(1). The Water Resources Act 1991 s 202 (information and assistance in connection with the control of pollution: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 345) has effect as if functions under the regulations were functions under the water pollution provisions of that Act: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 19(2).
- 22    The 'Water Framework Directive' means European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) (the Water Framework Directive): see the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 2(1); and PARA 7.
- 23    Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 20(3).
- 24    The Environment Act 1995 s 40 (directions to the new Agencies: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 74) has effect as if the power in s 40(2) to give directions included a power for the appropriate authority to give directions to any public body for the purposes of giving effect to the Water Framework Directive: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 20(1). The Environment Act 1995 s 122 (directions: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 154) applies in relation to any direction so given: Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 20(2).
- 25    The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 18-20 (see the text to notes 1-24) apply to the whole of the Northumbria River Basin District with regs 18 and 20 having effect as if for each reference to the appropriate authority there were substituted a reference to the Secretary of State: see the Water Environment (Water Framework Directive) (Northumbria

River Basin District) Regulations 2003, SI 2003/3245, reg 5(1), (2). As to the Northumbria River Basin District see PARA 198 note 14. As to the Secretary of State see PARA 15 note 1.

26 Similar duties to those in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, regs 18-20 (see the text to notes 1-24) are imposed in respect of the Solway Tweed River Basin District: see the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99, reg 2(1), Sch 1 paras 14-16. As to the Solway Tweed River Basin District see PARA 198 note 15.

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### **(iii) Determining Minimum Acceptable Flows**

#### **209. Minimum acceptable flows; in general.**

The Environment Agency<sup>1</sup> may, if it thinks it appropriate to do so, submit a draft statement<sup>2</sup> to the Secretary of State<sup>3</sup> or, in relation to Wales, to the Welsh Ministers<sup>4</sup> containing, in relation to any inland waters<sup>5</sup> that are not discrete waters<sup>6</sup>:

- 340 (1) provision for determining the minimum acceptable flow for those waters<sup>7</sup>; or
- 341 (2) where any provision for determining such a flow is for the time being in force in relation to those waters, provision for amending that provision or for replacing it with different provision for determining the minimum acceptable flow for those waters<sup>8</sup>.

The provision contained in any statement for determining the minimum acceptable flow for any inland waters must, in relation to the inland waters to which it relates, set out: (a) the control points at which the flow is to be measured<sup>9</sup>; (b) the method of measurement which is to be used at each control point<sup>10</sup>; and (c) the flow which is to be the minimum acceptable flow at each control point or, where appropriate, the flows which are to be the minimum acceptable flows at each such point for the different times or periods specified in the statement<sup>11</sup>.

In determining the flow to be specified in relation to any inland waters under head (c) above, the Agency must have regard<sup>12</sup>: (i) to the flow of water in the inland waters from time to time<sup>13</sup>; (ii) in the light of its duties under the Environment Act 1995<sup>14</sup>, to the character of the inland waters and their surroundings<sup>15</sup>; (iii) to any water quality objectives established<sup>16</sup> in relation to the inland waters or any other inland waters which may be affected by the flow in the inland waters in question<sup>17</sup>. The flow specified in relation to any inland waters under that head must be not less than the minimum which, in the opinion of the Agency, is needed for safeguarding the public health and for meeting (in respect of both quantity and quality of water)<sup>18</sup>: (A) the requirements of existing lawful uses<sup>19</sup> of the inland waters, whether for agriculture<sup>20</sup>, industry, water supply or other purposes<sup>21</sup>; and (B) the requirements, in relation to both those waters and other inland waters whose flow may be affected by changes in the flow of those waters, of navigation, fisheries or land drainage<sup>22</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the procedure for the submission and approval of draft statements see PARAS 210-211.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 s 21, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to the meaning of 'inland waters' see PARA 187 note 2.

6 Water Resources Act 1991 s 21(1) (s 21(1), (4), (5), (9) amended by the Environment Act 1995 s 120, Sch 22 paras 128, 133(2)). As to the meaning of 'discrete waters' see PARA 187 note 4.

7 Water Resources Act 1991 s 21(1)(a). As to the determination of minimum acceptable flows see also the Water Resources Act 1991 ss 22, 23; and PARAS 212-213.

8 Water Resources Act 1991 s 21(1)(b).

9 Water Resources Act 1991 s 21(2)(a).

10 Water Resources Act 1991 s 21(2)(b).

11 Water Resources Act 1991 s 21(2)(c).

12 Water Resources Act 1991 s 21(4) (as amended: see note 6).

13 Water Resources Act 1991 s 21(4)(a).

14 *Ie* under the Environment Act 1995 ss 6(1), 7 and 8: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 76 et seq.

15 Water Resources Act 1991 s 21(4)(b) (as amended: see note 6).

16 *Ie* under the Water Resources Act 1991 Pt III Ch I (ss 82-84): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 330 et seq.

17 Water Resources Act 1991 s 21(4)(c).

18 Water Resources Act 1991 s 21(5) (as amended: see note 6).

19 For these purposes the Agency is entitled (but is not bound) to treat as lawful any existing use of any inland waters unless by a decision given in any legal proceedings, it has been held to be unlawful and that decision has not been quashed or reversed: Water Resources Act 1991 s 21(9)(a), (b) (as amended: see note 6).

20 'Agriculture' includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes; and 'agricultural' must be construed accordingly: Agriculture Act 1947 s 109(3); definition applied by the Water Resources Act 1991 s 221(1).

21 Water Resources Act 1991 s 21(5)(a).

22 Water Resources Act 1991 s 21(5)(b). The reference to land drainage includes a reference to defence against water (including sea water), irrigation other than spray irrigation, warping and the provision of flood warning systems: s 21(9) (repealed as from a day to be appointed by the Water Act 2003 ss 8(1), (2)(a), 101(2), 105(3), (5), Sch 9 Pt 1). As from a day to be appointed in the Water Resources Act 1991 s 21(5), the reference to land drainage includes: (1) defence against water (including sea water), irrigation (other than spray irrigation), warping and the carrying on, for any purpose, of any other practice which involves management of the level of water in a watercourse; and (2) the provision of flood warning systems: s 21(10) (added as from a day to be appointed by the Water Act 2003 ss 8(1), (2)(b), 105(3), (5)). At the date at which this volume states the law no such days had been appointed. As to the meaning of 'spray irrigation' see PARA 262. As to the meaning of 'warping' see PARA 573 note 9. As to the meaning of 'watercourse' see PARA 187 note 2. As to land drainage generally see PARA 573 et seq.



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## 210. Preparation and submission of draft statement.

Before preparing so much of any draft statement containing provision for determining the minimum acceptable flow of inland waters<sup>1</sup> as relates to any particular inland waters, the Environment Agency<sup>2</sup> must consult<sup>3</sup>:

- 342 (1) any water undertaker<sup>4</sup> having the right to abstract<sup>5</sup> water from those waters<sup>6</sup>;
- 343 (2) any other water undertaker having the right to abstract water from any related underground strata<sup>7</sup>;
- 344 (3) the drainage board for any internal drainage district<sup>8</sup> from which water is discharged into those waters or in which any part of those waters is situated<sup>9</sup>;
- 345 (4) any navigation, harbour or conservancy authority<sup>10</sup> having functions in relation to those waters or any related inland waters<sup>11</sup>;
- 346 (5) if those waters are wholly or partly situated in Wales<sup>12</sup> (or in an area of the sea adjoining either the coast of Wales or an area of sea forming part of Wales) and they or any related inland waters are tidal waters in relation to which there is no such navigation, harbour or conservancy authority, the Secretary of State for Transport<sup>13</sup>; and
- 347 (6) any person<sup>14</sup> authorised by a licence under the Electricity Act 1989<sup>15</sup> to generate electricity who has a right to abstract water from those waters<sup>16</sup>.

Before submitting a draft statement to the Secretary of State<sup>17</sup> or, in relation to Wales, to the Welsh Ministers<sup>18</sup>, the Agency must publish a notice<sup>19</sup>: (a) stating the general effect of the draft statement<sup>20</sup>; (b) specifying the place where a copy of the draft statement, and of any relevant map or plan, may be inspected by any person free of charge at all reasonable times during the period of 28 days beginning with the date of first publication of the notice<sup>21</sup>; and (c) stating that any person may within that period, by notice in writing<sup>22</sup> to the Secretary of State or where appropriate, the Welsh Ministers object to the approval of the statement<sup>23</sup>.

Not later than the date on which that notice is first published, the Agency must serve<sup>24</sup> a copy of the notice on the specified bodies and persons<sup>25</sup> and must also publish a notice in the London Gazette<sup>26</sup>. The Agency must, at the request of any person, furnish him with a copy of the draft statement on payment of such charge as the Agency thinks reasonable<sup>27</sup>.

1 le a draft statement under the Water Resources Act 1991 s 21: see PARA 209. As to the meaning of 'inland waters' see PARA 187 note 2. References in Sch 5 (see the text to notes 17-27), in relation to a statement for amending the provision for determining the minimum acceptable flow of any inland waters, to the inland waters to which the statement relates are references to the inland waters to which the proposed amendment relates: Sch 5 para 1(2).

2 As to the Environment Agency see PARA 17.

3 Water Resources Act 1991 s 21(3) (s 21(3), Sch 5 paras 2(3)(h), (4), 3 amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to the meaning of 'abstract' see PARA 192 note 2.

6 Water Resources Act 1991 s 21(3)(a).

7 Water Resources Act 1991 s 21(3)(b). For these purposes, underground strata are related underground strata in relation to any inland waters if: (1) a water undertaker has a right to abstract water from the strata; and (2) it appears to the Agency, having regard to the extent to which the level of water in the strata depends on the flow of those waters, that the exercise of that right may be substantially affected by so much of the draft statement in question as relates to those waters: s 21(8)(a) (s 21(8) amended by the Environment Act 1995 s 120, Sch 22 paras 128, 133(2)). As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.

8 As to the internal drainage boards and districts see PARA 569 et seq.

9 Water Resources Act 1991 s 21(3)(c).

10 As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

11 Water Resources Act 1991 s 21(3)(d). For these purposes and the purposes of Sch 5 para 2(3) (see note 25) inland waters are related inland waters in relation to any other inland waters, where it appears to the Agency that changes in the flow of the other waters may affect the flow of the first-mentioned inland waters: s 21(8)(b) (as amended: see note 7), Sch 5 para 2(5).

12 As to the meaning of 'Wales' see PARA 16 note 2.

13 Water Resources Act 1991 s 21(3)(e) (amended by SI 1997/2971; SI 2002/2626). As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509. Any function expressly referred to in the Water Resources Act 1991 as a function of the Secretary of State for Transport is not transferred, so far as exercisable in relation to Wales, to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30.

14 As to the meaning of 'person' see PARA 13 note 29.

15 le under the Electricity Act 1989 Pt I (ss 3A-64): see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1041 et seq.

16 Water Resources Act 1991 s 21(3)(f) (amended by the Environment Act 1995 s 120, Sch 22 para 133(1)).

17 As to the Secretary of State see PARA 15 note 1.

18 The functions of the Secretary of State under the Water Resources Act 1991 s 21, Sch 5 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. See, however, note 13. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

19 The notice must be published either: (1) at least once in each of two successive weeks, in one or more newspapers circulating in the locality in which the inland waters to which the draft statement relates are situated (Water Resources Act 1991 Sch 5 para 2(2)(a)); or (2) in any other manner which, in any particular case, may be certified by the Secretary of State or where appropriate, the Welsh Ministers to be expedient in that case (Sch 5 para 2(2)(b)).

20 Water Resources Act 1991 Sch 5 para 2(1)(a).

21 Water Resources Act 1991 Sch 5 para 2(1)(b).

22 As to the meaning of 'writing' see PARA 22 note 1.

23 Water Resources Act 1991 Sch 5 para 2(1)(c).

24 As to the service of documents see PARA 22.

25 The specified bodies and persons are: (1) every local authority, joint planning board or National Park authority whose area comprises any inland waters to which the draft statement relates (Water Resources Act 1991 Sch 5 para 2(3)(a) (amended by virtue of SI 1995/2803; SI 1996/1243; SI 2005/421)); (2) any water

undertaker having the right to abstract water from any such inland waters (Water Resources Act 1991 Sch 5 para 2(3)(b)); (3) any other water undertaker which was consulted in relation to the draft statement in pursuance of s 21(3)(b) (see the text to note 7) (Sch 5 para 2(3)(c)); (4) the drainage board for any internal drainage district which comprises any such inland waters or from which water is discharged into any such inland waters (Sch 5 para 2(3)(d)); (5) any navigation authority, harbour authority or conservancy authority having functions in relation to any such waters or any related inland waters (Sch 5 para 2(3)(e)); (6) if any such waters or any related inland waters are tidal waters in relation to which there is no such navigation authority, harbour authority or conservancy authority, the Secretary of State for Transport (Sch 5 para 2(3)(f) (amended by SI 2002/2626)); (7) any person authorised by a licence under the Electricity Act 1989 Pt I (ss 3A-64) to generate electricity who has a right to abstract water from any such waters or related inland waters (Water Resources Act 1991 Sch 5 para 2(3)(g) (amended by the Environment Act 1995 s 120, Sch 22 para 180)); and (8) every person who has given notice to the Agency requesting it to notify him of action taken in connection with the determination of a minimum acceptable flow for any inland waters to which the draft statement relates, and, if the Agency has required him to pay a reasonable charge for being so notified, has paid that charge (Water Resources Act 1991 Sch 5 para 2(3)(h) (as amended: see note 3)). As to the meanings of 'local authority' and 'joint planning board' see PARA 187 note 2. As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

26 Water Resources Act 1991 Sch 5 para 2(4) (as amended: see note 3). The notice must: (1) state that the draft statement has been submitted to the Secretary of State or, where appropriate, the Welsh Ministers (Sch 5 para 2(4)(a)); (2) name the areas in respect of which a copy of a notice is required to be served under Sch 5 para 2(3)(a) (see note 25) (Sch 5 para 2(4)(b)); (3) specify a place where a copy of the draft statement and of any relevant map or plan may be inspected (Sch 5 para 2(4)(c)); and (4) where the notice required by Sch 5 para 2(1) (see the text to notes 17-23) is published in a newspaper, give the name of the newspaper and the date of an issue containing the notice (Sch 5 para 2(4)(d)).

27 Water Resources Act 1991 Sch 5 para 3 (as amended: see note 3).

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## **211. Approval of the draft statement.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may approve the statement relating to the minimum acceptable flow of inland waters<sup>3</sup> either in the form of the draft or in that form as altered in such manner as he or they think fit<sup>4</sup>. Where the Secretary of State or, as the case may be, the Welsh Ministers propose to make any alteration of a statement before approving it<sup>5</sup> and consider that any persons<sup>6</sup> are likely to be adversely affected by it<sup>7</sup>, the Environment Agency<sup>8</sup> must give and publish such additional notices, in such manner, as the Secretary of State or the Welsh Ministers may require<sup>9</sup>.

If, before the end of:

- 348 (1) a period of 28 days<sup>10</sup> beginning with the date of first publication of the notice of the draft statement<sup>11</sup>;
- 349 (2) a period of 25 days from the publication of a notice<sup>12</sup> in the London Gazette<sup>13</sup>;
- or
- 350 (3) any period specified in such additional notices published by the Agency<sup>14</sup>,

notice of an objection is received by the Secretary of State or, where appropriate, the Welsh Ministers from any person on whom a notice is required to be served, or from any other person appearing to the Secretary of State or the Welsh Ministers to be affected by the draft statement (either as prepared in draft or as proposed to be altered)<sup>15</sup>, and the objection is not withdrawn, the Secretary of State or the Welsh Ministers, before approving the statement, must either cause a local inquiry to be held<sup>16</sup>, or afford to the objector and to the Agency an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State or the Welsh Ministers for the purpose<sup>17</sup>.

The approval under these provisions of a draft statement brings into force, on the date specified in that approval, so much of that statement, as approved, as contains provision for determining, amending or replacing the minimum acceptable flow<sup>18</sup> for any inland waters<sup>19</sup>.

Where a statement is approved, whether in the form of the draft proposed by the Agency or with alterations, the Secretary of State or, where appropriate, the Welsh Ministers must give notice to the Agency stating that the statement has been approved, either without alteration or with alterations specified in the notice<sup>20</sup>, and specifying the date (not being earlier than 28 days after the date of that notice) on which the statement is to have effect<sup>21</sup>; and the Agency must forthwith publish the notice<sup>22</sup>. The Agency must keep a copy of every approved statement available at its offices for inspection by the public, free of charge, at all reasonable times<sup>23</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 s 21 and Sch 5, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3     le the draft statement prepared under the Water Resources Act 1991 s 21: see PARA 209. As to the preparation and submission of such statements see PARA 210.

4     Water Resources Act 1991 Sch 5 para 4(1).

5     Water Resources Act 1991 Sch 5 para 4(2)(a).

6     As to the meaning of 'person' see PARA 13 note 29.

7     Water Resources Act 1991 Sch 5 para 4(2)(b).

8     As to the Environment Agency see PARA 17.

9     Water Resources Act 1991 Sch 5 para 4(2) (Sch 5 paras 4, 5 amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the giving of notices see PARA 22.

10    le the period specified in the Water Resources Act 1991 Sch 5 para 2(1)(b): see PARA 210.

11    Water Resources Act 1991 Sch 5 para 4(3)(a).

12    le the notice under the Water Resources Act 1991 Sch 5 para 2(4): see PARA 210.

13    Water Resources Act 1991 Sch 5 para 4(3)(b).

14    Water Resources Act 1991 Sch 5 para 4(3)(c).

15    Water Resources Act 1991 Sch 5 para 4(3).

16    Water Resources Act 1991 Sch 5 para 4(4)(a).

17    Water Resources Act 1991 Sch 5 para 4(4)(b) (as amended: see note 9).

18    'Minimum acceptable flow', in relation to any inland waters, means (except in the Water Resources Act 1991 s 21 (see PARAS 209-210) and s 22 (see PARA 212) and subject to s 23(3) (see PARA 213)) the minimum acceptable flow as for the time being contained in provisions which are in force under s 21(7) in relation to those waters: s 221(1). As to the meaning of 'inland waters' see PARA 187 note 2.

19    Water Resources Act 1991 s 21(7).

20    Water Resources Act 1991 Sch 5 para 5(1)(a).

21    Water Resources Act 1991 Sch 5 para 5(1)(b).

22    Water Resources Act 1991 Sch 5 para 5(1) (as amended: see note 9).

23    Water Resources Act 1991 Sch 5 para 5(2) (as amended: see note 9).

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## **212. Directions to the Environment Agency to consider minimum acceptable flow.**

If the Environment Agency<sup>1</sup> is directed by the Secretary of State<sup>2</sup> or, in relation to Wales, by the Welsh Ministers<sup>3</sup>, to consider whether the minimum acceptable flow for any particular inland waters<sup>4</sup> ought to be determined or reviewed<sup>5</sup>, the Agency must consider that matter as soon as reasonably practicable after being directed to do so<sup>6</sup>.

After considering any such matter, the Agency must submit to the Secretary of State or, where appropriate, the Welsh Ministers with respect to the inland waters in question either<sup>7</sup>:

- 351 (1) a draft statement<sup>8</sup> containing provision for determining, or for amending an existing provision determining, the minimum acceptable flow for those waters<sup>9</sup>; or
- 352 (2) a draft statement that no minimum acceptable flow ought to be determined for those waters or, as the case may require, that the minimum acceptable flow for those waters does not need to be changed<sup>10</sup>.

The provisions with respect to the submission and approval of draft statements containing provision for determining, or for amending an existing provision determining, the minimum acceptable flow for inland waters apply to a draft statement under the above provisions<sup>11</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 s 22, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the meaning of 'inland waters' see PARA 187 note 2.

5 As to the determination and review of minimum acceptable flows see PARA 209.

6 Water Resources Act 1991 s 22(1) (s 22(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 Water Resources Act 1991 s 22(2) (as amended: see note 6).

8 I.e. such a draft statement as is mentioned in the Water Resources Act 1991 s 21(1): see PARA 209.

9 Water Resources Act 1991 s 22(2)(a).

10 Water Resources Act 1991 s 22(2)(b).

11 The provisions of the Water Resources Act 1991 s 21(6), (7) (see PARAS 209-211) apply in relation to a draft statement under s 22(2) as they apply in relation to a draft statement under s 21: s 22(2). Schedule 5 applies in the case of any draft statement prepared under s 21 or s 22: Sch 5 para 1(1). Without prejudice to the generality of Sch 5 para 4 (see PARA 211), the power of the Secretary of State or, where appropriate, the Welsh Ministers under that paragraph to alter a draft statement before approving it includes power to substitute a

statement containing or amending any such provision as is mentioned in s 21(2) (see PARA 209) for such a draft statement as is mentioned in s 22(2)(b) (see the text to note 10): s 22(3).

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### **213. Minimum acceptable level or volume of inland waters.**

Where it appears to the Environment Agency<sup>1</sup>, in the case of any particular inland waters<sup>2</sup>, that it would be appropriate to measure the level or the volume (either instead of or in addition to the flow), the Agency may determine that the provisions of the Water Resources Act 1991 concerning minimum acceptable flows<sup>3</sup> are to apply in relation to those inland waters as if any reference to the flow were, or as the case may be, included a reference to the level or to the volume<sup>4</sup>. Where the Agency makes such a determination with respect to any inland waters, any draft statement prepared<sup>5</sup>, in so far as it relates to those waters, must state<sup>6</sup>: (1) whether the level or the volume is to be measured<sup>7</sup>; and (2) whether it is to be measured instead of, or in addition to, the flow<sup>8</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'inland waters' see PARA 187 note 2.

3 In the Water Resources Act 1991 ss 21, 22: see PARAS 209-212.

4 Water Resources Act 1991 s 23(1) (s 23(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 214 et seq) apply in relation to any inland waters with respect to which a determination has been made under s 23(1) as if any reference in that Chapter to the flow were, or (as the case may be) included, a reference to the level or, as the case may be, the volume: s 23(3).

5 Is prepared for the purposes of the Water Resources Act 1991 s 21 or 22: see PARAS 209, 212.

6 Water Resources Act 1991 s 23(2) (as amended: see note 4).

7 Water Resources Act 1991 s 23(2)(a).

8 Water Resources Act 1991 s 23(2)(b).



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### **(3) CONTROL OF ABSTRACTION AND IMPOUNDING**

#### **(i) Restrictions on Abstraction and Impounding**

##### **214. Restrictions on abstraction.**

Subject to certain statutory provisions<sup>1</sup>, and to any drought order or drought permit<sup>2</sup>, no person<sup>3</sup> must:

- 353 (1) abstract<sup>4</sup> water from any source of supply<sup>5</sup>; or
- 354 (2) cause or permit any other person so to abstract any water<sup>6</sup>,

except in pursuance of a licence<sup>7</sup> granted by the Environment Agency<sup>8</sup> and in accordance with the provisions of that licence<sup>9</sup>. The restriction on abstraction does not apply to any transfer of water from one area of inland waters<sup>10</sup> to another in the course of, or resulting from, any operations carried out by a navigation authority, harbour authority or conservancy authority<sup>11</sup> in the carrying out of their functions as such an authority<sup>12</sup>.

Where by virtue of the above provisions the abstraction of water contained in any underground strata<sup>13</sup> is prohibited except in pursuance of a licence, no person may begin, or cause or permit any other person to begin: (a) to construct any well, borehole or other work by which water may be abstracted from those strata<sup>14</sup>; (b) to extend any such well, borehole or other work<sup>15</sup>; or (c) to install or modify any machinery or apparatus by which additional quantities of water may be abstracted from those strata by means of a well, borehole or other work<sup>16</sup>, unless the following conditions are satisfied<sup>17</sup>:

- 355 (i) the abstraction of the water or, as the case may be, of the additional quantities of water, is authorised by a licence<sup>18</sup>; and
- 356 (ii) either the well, borehole or work as constructed or extended<sup>19</sup>, or the machinery or apparatus as installed or modified<sup>20</sup>, fulfils the requirements of that licence as to the means by which water is authorised to be abstracted<sup>21</sup>.

A person is guilty of an offence<sup>22</sup>: (A) if he contravenes the provisions above<sup>23</sup>; or (B) if he is the holder of a licence for these purposes and, in circumstances not constituting such a contravention, he does not comply with a condition or requirement imposed by the provisions of that licence as for the time being in force<sup>24</sup>.

Except in so far as otherwise expressly provided<sup>25</sup>, the restrictions imposed by the above provisions<sup>26</sup> are not to be construed as:

- 357 (aa) conferring a right of action in any civil proceedings (other than proceedings for the recovery of a fine) in respect of any contravention of those restrictions<sup>27</sup>;
- 358 (bb) affecting any restriction imposed by or under any other enactment<sup>28</sup>, whether contained in a public general Act or in a local or private Act<sup>29</sup>; or
- 359 (cc) derogating from any right of action or other remedy (whether civil or criminal) in proceedings instituted otherwise than under the relevant provisions<sup>30</sup> of the Water Resources Act 1991<sup>31</sup>.

1 le subject to the provisions of the Water Resources Act 1991 Pt II Ch II (ss 24-72). See in particular s 26(1) (text to notes 10-12), ss 27-29 (PARAS 221-223) and s 32 (PARA 224).

2 le a drought order or drought permit under the Water Resources Act 1991 Pt II Ch III (ss 73-81): see PARA 305 et seq.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to the meaning of 'abstract' see PARA 192 note 2.

5 Water Resources Act 1991 s 24(1)(a). As to the meaning of 'source of supply' see PARA 187.

6 Water Resources Act 1991 s 24(1)(b).

7 le a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq. Any reference in Pt II Ch II (ss 24-72) to the doing of anything in pursuance of a licence under those provisions is a reference to its being done:

33 (1) by the holder of such a licence; or

34 (2) by a person acting as a servant or agent of, or otherwise under the authority of, the holder of such a licence,

at a time when the licence is in force and in circumstances such that, if no such licence were in force, the doing of that thing would contravene a restriction imposed by Pt II Ch II (ss 24-72): s 72(3). As to the meaning of 'contravene' see PARA 20 note 5. As to who is the holder of a licence see s 47; and PARA 250.

The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of the granting of a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

8 As to the Environment Agency see PARA 17.

9 Water Resources Act 1991 s 24(1) (amended by the Environment Act 1995 s 120, Sch 22 para 128; SI 1996/593). The restrictions imposed by the Water Resources Act 1991 s 24 have effect notwithstanding anything in any enactment contained in any Act passed before the passing of the Water Resources Act 1963 on 31 July 1963 or in any statutory provision made or issued, whether before or after the passing of that Act, by virtue of such an enactment: s 24(6). 'Statutory provision' means a provision (whether of a general or special nature) which is contained in, or in any document made or issued under, any Act (whether of a general or special nature): s 72(1). An easement at common law is not automatically extinguished by the provisions of s 24: see *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441, CA. As to common law rights of abstraction see PARA 93 et seq.

The restriction on abstraction has effect in relation to abstraction by the Environment Agency as if the references in the Water Resources Act 1991 s 24(1) to a licence were references to a licence granted, or, by virtue of the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, Sch 2 para 6(2) (see PARA 237), deemed to have been granted, to the Agency under the Water Resources Act 1991 s 42 (consideration of called-in applications: see PARA 243): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 14(1). 'Restriction on abstraction' means the restriction imposed by the Water Resources Act 1991 s 24(1): s 72(1).

10 As to the meaning of 'inland waters' see PARA 187 note 2.

11 As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

12 Water Resources Act 1991 s 26(1). As from a day to be appointed there is substituted for this provision the following: Subject to s 26(2) (see below), the restriction on abstraction does not apply to any transfer, without intervening use, of water from inland waters described in the Table below to inland waters so described, if the transfer is in the course of, or results from, any operations carried out by a navigation authority, harbour authority or conservancy authority in the carrying out of their functions as such an authority: s 26(1) (s 26(1), (2) prospectively substituted, (4), (5) prospectively added, by the Water Act 2003 s 5). The transfers in question are: (1) the transfer from a water system of the authority's to the same water system; (2) the transfer from a water system of the authority's to inland waters not forming part of that water system; (3) the transfer from a supply reservoir of the authority's to a water system of the authority's with which that reservoir is connected:

Water Resources Act 1991 s 26(1) Table (as so substituted). Section 26(1) does not apply to a transfer of water from a water system to any inland waters outside that water system in order to: (a) empty a dry dock; or (b) introduce into those inland waters all or part of a quantity of water to be abstracted from any connected inland waters in pursuance of a licence to do so granted under Pt II Ch II (ss 24-72): s 26(2) (as so prospectively substituted). References to an authority's water system are to a water system in relation to which the authority has functions; and to an authority's supply reservoir are to a reservoir belonging to a navigation authority, used for the purposes of supplying that navigation authority's water system, and which does not discharge to any inland waters other than that water system: s 26(4) (as so prospectively added). For these purposes, 'water system' means the canals, the harbours, or the canals and harbours constituting the system in question together with the locks, docks, balancing reservoirs, weirs and other works associated with the system (other than any supply reservoir as described in s 26(4) above), but excluding any part of the system which consists of a navigable river or part of one: s 26(5) (as so prospectively added). At the date at which this volume states the law no such day had been appointed.

13 As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.

14 Water Resources Act 1991 s 24(2)(a).

15 Water Resources Act 1991 s 24(2)(b).

16 Water Resources Act 1991 s 24(2)(c).

17 Water Resources Act 1991 s 24(2).

18 Water Resources Act 1991 s 24(3)(a).

19 Water Resources Act 1991 s 24(2)(b)(i).

20 Water Resources Act 1991 s 24(2)(b)(ii).

21 Water Resources Act 1991 s 24(2)(b).

22 The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000 (Water Resources Act 1991 s 24(5)(a) (amended by the Water Act 2003 s 60(1)), or on conviction on indictment, a fine (Water Resources Act 1991 s 24(5)(b)). As to enforcement notices see PARA 217. As to restrictions on the institution of proceedings see PARA 188. As to offences by bodies corporate see PARA 185.

23 Water Resources Act 1991 s 24(4)(a). The provisions referred to are those of s 24(1), (2): see the text to notes 1-9, 13-17. As to the meaning of 'contravene' see PARA 20 note 5.

24 Water Resources Act 1991 s 24(4)(b).

25 Ie except in so far as the Water Resources Act 1991 otherwise expressly provides and subject to the provisions of the Interpretation Act 1978 s 18 (offences under two or more laws: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1272; **STATUTES** vol 44(1) (Reissue) PARA 1363): see the Water Resources Act 1991 s 70 (amended by the Water Act 2003 s 8(1), (4)).

26 Ie imposed by the Water Resources Act 1991 s 24: see the text to notes 1-9, 13-24.

27 Water Resources Act 1991 s 70(a).

28 As to the meaning of 'enactment' see PARA 14 note 31.

29 Water Resources Act 1991 s 70(b).

30 Ie otherwise than under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

31 Water Resources Act 1991 s 70(c).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(3) CONTROL OF ABSTRACTION AND IMPOUNDING/(i) Restrictions on Abstraction and Impounding/215. Restrictions on impounding.

## **215. Restrictions on impounding.**

Subject to certain statutory provisions<sup>1</sup> and to any drought order or drought permit<sup>2</sup>, no person<sup>3</sup> must:

- 360 (1) begin, or cause or permit any other person to begin, to construct or alter any impounding works<sup>4</sup> at any point in any inland waters which are not discrete waters<sup>5</sup>; or
- 361 (2) cause or permit the flow of any inland waters which are not discrete waters to be obstructed or impeded at any point by means of impounding works<sup>6</sup>,

unless, in either case, the following conditions are satisfied<sup>7</sup>. The conditions are that: (a) a licence<sup>8</sup> granted by the Environment Agency<sup>9</sup> to obstruct or impede the flow of those inland waters at that point by means of impounding works is in force<sup>10</sup>; (b) the impounding works will not, or, as the case may be, do not, obstruct or impede the flow of the inland waters except to the extent, and in the manner, authorised by the licence<sup>11</sup>; and (c) any other conditions or requirements imposed by the provisions, as for the time being in force, of the licence, whether as to the provision of compensation water or otherwise, are complied with<sup>12</sup>.

A person is guilty of an offence<sup>13</sup> if: (i) he contravenes the provisions above<sup>14</sup>; or (ii) he is the holder of a licence<sup>15</sup> for these purposes and he does not comply with a condition or requirement imposed by the provisions, as for the time being in force, of that licence<sup>16</sup>.

Except in so far as otherwise expressly provided<sup>17</sup>, the restrictions imposed by the above provisions<sup>18</sup> are not to be construed as:

- 362 (A) conferring a right of action in any civil proceedings (other than proceedings for the recovery of a fine) in respect of any contravention of those restrictions<sup>19</sup>;
- 363 (B) affecting any restriction imposed by or under any other enactment<sup>20</sup>, whether contained in a public general Act or in a local or private Act<sup>21</sup>; or
- 364 (C) derogating from any right of action or other remedy (whether civil or criminal) in proceedings instituted otherwise than under the relevant provisions<sup>22</sup> of the Water Resources Act 1991<sup>23</sup>.

Subject as provided<sup>24</sup>, the restriction on impounding works<sup>25</sup> does not apply in respect of any impounding works if either the construction or alteration of those works<sup>26</sup>, or the obstruction or impeding of the flow of the inland waters resulting from the construction or alteration of the works<sup>27</sup>, is authorised (in whatsoever terms, and whether expressly or by implication) by virtue of any specified statutory provision<sup>28</sup>. Nor does the restriction on impounding works apply to the construction or alteration of impounding works in the course of the performance by a navigation authority, harbour authority or conservancy authority<sup>29</sup> of their functions as such an authority<sup>30</sup>.

1    Ie subject to the provisions of the Water Resources Act 1991 ss 25(2)-72: see below and PARA 216 et seq.

2    Ie any drought order or drought permit under the Water Resources Act 1991 Pt II Ch III (ss 73-81): see PARA 305 et seq.

3 As to the meaning of 'person' see PARA 13 note 29.

4 'Impounding works' means either: (1) any dam, weir or other works in any inland waters by which water may be impounded; or (2) any works for diverting the flow of any inland waters in connection with the construction or alteration of any dam, weir, or other works falling within head (1): Water Resources Act 1991 ss 25(8), 72(1). In relation to impounding works, references to alteration include the removal or partial removal of those works, and cognate expressions must be construed accordingly: s 25(9) (added by the Water Act 2003 ss 2(1), (5)). Subject to the Water Act 2003 s 3 (see PARA 216), the amendments made by that Act to the Water Resources Act 1991 s 25 apply, as regards any act or omission after 1 April 2006 (ie the day on which they came into force), with respect to impounding works whenever constructed: Water Act 2003 s 2(10); Water Act 2003 (Commencement No 6, Transitional Provisions and Savings) Order 2006, SI 2006/984, art 2(b), (c), (s). As to the meaning of 'inland waters' see PARA 187 note 2. 'Flow' must be construed subject to the Water Resources Act 1991 s 23(3) (see PARA 213): s 72(1).

5 Water Resources Act 1991 s 25(1)(a) (s 25(1) substituted, 25(1A) added, by the Water Act 2003 s 2(1), (2)). As to the meaning of 'discrete waters' see PARA 187 note 4.

6 Water Resources Act 1991 s 25(1)(b) (as substituted: see note 5).

7 Water Resources Act 1991 s 25(1) (as substituted: see note 5).

8 Ie a licence granted under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq. A licence which has been granted in respect of particular impounding works, for the purposes of s 25, before 1 April 2006 (ie the coming into force of the Water Act 2003 s 2(2)) and which is in force, is to be taken to satisfy the condition referred to in the Water Resources Act 1991 s 25(1A)(a), in respect of those impounding works: Water Act 2003 s 2(6); Water Act 2003 (Commencement No 6, Transitional Provisions and Savings) Order 2006, SI 2006/984, art 2(b).

9 As to the Environment Agency see PARA 17.

10 Water Resources Act 1991 s 25(1A)(a) (as added: see note 5). The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of the granting of a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

11 Water Resources Act 1991 s 25(1A)(b) (as added: see note 5).

12 Water Resources Act 1991 s 25(1A)(c) (as added: see note 5).

13 The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000 (Water Resources Act 1991 s 25(3)(a) (amended by the Water Act 2003 s 60(1)) or, on conviction on indictment, a fine (Water Resources Act 1991 s 25(3)(b)). As to enforcement notices see PARA 217. As to restrictions on the institution of proceedings see PARA 188. As to offences by bodies corporate see PARA 185.

14 Water Resources Act 1991 s 25(2)(a). As to the meaning of 'contravene' see PARA 20 note 5.

15 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

16 Water Resources Act 1991 s 25(2)(b) (amended by the Water Act 2003 ss 2(1), (3), 101(2), Sch 9 Pt 1).

17 Ie except in so far as the Water Resources Act 1991 otherwise expressly provides and subject to the provisions of the Interpretation Act 1978 s 18 (offences under two or more laws: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1272; **STATUTES** vol 44(1) (Reissue) PARA 1363): see the Water Resources Act 1991 s 70 (amended by the Water Act 2003 s 8(1), (4)).

18 Ie imposed by the Water Resources Act 1991 s 25: see the text to notes 1-16. See also the text to notes 24-28.

19 Water Resources Act 1991 s 70(a).

20 As to the meaning of 'enactment' see PARA 14 note 31.

21 Water Resources Act 1991 s 70(b).

22 Ie otherwise than under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

23 Water Resources Act 1991 s 70(c).

24 The provisions of the Water Resources Act 1991 Pt II Ch II (ss 24-72) have effect in accordance with s 25(7) below where by virtue of any such provision as is mentioned in s 25(5) and is for the time being in force: (1) any water undertaker or sewerage undertaker to which rights under that provision have been transferred in accordance with a scheme under the Water Act 1989 Sch 2 (see PARA 108) or the Water Industry Act 1991 Sch 2 (see PARA 141); or (2) any other person, is authorised (in whatsoever terms, and whether expressly or by implication) to obstruct or impede the flow of any inland waters by means of impounding works (whether those works have already been constructed or not): Water Resources Act 1991 s 25(6). Where s 25(6) applies, the provisions of Pt II Ch II have effect (with the necessary modifications), where the reference is to the revocation or variation of a licence under that Chapter, as if any reference in those provisions to a licence under that Chapter included a reference to the authorisation mentioned in that subsection, and any reference to the holder of such a licence included a reference to the undertaker or other person so mentioned: s 25(7). As to the meanings of 'water undertaker' and 'sewerage undertakers' see PARA 137 note 4.

25 The 'restriction on impounding works' means the restriction imposed by the Water Resources Act 1991 s 25(1)(a) and (b) (see heads (1) and (2) in the text): s 72(1) (definition amended by the Water Act 2003 s 2(9)).

26 Water Resources Act 1991 s 25(5)(a).

27 Water Resources Act 1991 s 25(5)(b).

28 Water Resources Act 1991 s 25(5) (amended by the Water Act 2003 s 2(1), (4)). The statutory provision referred to is such statutory provision as at 1 December 1991 (ie the coming into force of the Water Resources Act 1991) was an alternative statutory provision for the purposes of the Water Resources Act 1963 s 36(2) (repealed): Water Resources Act 1991 ss 25(5), 225(2). 'Alternative statutory provision' was defined in the Water Resources Act 1963 as a statutory provision which was not contained in, or made or issued under the Water Resources Act 1963 or the Water Act 1958 (repealed), and was passed, made or issued either: (1) before the end of the initial period (see the Water Resources Act 1963 s 23(1) (repealed)), whether before or after the passing of the Water Resources Act 1963 (repealed) (on 31 July 1963); or (2) after the end of that period, but in pursuance of an application made to the former Minister of Housing and Local Government or the Secretary of State before the end of that period, whether before or after the passing of the Water Resources Act 1963 (repealed): s 36(3) (repealed).

Subject to the Water Resources Act 1991 s 25(5), the restrictions imposed by s 25 have effect notwithstanding anything in any enactment contained in any Act passed before the passing of the Water Resources Act 1963 on 31 July 1963 or in any statutory provision made or issued, whether before or after the passing of that Act, by virtue of such an enactment: Water Resources Act 1991 s 25(4).

29 As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

30 Water Resources Act 1991 s 26(2). As from a day to be appointed there is substituted for this provision the following: the restriction on impounding works does not apply to: (1) the construction or alteration of impounding works; or (2) the obstruction or impeding of inland waters by means of impounding works, in the course of the performance by a navigation authority, harbour authority or conservancy authority of their functions as such an authority, unless the construction, alteration, obstruction or impeding affects any inland waters in relation to which the authority does not have functions: s 26(3) (prospectively added by the Water Act 2003 s 5). At the date at which this volume states the law no such day had been appointed.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(3) CONTROL OF ABSTRACTION AND IMPOUNDING/(i) Restrictions on Abstraction and Impounding/216. Effect of restriction on impounding on existing impounding works.

## **216. Effect of restriction on impounding on existing impounding works.**

Except as provided below<sup>1</sup>, the restriction on causing or permitting the flow of any inland waters<sup>2</sup> which are not discrete waters to be obstructed or impeded at any point by means of impounding works<sup>3</sup> does not apply in respect of any existing unlicensed impounding works<sup>4</sup>. With respect to any existing unlicensed impounding works to which that restriction would otherwise apply, the Environment Agency<sup>5</sup> may serve a notice<sup>6</sup> on any relevant person<sup>7</sup> requiring him to apply for a licence<sup>8</sup>. If that person fails to apply for such a licence within:

365 (1) the period of 28 days beginning with the date of service of the notice, or, if an appeal is brought<sup>9</sup> and the appeal is dismissed, the date when the decision of the appropriate authority<sup>10</sup> is notified to that person<sup>11</sup>; or

366 (2) such extended period as may be agreed in writing<sup>12</sup> between the Agency and that person<sup>13</sup>,

that restriction applies in respect of the impounding works from the expiry of that period<sup>14</sup>.

If the relevant person on whom a notice is served is aggrieved by the service of that notice, he may by notice appeal to the appropriate authority<sup>15</sup>. Where such an appeal is brought, the appropriate authority may allow or dismiss the appeal or reverse or vary any part of the decision of the Agency, whether the appeal relates to that part of the decision or not<sup>16</sup>; and the decision of the appropriate authority is final<sup>17</sup>.

Without prejudice to the Agency's power to serve a notice requiring a relevant person to apply for a licence<sup>18</sup>, where it appears to the Agency to be necessary for the protection of the environment<sup>19</sup> or the performance of its functions in connection with the management of water resources<sup>20</sup>, the Agency may serve a works notice<sup>21</sup> on any relevant person with respect to any existing unlicensed impounding works<sup>22</sup>.

If a person on whom the Agency serves such a works notice fails to comply with any of its requirements, he is guilty of an offence<sup>23</sup>. If the Agency is of the opinion that proceedings for such an offence would afford an ineffectual remedy against a person who has failed to comply with the requirements of a works notice, the Agency may take proceedings in the High Court for the purpose of securing compliance with the notice<sup>24</sup>. If a person on whom a works notice has been served fails to comply with any of its requirements, the Agency may do what that person was required to do and may recover from him any costs or expenses reasonably incurred by the Agency in doing it<sup>25</sup>.

Certain provisions of the Water Resources Act 1991 apply to the above provisions<sup>26</sup>.

1 le except as provided in the Water Act 2003 s 3(3): see the text to notes 9-14.

2 The Water Act 2003 ss 3, 4 do not apply to certain inland waters unless they are in England: see the Environment Act 1995 s 6(3), (3A); and PARA 188 note 16.

3 le the restriction in the Water Resources Act 1991 s 25(1)(b): see PARA 215. Nothing in the Water Act 2003 s 3(1)-(10) affects the application of the Water Resources Act 1991 s 25(1)(a) (see PARA 215) to the alteration, after the effective date, of any existing unlicensed impounding works: Water Act 2003 s 3(11). 'Existing unlicensed impounding works' means unlicensed impounding works, the construction of which was begun before the effective date; 'unlicensed impounding works' means impounding works (as defined in the Water

Resources Act 1991 s 25(8): see PARA 215 note 4) in respect of which (1) no licence or authorisation of the kind referred to in s 25 (see PARA 215) was in force immediately before the effective date; and (2) no such licence has been granted since that date; and 'effective date' means 1 April 2006 (ie the date when the Water Act 2003 s 2 came into force): ss 3(12), 4(8); Water Act 2003 (Commencement No 6, Transitional Provisions and Savings) Order 2006, SI 2006/984, art 2(b).

4 Water Act 2003 s 3(1).

5 As to the Environment Agency see PARA 17.

6 The Water Resources Act 1991 s 220 applies to the service of documents: see the Water Act 2003 s 33(4); and PARA 22.

7 'Relevant person' means any person who appears to the Environment Agency to have responsibility in respect of the impounding works in question: Water Act 2003 ss 3(12), 4(8). As to the meaning of 'person' see PARA 13 note 29.

8 Water Act 2003 s 3(2). 'Licence' means a licence of the kind referred to in the Water Resources Act 1991 s 25 (see PARA 215): Water Act 2003 s 3(12). On an application for a licence in respect of any existing unlicensed impounding works, the Water Resources Act 1991 s 39(1) (see PARA 240) applies only to the extent that the obstruction or impeding of the flow of inland waters which would, if the licence were granted, be authorised by that licence is to differ in any material respect from that which was taking place at the time the application was made: Water Act 2003 s 3(8). If a licence granted in respect of existing unlicensed impounding works is revoked or varied in the circumstances mentioned in the Water Resources Act 1991 s 61 (compensation where licence modified on direction of the Secretary of State: see PARA 263), s 61(3) applies as if that licence had been granted when construction of the impounding works began and had remained in force since then: Water Act 2003 s 3(9). Section 3(9) does not, however, apply to a licence granted in respect of existing unlicensed impounding works if, before the effective date, there had occurred any contravention of the Water Resources Act 1991 s 25(1) (see PARA 215) in respect of those impounding works: Water Act 2003 s 3(10).

9 ie under the Water Act 2003 s 3(4): see the text to note 15.

10 'Appropriate authority' means: (1) in relation to Wales, the Welsh Ministers; and (2) in relation to England, the Secretary of State: Water Act 2003 ss 3(12), 4(8); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Act 2003 s 3 were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'England' see PARA 19 note 8. As to the Secretary of State see PARA 15 note 1.

11 Water Act 2003 s 3(3)(a).

12 As to the meaning of 'writing' see PARA 22 note 1.

13 Water Act 2003 s 3(3)(b).

14 Water Act 2003 s 3(3).

15 Water Act 2003 s 3(4). The appropriate authority may by regulations make provision with respect to the manner in which notices of appeal must be served, the period within which such notices must be served, and the procedure on any such appeal: s 3(5). Section 3(4)-(6) are subject to the Environment Act 1995 s 114 (power of Secretary of State to delegate or refer in connection with appeals: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65): Water Act 2003 s 3(7). As to the making of regulations see PARA 21.

Any notice of appeal must be served within 21 days beginning on the date of service of the notice served under s 3(2) (see the text to notes 5-8): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 33(1). The Anti-Pollution Works Regulations 1999, SI 1999/1006, regs 3-6 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 327) apply in relation to an appeal as if in those regulations, references to the Secretary of State were references to the appropriate authority; and in reg 3, references to a notice of appeal were references to a notice of appeal under the Water Act 2003 s 3(4): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 33(2).

16 Water Act 2003 s 3(6)(a).

17 Water Act 2003 s 3(6)(b). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

18 ie the power under the Water Act 2003 s 3(2): see the text to notes 5-8.

19 Water Act 2003 s 4(1)(a).



20 Water Act 2003 s 4(1)(b). As to the general duty of the Agency in relation to the conservation and use of water resources see PARA 188.

21 A 'works notice' is a notice requiring the person on whom it is served to carry out such works or operations in relation to the impounding works as: (1) appear to the Agency to be required for the purposes mentioned in the Water Act 2003 s 4(1)(a) or (b) (see the text to notes 19-20) (s 4(2)(a)); and (2) are specified in the notice (s 4(2)(b)).

22 Water Act 2003 s 4(1). The existing unlicensed impounding works referred to are those of the kind mentioned in s 3(2) (see the text to notes 5-8): s 4(1). The following provisions of the Water Resources Act 1991 apply in relation to works notices under the Water Act 2003 s 4 as they apply in relation to notices referred to in those provisions: (1) the Water Resources Act 1991 s 25A(5)-(9) (see PARA 217); and (2) ss 161B, 161C (see PARAS 218, 219), including any power to make regulations or give directions, but references in those provisions to the Secretary of State must be treated as references to the appropriate authority: Water Act 2003 s 4(3).

A works notice must: (1) state the name and address of the person on whom the notice is served; (2) specify the impounding works to which the notice relates; (3) specify the works or operations required to be carried out and give the Agency's reasons for requiring those works or operations to be carried out; (4) state why it appears to the Agency to be necessary to serve the notice; (5) inform the person on whom the notice is served of (a) his right to appeal under the Water Resources Act 1991 s 161C (appeals against works notices: see PARA 219), as applied by the Water Act 2003 s 4(3), and of the time for appealing; and (b) the requirements imposed by the Anti-Pollution Works Regulations 1999, SI 1999/1006, reg 3 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 327), as applied by the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 28, in relation to the exercise of that right; and (6) set out the provisions of the Water Act 2003 s 4(4)-(7): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 27. The Anti-Pollution Works Regulations 1999, SI 1999/1006, regs 3-7 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 326, 327) apply in relation to a works notice under the Water Act 2003 s 4, as they apply to a works notice under the Water Resources Act 1991 s 161A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 326): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 28.

23 Water Act 2003 s 4(4). The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000 (s 4(5)(a)), or on conviction on indictment, a fine (s 4(5)(b)).

24 Water Act 2003 s 4(7). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

25 Water Act 2003 s 4(6).

26 The Water Resources Act 1991 s 120 (contributions between the Agency and certain other authorities: see PARA 189); s 158 (works agreements for water resources purposes: see PARA 461); s 201 (power to require information in respect of water resources functions), as substituted by the Water Act 2003 s 70 (see PARA 195); the Water Resources Act 1991 s 216 (enforcement; powers and duties: see PARA 188); s 222 (Crown application: see PARA 20), as in force immediately before the substitution made by the Environment Act 1995 Sch 21 para 2(4) and for so long as the substituted Water Resources Act 1991 s 222 does not apply to Pt II; apply to (or in relation to) the Water Act 2003 ss 3 and 4 (the applicable sections) as they apply to (or in relation to) the Water Resources Act 1991 Pt II (ss 20-81) or, as the case may be, Pt II Ch II (ss 24-72): see the Water Act 2003 s 33(1) (a), (b), (3). Accordingly, in those provisions of the Water Resources Act 1991: (1) references to Pt II of, or to Pt II Ch II of, the Water Resources Act 1991 are to be read as if the applicable sections were included in that Part or that Chapter; (2) references to the related water resources provisions are to be read as if those provisions meant, in relation to the applicable sections, those provisions of the Water Resources Act 1991 other than s 222, and (3) references to the Secretary of State are to be read as references to the appropriate authority (as defined, in each case, in the applicable section in question): Water Act 2003 s 33(2). References in the Water Resources Act 1991 to the functions (generally) of the Environment Agency are to be read as including the Agency's functions under the applicable sections: Water Act 2003 s 33(5). As to the meaning of 'related water resources provisions' see PARA 188 note 15.

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## **217. Enforcement notices.**

Where it appears to the Environment Agency<sup>1</sup> that a person<sup>2</sup> is:

- 367 (1) in breach of the restrictions<sup>3</sup> on abstracting or on impounding<sup>4</sup>; or
- 368 (2) is the holder of a licence<sup>5</sup> and has not complied with a condition or requirement imposed by the provisions, as for the time being in force, of that licence<sup>6</sup>,

the Agency is entitled to serve<sup>7</sup> an enforcement notice on him<sup>8</sup> if it appears to the Agency that the breach or failure to comply is causing or is likely to cause significant damage to the environment<sup>9</sup>.

An enforcement notice is a notice requiring the person on whom it is served: (a) to cease his breach of the restrictions on abstracting or on impounding, or to comply with the condition or requirement in question<sup>10</sup>; and (b) to carry out any works or operations specified in the notice<sup>11</sup>. The works or operations which may be specified are works or operations which it appears to the Agency will be appropriate for the purpose of remedying or mitigating the effects of the breach or failure to comply, and may include: (i) works or operations for the purpose, so far as it is reasonably practicable to do so, of restoring any affected waters, including any flora and fauna dependent on them, to their state immediately before the breach or failure to comply<sup>12</sup>; and (ii) in the case of a breach of the restriction on impounding<sup>13</sup>, the removal of any unauthorised impounding works<sup>14</sup> or the reversal of any unauthorised alteration to impounding works<sup>15</sup>. An enforcement notice must specify the periods within which the person on whom it is served must do each of the things specified in the notice<sup>16</sup>.

The Secretary of State or, where appropriate, the Welsh Ministers may, if he or they think fit in relation to any person, give directions to the Agency as to whether or how it should exercise its powers under the above provisions<sup>17</sup>.

In proceedings for any offence in relation to the restrictions on abstraction or on impounding<sup>18</sup> against a person upon whom an enforcement notice has been served, the following are not to be taken as evidence that he has committed the offence: (A) the fact that an enforcement notice has been served on him<sup>19</sup>; (B) the fact that he does not appeal against it<sup>20</sup>; (C) the fact that on an appeal against it the notice is confirmed, whether with or without modifications<sup>21</sup>.

If a person on whom the Agency serves an enforcement notice fails to comply with any of its requirements, he is guilty of an offence<sup>22</sup>. If the Agency is of the opinion that proceedings for such an offence would afford an ineffectual remedy against a person who has failed to comply with the requirements of an enforcement notice, the Agency may take proceedings in the High Court for the purpose of securing compliance with the notice<sup>23</sup>. If a person on whom an enforcement notice has been served fails to comply with any of its requirements, the Agency may do what that person was required to do and may recover from him any costs or expenses reasonably incurred by the Agency in doing it<sup>24</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'person' see PARA 13 note 29.

3 le in breach of the Water Resources Act 1991 s 24(1) or (2) (see PARA 214) or s 25(1) (see PARA 215).

4 Water Resources Act 1991 s 25A(1)(a) (ss 25A, 25C added by the Water Act 2003 s 30).

5 le for the purposes of the Water Resources Act 1991 s 24 (see PARA 214) or s 25 (see PARA 215) a holder of a licence under Pt II Ch II (ss 24-72).

6 Water Resources Act 1991 s 25A(1)(b) (as added: see note 4).

7 Before serving an enforcement notice on any person, the Agency must take reasonable steps to consult that person about the works or operations which are to be specified in the notice: Water Resources Act 1991 s 25A(6) (as added: see note 4). An enforcement notice is not invalid, or invalidly served, merely because of a failure to comply with s 25A(6) or with regulations made by virtue of s 25A(7)(b) (see note 8): s 25A(8) (as so added). As to the service of documents see PARA 22. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

8 See the Water Resources Act 1991 s 25A(1) (as added: see note 4). The Secretary of State or, in relation to Wales, the Welsh Ministers, may by regulations make provision for or in connection with: (1) the form or content of enforcement notices (s 25A(7)(a) (as so added)); (2) requirements for consultation, before the service of an enforcement notice, with persons other than the person upon whom the notice is to be served (s 25A(7)(b) (as so added)); (3) steps to be taken for the purposes of any consultation required under s 25A(6) (see note 7) or regulations made by virtue of head (2) above (s 25A(7)(c) (as so added)); (4) any other steps of a procedural nature which are to be taken in connection with, or in consequence of, the service of an enforcement notice (s 25A(7)(d) (as so added)). The functions of the Secretary of State under the Water Resources Act 1991 s 25A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

An enforcement notice must: (a) state the name and address of the person on whom the notice is served; (b) describe the breach or failure to comply to which the notice relates; (c) describe the significant damage to the environment which is being, or is likely to be, caused by that breach or failure; (d) identify the source of supply or inland waters that are subject, or likely to be subject, to that damage; (e) specify the works or operations (if any) required to be carried out and give the Agency's reasons for requiring those works or operations to be carried out; (f) inform the person on whom the notice is served of his right to appeal under s 161C as applied by s 25B (see PARA 219), including the time for appealing, and the requirements imposed by Anti-Pollution Works Regulations 1999, SI 1999/1006, reg 3 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 327) as applied by the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 28 (see PARA 219), in relation to the exercise of that right; and (g) set out the provisions of the Water Resources Act 1991 s 25C (see the text to notes 22-24): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 25.

9 See the Water Resources Act 1991 s 25A(2) (as added: see note 4). Sections 25A, 25C do not apply in relation to any breach or failure to comply by the Agency, being a breach of the kind referred to in s 25A(1)(a) or (b) (see the text to notes 1-6): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 26.

10 Water Resources Act 1991 s 25A(3)(a) (as added: see note 4).

11 Water Resources Act 1991 s 25A(3)(b) (as added: see note 4). As to rights of entry on land for the purposes of complying with an enforcement notice see PARA 218.

12 Water Resources Act 1991 s 25A(4)(a) (as added: see note 4).

13 le a breach of the Water Resources Act 1991 s 25(1): see PARA 215.

14 As to the meaning of 'impounding works' see PARA 215 note 4.

15 Water Resources Act 1991 s 25A(4)(b) (as added: see note 4).

16 Water Resources Act 1991 s 25A(5) (as added: see note 4).

17 Water Resources Act 1991 s 25A(9) (as added: see note 4).

18 le any offence under the Water Resources Act 1991 s 24 (see PARA 214) or s 25 (see PARA 215).

19 Water Resources Act 1991 s 25A(10)(a) (as added: see note 4).

20 Water Resources Act 1991 s 25A(10)(b) (as added: see note 4). As to appeals see PARA 219.

21 Water Resources Act 1991 s 25A(10)(c) (as added: see note 4). As to the meaning of 'modifications' see PARA 141 note 20.

22 Water Resources Act 1991 s 25C(1) (as added: see note 4). The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000 (s 25C(2)(a) (as so added)); on conviction on indictment, a fine (s 25C(2)(b) (as so added)).

<sup>23</sup> Water Resources Act 1991 s 25C(4) (as added: see note 4). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

24 Water Resources Act 1991 s 25C(3) (as added: see note 4).

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## **218. Rights of entry.**

An enforcement notice<sup>1</sup> may require a person<sup>2</sup> to carry out works or operations in relation to any land<sup>3</sup> or waters notwithstanding that he is not entitled to carry out those works or operations<sup>4</sup>. Any person whose consent is required before any works or operations required by an enforcement notice may be carried out must grant, or join in granting, such rights in relation to any land or waters as will enable the person on whom the enforcement notice is served to comply with any requirements imposed by the notice<sup>5</sup>.

Before serving an enforcement notice, the Agency must reasonably endeavour to consult<sup>6</sup> every person who appears to it: (1) to be the owner<sup>7</sup> or occupier of any relevant land<sup>8</sup>; and (2) to be a person who might be required<sup>9</sup> to grant, or join in granting, any rights<sup>10</sup> concerning the rights which that person may be so required to grant<sup>11</sup>.

A person who grants, or joins in granting, any rights<sup>12</sup> is entitled, on making an application within such period as may be prescribed by regulations<sup>13</sup> and in such manner as may be prescribed to such person as may be prescribed, to be paid by the person on whom the enforcement notice in question is served compensation of such amount as may be determined in such manner as may be prescribed<sup>14</sup>. Compensation is payable for loss and damage of the following descriptions<sup>15</sup>:

- 369 (a) any depreciation in the value of any relevant interest<sup>16</sup> to which the grantor<sup>17</sup> is entitled which results from the grant of the right<sup>18</sup>;
- 370 (b) loss or damage, in relation to any relevant interest to which he is entitled, which is attributable to the grant of the right or the exercise of it, does not consist of depreciation in the value of that interest, and is loss or damage for which he would have been entitled to compensation by way of compensation for disturbance, if that interest had been acquired compulsorily under the Acquisition of Land Act 1981, in pursuance of a notice to treat served on the date on which the grant of the right was made<sup>19</sup>;
- 371 (c) damage to, or injurious affection of, any interest in land to which the grantor is entitled which is not a relevant interest and which results from the grant of the right or from the exercise of it<sup>20</sup>;
- 372 (d) any loss or damage sustained by the grantor, other than in relation to any interest in land to which he is entitled, which is attributable to the grant of the right or the exercise of it<sup>21</sup>; and
- 373 (e) the amount of any valuation and legal expenses reasonably incurred by the grantor in granting the right and in the preparation of the application for and the negotiation of the amount of compensation<sup>22</sup>.

1 As to enforcement notices see PARA 217.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'land' see PARA 14 note 21.

4 Water Resources Act 1991 s 161B(1) (s 161B added by the Environment Act 1995 s 120, Sch 22 para 162; and applied by the Water Resources Act 1991 s 25B). Section 161B (including any power to make regulations)

applies in relation to enforcement notices as it applies in relation to works notices under s 161A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 324): s 25B (added by the Water Act 2003 s 30).

5 Water Resources Act 1991 s 161B(2) (as added and applied: see note 4).

6 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

7 As to the meaning of 'owner' see PARA 22 note 9.

8 Water Resources Act 1991 s 161B(3)(a) (as added and applied: see note 4). 'Relevant land' means: (1) any land or waters in relation to which the works notice in question requires, or may require, works or operations to be carried out; or (2) any land adjoining or adjacent to that land or those waters: s 161B(7) (as so added and applied).

9 le by the Water Resources Act 1991 s 161B(2): see the text to note 5.

10 Water Resources Act 1991 s 161B(3)(b) (as added and applied: see note 4).

11 Water Resources Act 1991 s 161B(3) (as added and applied: see note 4). An enforcement notice must not be regarded as invalid, or as invalidly served, by reason only of any failure to comply with the requirements of s 161B(3): s 161B(4) (as so added and applied).

12 le pursuant to the Water Resources Act 1991 s 161B(2): see the text to note 5.

13 As to the making of regulations see PARA 21.

14 Water Resources Act 1991 s 161B(5) (as added and applied: see note 4). 'Prescribed' means prescribed by regulations: see the Water Resources Act 1991 s 221(1). Without prejudice to the generality of the regulations that may be made by virtue of s 161B(5), such regulations may: (1) provide for the basis on which any amount to be paid by way of compensation under s 161B is to be assessed; (2) without prejudice to the generality of head (1) above, provide for such compensation to be payable in respect of any effect of any rights being granted, or any consequence of the exercise of any rights which have been granted; (3) provide for the times at which any entitlement to compensation is to arise or at which any such compensation is to become payable; (4) provide for the persons or bodies by whom, and the manner in which, any dispute as to whether any, and (if so) how much and when, compensation is payable, or as to the person to or by whom it must be paid, is to be determined; (5) provide for when or how applications may be made for compensation; (6) without prejudice to the generality of head (4) above, provide for when or how applications may be made for the determination of any such disputes as are mentioned in that head; (7) without prejudice to the generality of heads (5) and (6) above, prescribe the form in which any such applications as are mentioned in those paragraphs are to be made; (8) make provision similar to any provision made by Sch 19 para 8 (see PARA 469); (9) make different provision for different cases, including different provision in relation to different persons or circumstances; (10) include such incidental, supplemental, consequential or transitional provision as the Secretary of State or, in relation to Wales, the Welsh Ministers consider appropriate: s 161B(6) (as so added and applied; and substituted by SI 2007/3538). The functions of the Secretary of State under the Water Resources Act 1991 s 161B, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

The Anti-Pollution Works Regulations 1999, SI 1999/1006, reg 7 applies in relation to an enforcement notice under the Water Resources Act 1991 s 25A (see PARA 217) as it applies to a works notice under s 161A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 324): see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 28. An application for compensation must be made within the period beginning with the date of the grant of the rights in respect of which compensation is claimed and ending on whichever is the latest of the following dates: (a) 12 months after the date of the grant of those rights; (b) where there is an appeal against the enforcement notice which imposed the requirements in relation to which those rights were granted, 12 months after the date on which the appeal is determined or withdrawn; or (c) six months after the date on which the rights were first exercised: Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 2. An application for compensation must be made in writing and delivered at or sent by pre-paid post to the last known address for correspondence of the person to whom the right was granted and must contain: (i) a copy of the grant of rights in respect of which the grantor is applying for compensation and of any plans attached to such grant; (ii) a description of the exact nature of any interest in land in respect of which compensation is applied for; and (iii) a statement of the amount of compensation applied for, distinguishing the amounts applied for under each of heads (a)-(e) in the text and showing how the amount applied for under each head has been calculated: Anti-Pollution Works Regulations 1999, SI 1999/1006,

Schedule para 3. As to the meaning of 'month' see PARA 23 note 10. As to the meaning of 'writing' see PARA 22 note 1.

15 Interest is payable in the case of so much of the compensation as is payable: (1) by virtue of head (a) in the text, from the date of the depreciation; (2) by virtue of head (b), (c), or (d) in the text, from the date on which the loss is sustained or the damage done, or where injurious affection is sustained, the date of the injurious affection; (3) by virtue of head (e) in the text, on the date on which the expenses become payable: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58). Payments on account of compensation or interest may be made: see the Planning and Compensation Act 1991 s 80(2), (3).

16 'Relevant interest' means an interest in land out of which a right has been granted or which is bound by a right granted: Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 1.

17 'Grantor' means the person who grants, or joins in granting, any right pursuant to the Water Resources Act 1991 s 161B(2) (see the text to note 5): Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 1.

18 Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 4(a).

19 Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 4(b). As to the compulsory acquisition of land under the Acquisition of Land Act 1981 see **COMPULSORY ACQUISITION OF LAND**.

20 Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 4(c).

21 Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 4(d).

22 Anti-Pollution Works Regulations 1999, SI 1999/1006, Schedule para 4(e).

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## **219. Appeals against enforcement notices.**

A person<sup>1</sup> on whom an enforcement notice<sup>2</sup> is served may, within the period of 21 days beginning with the day on which the notice is served, appeal against the notice to the Secretary of State<sup>3</sup> or, in relation to Wales<sup>4</sup>, the Welsh Ministers<sup>5</sup>. On any such appeal the Secretary of State or, where appropriate, the Welsh Ministers:

- 374 (1) must quash the notice, if they are satisfied that there is a material defect in the notice<sup>6</sup>; but
- 375 (2) subject to that, may confirm the notice, with or without modification, or quash it<sup>7</sup>.

The Secretary of State or, where appropriate, the Welsh Ministers may by regulations<sup>8</sup> make provision with respect to the grounds on which appeals may be made<sup>9</sup>, or the procedure on any such appeal<sup>10</sup>. The regulations may (among other things): (a) include provisions comparable to those in the Public Health Act 1936<sup>11</sup> relating to appeals against notices requiring the execution of works<sup>12</sup>; (b) prescribe the cases in which an enforcement notice is, or is not, to be suspended until the appeal is decided, or until some other stage in the proceedings<sup>13</sup>; (c) prescribe the cases in which the decision on an appeal may in some respects be less favourable to the appellant than the enforcement notice against which he is appealing<sup>14</sup>; (d) prescribe the cases in which the appellant may claim that an enforcement notice should have been served on some other person and prescribe the procedure to be followed in those cases<sup>15</sup>; (e) make provision as respects the particulars to be included in the notice of appeal<sup>16</sup>, the persons on whom notice of appeal is to be served and the particulars, if any, which are to accompany the notice<sup>17</sup>, or the abandonment of an appeal<sup>18</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to enforcement notices see PARA 217.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 s 161C, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 Water Resources Act 1991 s 161C(1) (s 161C added by the Environment Act 1995 s 120, Sch 22 para 162; and applied by the Water Resources Act 1991 s 25B). Section 161C (including any power to make regulations) applies in relation to enforcement notices as it applies in relation to works notices under s 161A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 324): s 25B (added by the Water Act 2003 s 30). The Water Resources Act 1991 s 161C is subject to the Environment Act 1995 s 114 (delegation or reference of appeals: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65): Water Resources Act 1991 s 161C(6) (as so added and applied).

6 Water Resources Act 1991 s 161C(2)(a) (as added and applied: see note 5).

7 Water Resources Act 1991 s 161C(2)(b) (as added and applied: see note 5).



- 8 As to the making of regulations see PARA 21.
- 9 Water Resources Act 1991 s 161C(3)(a) (as added and applied: see note 5).
- 10 Water Resources Act 1991 s 161C(3)(b) (as added and applied: see note 5). The Anti-Pollution Works Regulations 1999, SI 1999/1006, regs 3-6 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 327) apply in relation to an enforcement notice under the Water Resources Act 1991 s 25A (see PARA 217) as they apply to a works notice under s 161A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 324): see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 28.
- 11 le those in the Public Health Act 1936 s 290: **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 125-127.
- 12 Water Resources Act 1991 s 161C(4)(a) (as added and applied: see note 5).
- 13 Water Resources Act 1991 s 161C(4)(b) (as added and applied: see note 5).
- 14 Water Resources Act 1991 s 161C(4)(c) (as added and applied: see note 5).
- 15 Water Resources Act 1991 s 161C(4)(d) (as added and applied: see note 5).
- 16 Water Resources Act 1991 s 161C(4)(e)(i) (as added and applied: see note 5).
- 17 Water Resources Act 1991 s 161C(4)(e)(ii) (as added and applied: see note 5).
- 18 Water Resources Act 1991 s 161C(4)(e)(iii) (as added and applied: see note 5).

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## 220. Civil remedies for loss or damage due to water abstraction.

Subject to certain exceptions<sup>1</sup>, a person who abstracts<sup>2</sup> water from any inland waters<sup>3</sup> or underground strata<sup>4</sup> (an 'abstractor') must not by that abstraction cause loss or damage<sup>5</sup> to another person<sup>6</sup>. A person who suffers such loss or damage (a 'relevant person') may bring a claim against the abstractor<sup>7</sup>, and such a claim will be treated as one in tort for breach of statutory duty<sup>8</sup>. In proceedings in respect of a claim under these provisions, the court may not, however, grant an injunction against the abstractor if that would risk interrupting the supply of water to the public, or would put public health or safety at risk<sup>9</sup>.

Except as provided above, no claim may be made in civil proceedings by a person, whether or not a relevant person, against an abstractor in respect of loss or damage caused by his abstraction of water<sup>10</sup>; but nothing in these provisions prevents or affects a claim for negligence or breach of contract<sup>11</sup>.

The above provisions do not apply in relation to any loss or damage suffered before 1 April 2005<sup>12</sup>.

1 The subject to the Water Resources Act 1991 s 48A(7) and to s 79 (including s 79 as applied by s 79A(9)) (see PARA 314): s 48A(1) (s 48A added by the Water Act 2003 s 24(1)). The Water Resources Act 1991 s 48A does not apply, and no claim may be brought thereunder, where the loss or damage is caused by an abstractor acting in pursuance of a licence under Pt II Ch II (ss 24-72) (see PARA 227 et seq) and is loss or damage: (1) in respect of which a person is entitled to bring a claim under s 60 (see PARA 267) (or would be so entitled if there were a breach of the duty referred to in s 60); (2) in respect of which a person would have been entitled to bring a claim under s 60 but for an express provision (including, eg, s 39(1A) (see PARA 240) and s 59C(6) (see PARA 254)) disapplying that duty; or (3) constituting grounds on which a person is entitled to apply to the Secretary of State or the Welsh Ministers under s 55 (see PARA 261) (or would be so entitled but for s 55(2)) for the revocation or variation of that licence, but without prejudice to the application of s 48 (see PARA 251): s 48A(7) (as so added). As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'abstract' see PARA 192 note 2.

3 As to the meaning of 'inland waters' see PARA 187 note 2.

4 As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.

5 As to the meaning of 'damage' see PARA 129 note 7.

6 Water Resources Act 1991 s 48A(1) (as added: see note 1). The owner of land has no common law right to the support of subterranean water: see PARA 105.

7 Water Resources Act 1991 s 48A(2) (as added: see note 1).

8 Water Resources Act 1991 s 48A(3) (as added: see note 1). As to breach of statutory duty see **TORT** vol 97 (2010) PARA 495 et seq.

9 Water Resources Act 1991 s 48A(4) (as added: see note 1).

10 Water Resources Act 1991 s 48A(5) (as added: see note 1).

11 Water Resources Act 1991 s 48A(6) (as added: see note 1). As to negligence see **NEGLIGENCE**. As to breach of contract see **CONTRACT**.

12 Water Act 2003 s 24(3)(a); Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, reg 5.

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## **(ii) Rights to Abstract or Impound**

### **221. Rights to abstract small quantities of water.**

The restriction on abstraction<sup>1</sup> does not apply to any abstraction of a quantity of water not exceeding 20 cubic metres<sup>2</sup> in any period of 24 hours, if the abstraction does not form part of a continuous operation<sup>3</sup>, or of a series of operations, by which a quantity of water which, in aggregate, is more than 20 cubic metres is abstracted during the period<sup>4</sup>. In the case of any abstraction of water from underground strata which falls within the above provision, the restriction on the construction or extension of any well, borehole or other work and on the installation or modification of machinery or other apparatus<sup>5</sup> does not apply:

- 376 (1) to the construction or extension of any well, borehole or other work<sup>6</sup>; or
- 377 (2) to the installation or modification of machinery or other apparatus<sup>7</sup>,

if the well, borehole or other work is constructed or extended, or the machinery or apparatus is installed or modified, for the purpose of abstracting the water<sup>8</sup>.

Where a person is authorised by a licence<sup>9</sup> to carry on a particular abstraction operation, or series of operations, the above provisions do not, however, permit him to carry it on beyond the authorisation conferred by the licence<sup>10</sup>.

1 As to the meaning of 'restriction on abstraction' see PARA 214 note 9. As to the meaning of 'abstraction' see PARA 192 note 2.

2 The Secretary of State or, in relation to Wales, the Welsh Ministers may by order made by statutory instrument provide that the Water Resources Act 1991 s 27(1) is to have effect in relation to: (1) a geographical area; or (2) a class of inland waters; or (3) a class of underground strata; or (4) a class of inland waters or of underground strata within a geographical area (in each case as specified in the order) as if for '20 cubic metres' there were substituted another quantity specified in the order: s 27A(1) (ss 27 substituted, 27A added by the Water Act 2003 s 6(1)). The Secretary of State or the Welsh Ministers may not make such an order except upon the application of the Environment Agency; but they may direct the Agency to make such an application: Water Resources Act 1991 s 27A(2) (as so added). Such an order may (a) make different provision in relation to the different heads in s 27A(1); and (b) make different provision for different areas, waters or underground strata: s 27A(3) (as so added). Schedule 6 (see PARA 222) has effect with respect to applications for orders under s 27A(1) and with respect to the making of such orders: s 27A(4) (as so added). An order under s 27A(1) which specifies a greater quantity than the one which previously had effect in relation to the area, waters or strata in question may make provision for a licence to abstract water granted under Pt II Ch II (ss 24-72) (see PARA 227 et seq) which is for the time being in force but which by virtue of the order has become wholly or partly unnecessary, to cease to have effect, or to cease to have effect to the extent specified in the order: s 27A(5) (as so added). An order under s 27A(1) may also include provision for or in relation to the payment by the Agency of compensation, in cases specified in the order, to a person who: (i) immediately before the making of such an order, had been in a position to carry out an abstraction to which, by virtue of s 27(1), the restriction on abstraction did not apply; (ii) following the making of that order, requires a licence under Pt II Ch II in order to carry out that abstraction; and (iii) has suffered loss or damage as a result of his having been refused such a licence in respect of that abstraction or granted such a licence, but in respect of an abstraction of more limited extent than the one he had been in a position to carry out: s 27A(6) (as so added). Section 219(2)(e), (f) (see PARA 21) applies in relation to orders under s 27A(1) as it applies to regulations made under the Water Resources Act 1991: s 27A(7) (as so added). A statutory instrument containing an order under s 27A(1) is subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 27A(8) (as so added). As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL**

**LAW AND HUMAN RIGHTS.** As to the Secretary of State see PARA 15 note 1. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'underground strata' see PARA 187 note 5. As to the Environment Agency see PARA 17. As to the meaning of 'person' see PARA 13 note 29. At the date at which this volume states the law no such order had been made.

The functions of the Secretary of State under the Water Resources Act 1991 s 27A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of the making of an order under the Water Resources Act 1991 s 27A: see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

3 As to a 'continuous operation' see *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441, CA (frequent abstractions from a mill pond).

4 Water Resources Act 1991 s 27(1) (as substituted: see note 2). The specified daily quantity is commonly referred to as the 'threshold' for licensing purposes.

5 Ie the restriction in the Water Resources Act 1991 s 24(2): see PARA 214.

6 Water Resources Act 1991 s 27(2)(a) (as substituted: see note 2).

7 Water Resources Act 1991 s 27(2)(b) (as substituted: see note 2).

8 Water Resources Act 1991 s 27(2) (as substituted: see note 2).

9 Ie under Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

10 Water Resources Act 1991 s 27(3) (as substituted: see note 2).

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## **222. Procedure for making orders relating to abstraction of small quantities and compulsory registration of protected rights.**

An application to the Secretary of State<sup>1</sup> or, in relation to Wales, to the Welsh Ministers<sup>2</sup> for an order relating to abstraction of small quantities<sup>3</sup> or an order relating to the compulsory registration of protected rights<sup>4</sup> must be accompanied by a draft of the proposed order<sup>5</sup>. Before submitting a draft order to the Secretary of State or, as the case may be, the Welsh Ministers, the Environment Agency<sup>6</sup> must publish a notice<sup>7</sup>:

- 378 (1) stating the general effect of the draft order<sup>8</sup>;
- 379 (2) specifying the place where a copy of the draft order, and of any relevant map or plan, may be inspected by any person<sup>9</sup> free of charge at all reasonable times during the period of 28 days beginning with the date of first publication of the notice<sup>10</sup>; and
- 380 (3) stating that any person may within that period, by notice<sup>11</sup> to the Secretary of State or, where appropriate, the Welsh Ministers object to the making of the order<sup>12</sup>.

Not later than the date on which the notice is first published in pursuance of the above provisions, the Agency must serve<sup>13</sup> a copy of the notice on the specified persons<sup>14</sup>. Where an application for an order is made, the Agency must also publish a notice in the London Gazette<sup>15</sup>; and must, at the request of any person, furnish him with a copy of the draft order on payment of such charge as it thinks reasonable<sup>16</sup>.

Where an application for an order is made, the Secretary of State or, where appropriate, the Welsh Ministers may, make the order either in the form of the draft or in that form as altered in such manner as he or they think fit<sup>17</sup>. Where the Secretary of State or the Welsh Ministers propose to make any alteration of an order before making it<sup>18</sup> and consider that any persons are likely to be adversely affected by it<sup>19</sup>, the Agency must give and publish such additional notices, in such manner, as the Secretary of State or, as the case may be, the Welsh Ministers may require<sup>20</sup>. If, before the end of any of the specified periods<sup>21</sup>, notice of an objection is received by the Secretary of State or, where appropriate, the Welsh Ministers from any person<sup>22</sup> then, where the objection in question is not withdrawn, the Secretary of State or, as the case may be, the Welsh Ministers, before making the order, may take such steps as he or they see fit and, in particular, may: (a) cause a local inquiry to be held<sup>23</sup>; or (b) afford to the objector and to the Agency an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State or, as the case may be, the Welsh Ministers for the purpose<sup>24</sup>.

Where an order is made<sup>25</sup>, whether in the form of the draft proposed by the Agency or with alterations, the Secretary of State or the Welsh Ministers must give notice to the Agency stating that the order has been made (either without alteration or with alterations specified in the notice)<sup>26</sup>, and specifying the date, not being earlier than 28 days after the date of such notice, on which the order is to have effect<sup>27</sup>; and the Agency must forthwith publish the notice<sup>28</sup>. The Agency must keep a copy of every order so made available at its offices for inspection by the public, free of charge, at all reasonable times<sup>29</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 Sch 6, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 le an order under the Water Resources Act 1991 s 27A(1): see PARA 221.

4 le an order under the Water Resources Act 1991 s 39B(3): see PARA 241.

5 Water Resources Act 1991 Sch 6 para 1(1) (Sch 6 substituted by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 14).

6 As to the Environment Agency see PARA 17.

7 The notice must be published either: (1) at least once in each of two successive weeks, in one or more newspapers circulating in the area to which the draft order relates (Water Resources Act 1991 Sch 6 para 1(3) (a) (as substituted: see note 5)); or (2) in any other manner which, in any particular case, may be certified by the Secretary of State or, where appropriate, the Welsh Ministers to be expedient in that case (Sch 6 para 1(3) (b) (as so substituted)). Where a draft order makes provision generally (rather than for a specified geographical area), references to the area to which the order relates are to the whole area (whether England, Wales or both of them) in relation to which the order is applied: Sch 6 para 1(6)(a) (as so substituted). As to the meaning of 'England' see PARA 19 note 8.

8 Water Resources Act 1991 Sch 6 para 1(2)(a) (as substituted: see note 5).

9 As to the meaning of 'person' see PARA 13 note 29.

10 Water Resources Act 1991 Sch 6 para 1(2)(b) (as substituted: see note 5).

11 As to the meaning of 'notice' see PARA 22 note 1.

12 Water Resources Act 1991 Sch 6 para 1(2)(c) (as substituted: see note 5).

13 As to the service of documents see PARA 22.

14 Water Resources Act 1991 Sch 6 para 1(4) (as substituted: see note 5). A copy of the notice must be served on: (1) every local authority, in its capacity as the local planning authority, joint planning board or National Park authority whose area consists of, includes or is included in the area to which the draft order relates; (2) any relevant water undertaker; (3) any internal drainage board (a) whose district consists of, includes or is included in the area to which the draft order relates; (b) from whose district water is discharged into any relevant source of supply; or (c) into whose district water is discharged from any relevant source of supply; (4) any navigation authority, harbour authority or conservancy authority having functions in relation to any relevant source of supply or any related inland waters; (5) if a relevant source of supply or related inland waters are tidal waters in relation to which there is no such navigation authority, harbour authority or conservancy authority, the Secretary of State for Transport; (6) any person authorised by a licence under the Electricity Act 1989 Pt I (ss 3A-64) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1041 et seq) to generate electricity who is (in that capacity) the holder of a licence to abstract water under the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 227 et seq) from any relevant source of supply or any related inland waters; (7) Natural England, if the area to which the order relates is or includes England, or part of it; (8) the Countryside Council for Wales, if the area to which the order relates is or includes Wales, or part of it; and (9) the Broads Authority (established under the Norfolk and Suffolk Broads Act 1988: see PARA 734), if the area to which the order relates is or includes the Broads (as defined in that Act: see PARA 735 note 2), or part of it: Water Resources Act 1991 Sch 6 para 1(4)(a)-(i) (as so substituted; Sch 6 para 1(4)(f) amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 133). For these purposes: (i) references to a National Park authority are to a National Park authority established under the Environment Act 1995 Pt III (ss 61-79) (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq); (ii) a 'relevant source of supply', in relation to a draft order, means (A) if the draft order relates only to particular sources of supply (or a class of them) in an area, any of those sources of supply (or any source of supply in that class) in that area; (B) otherwise, any source of supply in the area to which the draft order relates; (iii) a 'relevant water undertaker', in relation to a draft order, means a water undertaker which is the holder of a licence to abstract water under the Water Resources Act 1991 Pt II Ch II from a relevant source of supply or a source of supply which is related to a relevant source of supply; (iv) for the purposes of head (iii), a source of supply (the 'related source') is related to a relevant source of supply if it appears to the Agency that, having regard to the extent to which the level or flow of water in the related source depends on the level or flow of the waters in the relevant

source of supply, the ability of the water undertaker to abstract water from the related source in accordance with its licence may be substantially affected as a result of the draft order; and (v) 'related inland waters' are inland waters the level or flow of which may, in the Agency's opinion, be affected by changes in the level or flow of the waters in a relevant source of supply: Sch 6 para 1(6)(b)-(f) (as so substituted). As to the meanings of 'local authority' and 'joint planning board' see PARA 187 note 2. As to internal drainage boards see PARA 569 et seq. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3. As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq. As to the meaning of 'source of supply' see PARA 187. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'abstraction' see PARA 192 note 2. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'flow' see PARA 215 note 4. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

15 Water Resources Act 1991 Sch 6 para 1(5) (as substituted: see note 5). The notice must: (1) state that the draft order has been submitted to the Secretary of State or, as the case may be, to the Welsh Ministers; (2) name the areas of each of the authorities or boards in respect of which a copy of the notice is required to be served under Sch 6 para 1(4)(a) (see head (1) in note 14); (3) specify a place where a copy of the draft order and of any relevant map or plan may be inspected; and (4) where the notice required by Sch 6 para 1(2) (see the text to notes 6-12) is published in a newspaper, give the name of the newspaper and the date of an issue containing the notice: Sch 6 para 1(5)(a)-(d) (as so substituted).

16 Water Resources Act 1991 Sch 6 para 2 (as substituted: see note 5).

17 Water Resources Act 1991 Sch 6 para 3(1) (as substituted: see note 5). Where the order (whether as prepared in draft or as proposed to be altered) relates to any tidal water situated in Wales or in an area of the sea adjoining either the coast of Wales or an area of sea forming part of Wales, and no navigation authority, harbour authority or conservancy authority has functions in relation to that tidal water, the Welsh Ministers must not make the order except with the approval of the Secretary of State for Transport: Sch 6 para 3(5).

18 Water Resources Act 1991 Sch 6 para 3(2)(a) (as substituted: see note 5).

19 Water Resources Act 1991 Sch 6 para 3(2)(b) (as substituted: see note 5).

20 Water Resources Act 1991 Sch 6 para 3(2) (as substituted: see note 5).

21 Ie before the end of: (1) the period of 28 days referred to in the Water Resources Act 1991 Sch 6 para 1(2)(b) (see head (2) in the text); (2) the period of 25 days from the publication in the London Gazette of the notice under Sch 6 para 1(5) (see the text to note 15); or (3) any period specified in notices under Sch 6 para 3(2) (see the text to note 20): Sch 6 para 3(3)(a)-(c) (as substituted: see note 5).

22 Ie from any person on whom a notice is required by the Water Resources Act 1991 Sch 6 to be served, from any other person appearing to the Secretary of State or the Welsh Ministers to be affected by the order (either as prepared in draft or as proposed to be altered) or, in a case where the Secretary of State or the Welsh Ministers directed the Agency to apply for the order, from the Agency: Sch 6 para 3(3) (as substituted: see note 5).

23 Water Resources Act 1991 Sch 6 para 3(4)(a) (as substituted: see note 5).

24 Water Resources Act 1991 Sch 6 para 3(4)(b) (as substituted: see note 5).

25 Ie under the Water Resources Act 1991 s 27A(1) (see PARA 221) or s 39B(3) (see PARA 241).

26 Water Resources Act 1991 Sch 6 para 4(1)(a) (as substituted: see note 5).

27 Water Resources Act 1991 Sch 6 para 4(1)(b) (as substituted: see note 5).

28 Water Resources Act 1991 Sch 6 para 4(1) (as substituted: see note 5).

29 Water Resources Act 1991 Sch 6 para 4(2) (as substituted: see note 5).



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## 223. Rights to abstract for drainage etc purposes.

The restriction on abstraction<sup>1</sup> does not apply to:

- 381 (1) any abstraction of water from a source of supply<sup>2</sup> in the course of, or resulting from, any operations for purposes of land drainage<sup>3</sup>;
- 382 (2) until a day to be appointed, any abstraction of water from a source of supply in so far as the abstraction, where it does not fall within head (1) above, is necessary to prevent interference with any mining, quarrying, engineering, building or other operations<sup>4</sup> (whether underground or on the surface)<sup>5</sup>, or to prevent damage to works resulting from any such operations<sup>6</sup>;
- 383 (3) as from a day to be appointed, any abstraction of water from inland waters within the district of an internal drainage board<sup>7</sup> if the abstraction is carried out by or on behalf of that board in connection with its functions<sup>8</sup>, the water abstracted is transferred to another area of inland waters within the board's district without intervening use<sup>9</sup>, and the sole or main purpose of the transfer is to augment that other area of inland waters<sup>10</sup>;
- 384 (4) as from a day to be appointed, any abstraction of water from a source of supply in so far as the abstraction (where it does not fall within head (1) or (3) above) is an emergency abstraction<sup>11</sup> and the person<sup>12</sup> abstracting the water complies with the requirement as to the giving of notice in respect of the abstraction<sup>13</sup>.

In the case of any abstraction of water from underground strata which falls within head (1) or (2) or (4)<sup>14</sup> above, the restriction on constructing or extending any well, borehole or other work or installing or modifying machinery<sup>15</sup> does not apply to the construction or extension of any well, borehole or other work<sup>16</sup>, or to the installation or modification of machinery or other apparatus<sup>17</sup>, if the well, borehole or other work is constructed or extended, or the machinery or apparatus is installed or modified, for the purpose of abstracting the water<sup>18</sup>.

1 As to the meaning of 'restriction on abstraction' see PARA 214 note 9. As to the meaning of 'abstraction' see PARA 192 note 2.

2 As to the meaning of 'source of supply' see PARA 187.

3 Water Resources Act 1991 s 29(1). 'Land drainage' includes the protection of land against erosion or encroachment by water, whether from inland waters or from the sea, and also includes warping and irrigation other than spray irrigation: s 29(5). As from a day to be appointed this definition is substituted as follows: 'land drainage' (1) includes the protection of land against erosion or encroachment by water, whether from inland waters or from the sea; but (2) does not include warping, irrigation (including spray irrigation), or transferring water from one source of supply to another (whether with or without intervening use) solely or mainly in order to augment the latter: s 29(5) (prospectively substituted by the Water Act 2003 s 7(1), (5)). At the date at which this volume states the law no such day had been appointed. As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'warping' see PARA 573 note 9. As to the meaning of 'spray irrigation' see PARA 262. As to land drainage generally see PARA 573 et seq.

4 'Engineering or building operations', without prejudice to the generality of that expression, includes: (1) the construction, alteration, improvement, maintenance or demolition of any building or structure or of any reservoir, watercourse, dam, weir, well, borehole or other works; and (2) the installation, modification or

removal of any machinery or apparatus: Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1). As to the meaning of 'watercourse' see PARA 187 note 2.

5 Water Resources Act 1991 s 29(2)(a) (s 29(2), (3) prospectively repealed by the Water Act 2003 s 7(1), (3), (4) as from a day to be appointed; at the date at which this volume states the law no such day had been appointed).

6 Water Resources Act 1991 s 29(2)(b) (as prospectively repealed: see note 5). Where: (1) water is abstracted, in the course of any such operations as are mentioned in s 29(2), from any excavation into underground strata in a case in which the level of water in the underground strata depends wholly or mainly on water entering it from those strata; and (2) the abstraction is necessary as mentioned in that subsection, the exemption conferred by s 29(2) applies notwithstanding that the water is used for the purposes of the operations: s 29(3) (as so prospectively repealed). As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.

7 As to internal drainage boards see PARA 569 et seq.

8 Water Resources Act 1991 s 29(1A)(a) (s 29(1A) prospectively added by the Water Act 2003 s 7(1), (2) as from a day to be appointed; at the date at which this volume states the law no such day had been appointed).

9 Water Resources Act 1991 s 29(1A)(b) (as prospectively added: see note 8).

10 Water Resources Act 1991 s 29(1A)(c) (as prospectively added: see note 8).

11 An abstraction of water is an emergency abstraction if, in the opinion of the abstractor, an emergency has arisen which makes the abstraction necessary to prevent immediate danger of interference with any mining, quarrying, engineering, building or other operations (whether underground or on the surface) or, in relation to such operations, to prevent an immediate risk (1) to a human being of death, personal injury or harm to health; (2) of serious damage to works resulting from any such operations; or (3) of serious damage to the environment: Water Resources Act 1991 s 29(2A) (s 29(2) prospectively substituted, (2A)-(2C) prospectively added, by the Water Act 2003 s 7(1), (3) as from a day to be appointed). At the date at which this volume states the law no such day had been appointed.

12 As to the meaning of 'person' see PARA 13 note 29.

13 Water Resources Act 1991 s 29(2) (as prospectively substituted: see note 11). In the case of any emergency abstraction, the person abstracting the water must before the end of the period of five days beginning with the date on which the abstraction started give notice to the Environment Agency of the abstraction and of the source of supply in question, and the reasons for the abstractor's opinion that an emergency had arisen and that the abstraction was necessary: s 29(2B) (as prospectively added: see note 11). The Agency may give notice to the person referred to in s 29(2B) above that in the Agency's opinion an emergency had not arisen, or that the abstraction is not, or is no longer, necessary for any of the reasons set out in s 29(2A) (see note 11); and, if the Agency does so, the restriction on abstraction will apply to the abstraction from the time when the notice is served (and, if applicable, the restriction imposed by s 24(2) (see PARA 214) will apply accordingly): s 29(2C) (as so prospectively added). Section 29 has effect in relation to abstraction of water by the Agency from sources of supply as if s 29(2B) and (2C) were omitted: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 15. As to the Environment Agency see PARA 17. As to abstracting and impounding by the Agency see PARA 237.

14 Ie head (2) until such time as the Water Resources Act 1991 s 29(2) is substituted and thereafter head (4).

15 Ie the restriction imposed by the Water Resources Act 1991 s 24(2): see PARA 214.

16 Water Resources Act 1991 s 29(4)(a).

17 Water Resources Act 1991 s 29(4)(b).

18 Water Resources Act 1991 s 29(4).

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## **224. Test pumping consent and other miscellaneous rights to abstract.**

The restriction on abstraction<sup>1</sup> does not apply to any abstraction by machinery or apparatus installed on a vessel<sup>2</sup>, where the water is abstracted for use on that, or any other, vessel<sup>3</sup>.

The restriction on abstraction and related restrictions<sup>4</sup> do not apply to the doing of anything for extinguishing fires or protecting life and property in the event of fire<sup>5</sup>, or for the purpose of testing apparatus used for either of those purposes or of training or practice in the use of such apparatus<sup>6</sup>. Further, those restrictions do not apply to any abstraction of water<sup>7</sup>, to the construction or extension of any well, borehole or other work<sup>8</sup>, or to the installation or modification of machinery or other apparatus<sup>9</sup>, if the abstraction, construction, extension, installation or modification is for any of the purposes specified below and takes place with the consent of the Environment Agency<sup>10</sup> and in compliance with any conditions imposed by the Agency<sup>11</sup>. The purposes specified are: (1) the purpose of ascertaining the presence of water in any underground strata<sup>12</sup> or the quality or quantity of any such water<sup>13</sup>; and (2) the purpose of ascertaining the effect of abstracting water from the well, borehole or other work in question on the abstraction of water from, or the level of water in, any other well, borehole or other work or any inland waters<sup>14</sup>.

1 As to the meaning of 'restriction on abstraction' see PARA 214 note 9. As to the meaning of 'abstraction' see PARA 192 note 2.

2 'Vessel' includes a hovercraft: Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1). 'Hovercraft' means a vehicle which is designed to be supported when in motion wholly or partly by air expelled from the vehicle to form a cushion of which the boundaries include the ground, water or other surface beneath the vehicle: Hovercraft Act 1968 s 4(1); definition applied by the Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1). 'Vessel' is a wider term than 'ship', and includes anything beyond a mere boat: see *Gapp v Bond* (1887) 19 QBD 200 at 202, CA, per Lord Esher MR.

3 Water Resources Act 1991 s 32(1).

4 Ie the other restrictions imposed by the Water Resources Act 1991 s 24: see PARA 214.

5 Water Resources Act 1991 s 32(2)(a) (amended by the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 79(a)).

6 Water Resources Act 1991 s 32(2)(b) (amended by the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 79(b)).

7 Water Resources Act 1991 s 32(3)(a).

8 Water Resources Act 1991 s 32(3)(b).

9 Water Resources Act 1991 s 32(3)(c).

10 As to the Environment Agency see PARA 17. Such consent is commonly known as 'test pumping consent'.

11 Water Resources Act 1991 s 32(3) (amended by the Environment Act 1995 s 120, Sch 22 para 128). The Water Resources Act 1991 s 32(3) has effect in relation to: (1) the restriction on abstraction as it has effect, as modified by the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 14(1) (see PARA 214), in relation to abstraction by the Agency; and (2) the other restrictions imposed by the Water Resources Act 1991 s 24 (see PARA 214) as they apply to the Agency, as if all the words after 'purposes specified' were omitted: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 14(2).

12 As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.

13 Water Resources Act 1991 s 32(4)(a).

14 Water Resources Act 1991 s 32(4)(b). As to the meaning of 'inland waters' see PARA 187 note 2.

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## **225. Power to provide for further exemptions.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may make regulations<sup>3</sup> providing for further cases<sup>4</sup> in which:

- 385 (1) the restriction on abstraction<sup>5</sup> and, in the case of abstractions from underground strata<sup>6</sup>, the other restrictions<sup>7</sup> imposed<sup>8</sup>; or
- 386 (2) the restriction on impounding works<sup>9</sup>,

do not apply<sup>10</sup>. The regulations may, in particular, make provision, in relation to an exemption:

- 387 (a) for the exemption to apply only for a prescribed period<sup>11</sup>;
  - 388 (b) for the exemption not to apply unless prescribed conditions are satisfied, or continue to be satisfied<sup>12</sup>;
  - 389 (c) for the Environment Agency<sup>13</sup> to be notified, or its consent obtained:
- 39
- 45. (i) before any particular abstraction operation or series of such operations begins<sup>14</sup>; or
  - 46. (ii) in connection with such an operation or series of operations relating to the abstraction of water in underground strata, before any other thing which is mentioned in the relevant statutory provision<sup>15</sup> is done<sup>16</sup>; or
  - 47. (iii) before any impounding works are constructed or altered<sup>17</sup>,
- 40

in reliance on the exemption<sup>18</sup>.

The regulations may provide for an exemption to apply generally or to relate to: (A) a prescribed geographical area<sup>19</sup>; (B) in the case of an exemption from the restriction on abstraction or the other restrictions imposed<sup>20</sup>, a prescribed source of supply<sup>21</sup>; or (C) in the case of an exemption from the restriction on impounding works, prescribed inland waters<sup>22</sup>.

If the regulations provide for an exemption falling within head (1) above, the regulations must, if appropriate, make provision for the exemption not to permit a person<sup>23</sup> who is authorised by a licence<sup>24</sup> to carry on an abstraction operation, or series of operations, to carry it on beyond the authorisation conferred by the licence<sup>25</sup>; and must also make provision as to whether or not, in relation to any abstraction, the exemption provided for by the regulations is to be counted cumulatively with any other exemption<sup>26</sup> which a person has<sup>27</sup>. The regulations may, however, make provision for a licence which is for the time being in force to cease to have effect, or to cease to have effect to the extent specified in the regulations, if it authorises an activity which falls to any extent within the exemption provided for by the regulations<sup>28</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 s 33A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to

intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made. The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of the making of regulations under the Water Resources Act 1991 s 33A, where those regulations relate to (1) a prescribed geographical area; (2) a prescribed source of supply (in the case of an exemption from the restriction on abstraction or the other restrictions imposed by s 24 (see PARA 214); or (3) prescribed inland waters (in the case of an exemption from the restriction on impounding works): see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843). An exemption conferred by regulations under the Water Resources Act 1991 s 33A, other than regulations referred to in heads (1)-(3) above, does not apply in relation to any particular abstraction or impounding works unless the Environment Agency has given consent in writing to the abstraction or impounding works being carried out, and any such consent is similarly subject to the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49: see reg 84B(1), (2) (as so added). See further PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

4 Such a case is referred to in the Water Resources Act 1991 s 33A as an 'exemption': s 33A(1) (s 33A added by the Water Act 2003 s 9).

5 As to the meaning of 'restriction on abstraction' see PARA 214 note 9. As to the meaning of 'abstraction' see PARA 192 note 2.

6 As to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5.

7 Ie imposed by the Water Resources Act 1991 s 24: see PARA 214.

8 Water Resources Act 1991 s 33A(1)(a) (as added: see note 4).

9 Water Resources Act 1991 s 33A(1)(b) (as added: see note 4). As to the meaning of 'restriction on impounding works' see PARA 215 note 25.

10 Water Resources Act 1991 s 33A(1) (as added: see note 4).

11 Water Resources Act 1991 s 33A(2)(a) (as added: see note 4). 'Prescribed' means prescribed by regulations: see the Water Resources Act 1991 s 221(1).

12 Water Resources Act 1991 s 33A(2)(b) (as added: see note 4).

13 As to the Environment Agency see PARA 17.

14 Water Resources Act 1991 s 33A(2)(c)(i) (as added: see note 4).

15 Ie any other thing which is mentioned in the Water Resources Act 1991 s 24(2): see PARA 214.

16 Water Resources Act 1991 s 33A(2)(c)(ii) (as added: see note 4).

17 Water Resources Act 1991 s 33A(2)(c)(iii) (as added: see note 4).

18 Water Resources Act 1991 s 33A(2) (as added: see note 4).

19 Water Resources Act 1991 s 33A(3)(a) (as added: see note 4).

20 Ie imposed by the Water Resources Act 1991 s 24: see PARA 214.

21 Water Resources Act 1991 s 33A(3)(b) (as added: see note 4). As to the meaning of 'source of supply' see PARA 187.

22 Water Resources Act 1991 s 33A(3)(c) (as added: see note 4). As to the meaning of 'inland waters' see PARA 187 note 2.

23 As to the meaning of 'person' see PARA 13 note 29.

24 Ie a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq.

25 Water Resources Act 1991 s 33A(4)(a) (as added: see note 4).

26     le any other exemption which a person has by virtue of the Water Resources Act 1991 s 33A or of s 27 (see PARA 221).

27     Water Resources Act 1991 s 33A(4)(b) (as added: see note 4).

28     Water Resources Act 1991 s 33A(5) (as added: see note 4).

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## 226. Exception orders and their revocation.

Until 1 April 2004, the Water Resources Act 1991 made provision for any of the relevant authorities<sup>1</sup> to apply to the Secretary of State<sup>2</sup> or, in certain cases, to the National Assembly for Wales<sup>3</sup> for an order excepting one or more sources of supply from the restriction on abstraction<sup>4</sup>, on the grounds that that restriction was not needed in relation to that source, or those sources of supply<sup>5</sup>; and an order might be made accordingly<sup>6</sup>. The relevant provisions have now been repealed<sup>7</sup>; but, subject to the powers to revoke such orders which are set out below<sup>8</sup>, any order made under them which was in force immediately before that repeal continues in force despite that repeal<sup>9</sup>.

The appropriate authority<sup>10</sup> may by order<sup>11</sup> revoke any exception order<sup>12</sup>, that is, any order:

- 390 (1) made under the provisions of the Water Resources Act 1991<sup>13</sup> which gave powers to provide for further rights to abstract<sup>14</sup>;
- 391 (2) any order made under any local or private Act which provides for any exception from:
- 41
- 48. (a) the restriction on abstraction<sup>15</sup>; or
- 49. (b) that restriction and the one imposed<sup>16</sup> in relation to the construction of wells, boreholes etc<sup>17</sup>,
- 42
- 392 or for an exception which has the effect of such an exception<sup>18</sup>;

and if an order made under head (2) above revokes the exception order wholly, or wholly so far as it is not already revoked, that order may also repeal so much of the local or private Act as constitutes the power to make the exception order<sup>19</sup>.

An order may<sup>20</sup> revoke the exception order either wholly, or only in relation to:

- 393 (i) any one or more areas of inland waters specified in the order under these powers or any class of inland waters so specified<sup>21</sup>; or
- 394 (ii) any underground strata described in the order in any specified way<sup>22</sup> or any other way<sup>23</sup>.

An order may make provision, subject to any conditions or limitations specified in the order:

- 395 (A) for the restriction on abstraction and, in the case of abstractions from underground strata, the other restrictions imposed<sup>24</sup>, to continue not to apply to an abstraction despite the revocation of the exception order<sup>25</sup>;
- 396 (B) for a person<sup>26</sup> to continue to be taken to have a right to abstract water<sup>27</sup> to the same extent he was taken to do so under the exception order<sup>28</sup>;
- 397 (C) for the payment by the Environment Agency of compensation, in cases specified in the order, to any person who suffers loss or damage as a result of the revocation of the exception order<sup>29</sup>;



and if an order provides as mentioned in head (A) above, the order must also say whether or not the exemption so provided for is to be counted cumulatively with any other exemption<sup>30</sup> which a person has<sup>31</sup>.

1 For these purposes, the Environment Agency was a relevant authority in relation to every source of supply; and a navigation authority, harbour authority or conservancy authority having functions in relation to any inland waters was a relevant authority in relation to those inland waters: see the Water Resources Act 1991 s 33(3) (repealed). As to the Environment Agency see PARA 17. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3. As to the meaning of 'source of supply' see PARA 187. As to the meaning of 'inland waters' see PARA 187 note 2.

2 As to the Secretary of State see PARA 15 note 1.

3 As to the National Assembly for Wales see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 As to the meaning of 'restriction on abstraction' see PARA 214 note 9.

5 See the Water Resources Act 1991 s 33(1), (2) (repealed).

6 See the Water Resources Act 1991 s 33(5), (6) (repealed). The Environment Agency might be directed to make an application for such an order in relation to a source of supply: see s 33(4) (repealed).

7 See the Water Act 2003 s 10(11); the Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, art 3(c).

8 *le* subject to the Water Act 2003 s 10(1)-(10), (12).

9 Water Act 2003 s 10(11). Orders made under the Water Resources Act 1991 s 33 (repealed), being local in their effect, are not recorded in this work.

10 For these purposes, 'appropriate authority' means: (1) in relation to the revocation of an exception order which relates to inland waters or underground strata which are wholly in England, the Secretary of State; (2) in relation to the revocation of an exception order which relates to inland waters or underground strata which are wholly in Wales, the Welsh Ministers; (3) in relation to the revocation of an exception order which relates to inland waters or underground strata which are partly in England and partly in Wales, (a) the Secretary of State, in relation to the English part; and (b) the Welsh Ministers, in relation to the Welsh part; and references (however expressed) to the revocation of an exception order are to be construed accordingly: Water Act 2003 s 10(3); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Act 2003 s 10 were originally vested in the National Assembly for Wales but are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meaning of 'England' see PARA 19 note 8.

11 The procedure provided for by the Water Resources Act 1991 s 33 (repealed), Sch 6, or (as the case may be) any corresponding procedure provided for by the local or private Act in question, does not apply in relation to an order under the Water Act 2003 s 10: s 10(8). No order may be made under s 10 before 1 April 2005 (ie the coming into force of s 6: right to abstract small quantities and variation of the small quantity threshold (see PARA 221)): s 10(10). Orders made under the Water Act 2003 s 10, being local in their effect, are not recorded in this work.

12 *le* an order of a kind referred to in the Water Act 2003 s 10(1)(a) or (b) (see heads (1)-(2) in the text): s 10(2).

13 *le* made under the Water Resources Act 1991 s 33 (repealed): see the text to notes 1-9.

14 Water Act 2003 s 10(1)(a).

15 Water Act 2003 s 10(1)(b)(i). As to the meaning of 'restriction of abstraction' see PARA 214 note 9: definition applied by s 10(1)(b)(i).

16 *le* the restriction imposed by the Water Resources Act 1991 s 24(2): see PARA 214.

17 Water Act 2003 s 10(1)(b)(ii).

- 18    Water Act 2003 s 10(1)(b).
- 19    Water Act 2003 s 10(7).
- 20    le subject to the Water Act 2003 s 10(3)(c): see note 10 head (3).
- 21    Water Act 2003 s 10(4)(a).
- 22    le in any way mentioned in the Water Resources Act 1991 s 33(2)(b) (repealed).
- 23    Water Act 2003 s 10(4)(b).
- 24    le the other restrictions in the Water Resources Act 1991 s 24: see PARA 214.
- 25    Water Act 2003 s 10(5)(a).
- 26    As to the meaning of 'person' see PARA 13 note 29.
- 27    le for the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 28    Water Act 2003 s 10(5)(b).
- 29    Water Act 2003 s 10(5)(c).
- 30    le by virtue of the Water Resources Act 1991 s 27 (see PARA 221) or s 33A (see PARA 225).
- 31    Water Act 2003 s 10(6).

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### (iii) Licences and Consents

#### A. INTRODUCTION

##### 227. Types of abstraction licences.

Each licence to abstract<sup>1</sup> water must be of one of the following three types:

- 398 (1) a licence to abstract water from one source of supply<sup>2</sup> over a period of 28 days or more for any purpose (a 'full licence')<sup>3</sup>;
- 399 (2) a licence to abstract water from one source of supply over a period of 28 days or more for the purpose of:
  - 43 50. (a) transferring water to another source of supply<sup>4</sup>; or
  - 51. (b) transferring water to the same source of supply, but at another point, in the course of dewatering activities in connection with mining, quarrying, engineering, building or other operations<sup>5</sup>, whether underground or on the surface<sup>6</sup>,
  - 44 400 in either case without intervening use (a 'transfer licence')<sup>7</sup>;
  - 401 (3) a licence to abstract water from one source of supply over a period of less than 28 days (a 'temporary licence')<sup>8</sup>.

In the Water Resources Act 1991, a reference, however expressed, to a licence to abstract water must be taken as a reference to all types of licence, unless it is clear that a different meaning is intended<sup>9</sup>.

- 1 As to the meaning of 'abstract' see PARA 192 note 2.
- 2 As to the meaning of 'source of supply' see PARA 187.
- 3 Water Resources Act 1991 s 24A(1)(a) (s 24A added by the Water Act 2003 s 1(1)).
- 4 Water Resources Act 1991 s 24A(1)(b)(i) (as added: see note 3).
- 5 As to the meaning of 'engineering or building operations' see PARA 223 note 4.
- 6 Water Resources Act 1991 s 24A(1)(b)(ii) (as added: see note 3).
- 7 Water Resources Act 1991 s 24A(1)(b) (as added: see note 3).
- 8 Water Resources Act 1991 s 24A(1)(c) (as added: see note 3).
- 9 Water Resources Act 1991 s 24A(2) (as added: see note 3).

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## **228. Transitional provisions following the coming into force of the Water Act 2003.**

Subject to the following provisions, each licence to abstract water<sup>1</sup> which was in force immediately before 1 April 2006<sup>2</sup> must, after that date, be treated as a full licence<sup>3</sup>.

If, immediately before 1 April 2005<sup>4</sup>, a person<sup>5</sup> was the holder of a licence<sup>6</sup> to abstract water, and, on that date an abstraction authorised by the licence became an abstraction to which the restriction on abstraction<sup>7</sup> does not apply, the licence ceased to have effect, so far as it applied to that abstraction, on that date<sup>8</sup>. The person who was the holder of a full licence which so ceased, or ceased in part, to have effect, and who had been taken in consequence of that licence, or that part of the licence, to have a right to abstract water<sup>9</sup>, continues to be taken to have that right for the statutory purposes<sup>10</sup>. However, a person ceases to continue to be taken to have that right for those purposes if, during a period of:

- 402 (1) four years<sup>11</sup>; or
- 403 (2) if the abstractions authorised under the licence, or relevant part of the licence, were abstractions planned to be carried out at intervals of more than four years, or abstractions for emergency purposes only, such longer period as the Environment Agency<sup>12</sup> may determine on the application of the person<sup>13</sup>,

he does not carry out any such abstraction as would have been authorised by the licence, or relevant part of the licence, if it had still been in force<sup>14</sup>.

Where, immediately after the coming into force of any provision of the Water Act 2003, an abstraction of water to which the restriction on abstraction did not apply becomes one to which the restriction on abstraction does apply, nothing in the specified provisions of the Water Resources Act 1991<sup>15</sup> which relate to protected rights<sup>16</sup>, or any other enactment specified in regulations made by the Secretary of State<sup>17</sup>, prevents the Agency from granting a licence<sup>18</sup> in respect of that abstraction, or the Secretary of State from giving the Agency a direction to do so<sup>19</sup>.

1    Ie each licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72); see PARA 227.

2    Ie immediately before the coming into force of the Water Act 2003 s 1 which adds the Water Resources Act 1991 s 24A: see PARA 227. The Water Act 2003 s 1 came into force on 1 April 2006: see the Water Act 2003 (Commencement No 6, Transitional Provisions and Savings) Order 2006, SI 2006/984, art 2(a).

3    See the Water Act 2003 s 102(1). As to the meaning of 'full licence' see PARA 227: definition applied by s 102(1).

4    Ie immediately before the coming into force of the Water Act 2003 s 6 (see PARA 221) which came into force for all purposes on 1 April 2005: see the Water Act 2003 (Commencement No 4, Transitional Provisions and Savings) Order 2005, SI 2005/968, art 2(a).

5    As to the meaning of 'person' see PARA 13 note 29.

6    Ie under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

7 As to the meaning of 'restriction on abstraction' see PARA 214 note 9: definition applied by the Water Act 2003 s 102(6).

8 See the Water Act 2003 s 102(2).

9 Ie by virtue of the Water Resources Act 1991 s 48(1); see PARA 251.

10 Water Act 2003 s 102(3). The statutory purposes referred to are the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72).

11 Water Act 2003 s 102(4)(a).

12 As to the Environment Agency see PARA 17.

13 Water Act 2003 s 102(4)(b).

14 Water Act 2003 s 102(4).

15 Ie nothing in the Water Resources Act 1991 s 39(1) (see PARA 240), s 42(4) (see PARA 243) or s 44(4) (see PARA 246).

16 Water Act 2003 s 102(5)(a).

17 Water Act 2003 s 102(5)(b). As to the Secretary of State see PARA 15 note 1. As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

18 Ie under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

19 Water Act 2003 s 102(5).

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## **B. APPLICATIONS FOR A LICENCE**

### **229. Entitlement to apply for an abstraction licence.**

No application for a licence<sup>1</sup> to abstract water<sup>2</sup> may be entertained unless it is made by a person<sup>3</sup> entitled to make the application in accordance with the following provisions<sup>4</sup>.

In relation to abstractions from any inland waters, a person is entitled to make the application if, as respects the place, or, if more than one, as respects each of the places, at which the proposed abstractions are to be effected, he satisfies the Environment Agency that:

- 404 (1) he has, or at the time when the proposed licence is to take effect will have, a right of access<sup>5</sup> to land contiguous to the inland waters<sup>6</sup> at that place, or those places<sup>7</sup>; and
- 405 (2) he will continue to have such a right for the period of at least one year beginning with the date on which the proposed licence is to take effect, or until it is to expire if sooner<sup>8</sup>.

In relation to abstractions from underground strata<sup>9</sup>, a person is entitled to make the application if he satisfies the Agency that:

- 406 (a) he has, or at the time when the proposed licence is to take effect will have, a right of access to land consisting of or comprising those underground strata<sup>10</sup>; and
- 407 (b) he will continue to have such a right for the period of at least one year beginning with the date on which the proposed licence is to take effect, or until it is to expire, if sooner<sup>11</sup>.

1 le under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

2 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

3 As to the meaning of 'person' see PARA 13 note 29. In respect of abstraction from all inland waters owned or managed by the British Waterways Board (the 'Board') (except any such inland waters to which the Secretary of State or, in relation to Wales, the Welsh Ministers may by order made by statutory instrument direct that the Water Resources Act 1991 s 66 does not apply), no person other than the Board is entitled to apply for a licence and s 35 does not apply in relation to any such application by the Board for a licence: see s 66(1), (2)(b), (c)(i). Before making an order the Secretary of State or, where appropriate, the Welsh Ministers must consult the Board and the Environment Agency: s 66(3) (amended by the Environment Act 1995 s 120, Sch 22 para 128). At the date at which this volume states the law no such orders had been made. As to the British Waterways Board see PARA 725 et seq. As to the meaning of 'inland waters' see PARA 187 note 2. As to the Environment Agency see PARA 17. As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Water Resources Act 1991 s 66, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

Where the relevant land is vested in the incumbent of an ecclesiastical benefice of the Church of England or (in the case of a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72) to abstract water: see PARA 227) where it is such a benefice which has a right of access to the relevant land: (1) an application for a licence under that Chapter may be made by the Diocesan Board of Finance for the diocese in which the land is situated if the benefice is for the time being vacant; and (2) any reference in that Chapter to the applicant for a licence must be construed (a) in relation to any time when the benefice in question is vacant, as a reference to the Diocesan Board of Finance for the diocese in which the land is situated; and (b) in relation to any time when there is an incumbent of the benefice, as a reference to that incumbent: s 67(1), (8) (s 67(1) amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 8(1), (2); the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30). 'Relevant land', in relation to a licence under the Water Resources Act 1991 Pt II Ch II or an application for such a licence, means: (i) the land to which an applicant for a licence to abstract water is required by s 35 to have a right of access; or (ii) in the case of a licence for the purposes of s 25 (see PARA 215) or an application for such a licence (A) the land on which any part of the impounding works is, or is to be, or is proposed to be, constructed; or (B) in relation to an alteration of impounding works, the land on which any part of those works is situated or is to be, or is proposed to be, situated: s 67(8) (definition amended by the Water Act 2003 ss 2(8), 101(1), Sch 7 Pt 1 paras 1, 8(1), (3)). As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'impounding works' see PARA 215 note 4. As to the Church of England see **ECCLESIASTICAL LAW** vol 14 PARA 345 et seq.

4 Water Resources Act 1991 s 35(1).

5 The Environment Agency may, in particular, take evidence of a person's occupation of land to be evidence of his right of access to it: Water Resources Act 1991 s 35(3A) (s 35(2), (3) substituted, (3A) added, by the Water Act 2003 s 11(1), (2)). For these purposes, any reference to a person who will have a right of access to land of any description: (1) includes a reference to a person who satisfies the Environment Agency that he has entered into negotiations for the acquisition of an interest in land of that description such that, if the interest is acquired by him, he will be entitled to a right of access to that land (Water Resources Act 1991 s 35(4)(a) (s 35(4) amended by the Environment Act 1995 s 120(1), Sch 22 para 128; Water Act 2003 s 11(1), (3))); and (2) without prejudice to the application of head (1) to a person who is or can be authorised to acquire land compulsorily, also includes any person who satisfies the Agency that by virtue of any enactment, the compulsory acquisition by that person of land of that description either has been authorised or can be authorised and has been initiated (Water Resources Act 1991 s 35(4)(b) (as so amended)). The reference above to initiating the compulsory acquisition of land by a person is a reference to: (a) the submission to the relevant minister of a draft of an order which, if made by that minister in the form of the draft, will authorise that person to acquire that land compulsorily, with or without other land (s 35(5)(a)); or (b) the submission to the relevant minister of an order which, if confirmed by that minister as submitted, will authorise that person to acquire that land compulsorily, with or without other land (s 35(5)(b)). 'Relevant minister', in relation to the compulsory acquisition of land by any person, means the minister who, in accordance with the enactment mentioned in s 35(4)(b) above, is empowered to authorise that person to acquire land compulsorily: s 35(6). As to the meaning of 'enactment' see PARA 14 note 31.

6 For the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72) land must be taken to be contiguous to any inland waters notwithstanding that it is separated from those waters by a towpath or by any other land used, or acquired for use, in connection with the navigation of the inland waters, unless that other land comprises any building or works other than a lock, pier, wharf, landing-stage or similar works: s 72(4).

7 Water Resources Act 1991 s 35(2)(a) (as substituted: see note 5).

8 Water Resources Act 1991 s 35(2)(b) (as substituted: see note 5).

9 As to the meaning of 'underground strata' see PARA 187 note 5.

10 Water Resources Act 1991 s 35(3)(a) (as substituted: see note 5).

11 Water Resources Act 1991 s 35(3)(b) (as substituted: see note 5).

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### **230. Regulations with respect to applications for licences.**

Any application for a licence<sup>1</sup> must be made in such manner as may be prescribed<sup>2</sup>, and must include such particulars, be accompanied by such reports, and be verified by such evidence, as may be prescribed<sup>3</sup>.

The Secretary of State<sup>4</sup> or, in relation to Wales, the Welsh Ministers<sup>5</sup> may by regulations make provision as to the manner in which applications for the grant of licences are to be dealt with, including provision requiring the giving of notices of, and information relating to, the making of such applications or decisions on such applications, and provision for making such applications available for public inspection<sup>6</sup>. Without prejudice to the generality of this provision, provision must be made by regulations for securing that, in such circumstances as may be prescribed, being circumstances in which it appears to the Secretary of State or, where appropriate, the Welsh Ministers that applications for licences would be of special concern to National Park authorities<sup>7</sup>: (1) notice of any such application will be given to such one or more National Park authorities as may be determined in accordance with the regulations<sup>8</sup>; and (2) the matters to which the Environment Agency<sup>9</sup> or, as the case may be, the Secretary of State or the Welsh Ministers are to have regard in dealing with the application will include any representations made by any such National Park authority within such period and in such manner as may be prescribed<sup>10</sup>.

The preceding provisions have effect subject to any express provision contained in, or having effect by virtue of, any other enactment<sup>11</sup> contained in the Water Resources Act 1991<sup>12</sup>; and any regulations made under the preceding provisions have effect subject to any such express provision<sup>13</sup>.

1    I.e. a licence under the Water Resources Act 1991 Pt II Ch II (ss s 24-72): see PARA 227.

2    'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers (see note 5): see the Water Resources Act 1991 s 221(1). As to the making of regulations see PARA 21. As to the regulations made under s 34 see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641; and PARA 231.

3    Water Resources Act 1991 s 34(1) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 2(a)).

4    As to the Secretary of State see PARA 15 note 1.

5    The functions of the Secretary of State under the Water Resources Act 1991 s 34, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6    Water Resources Act 1991 s 34(2) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 2(b)).

7    As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

8    Water Resources Act 1991 s 34(3)(a) (s 34(3) amended by the Environment Act 1995 s 120(1), (3), Sch 22 para 128, Sch 24).

9    As to the Environment Agency see PARA 17.



- 10 Water Resources Act 1991 s 34(3)(b) (as amended: see note 8).
- 11 As to the meaning of 'enactment' see PARA 14 note 31.
- 12 ie in the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 13 Water Resources Act 1991 s 34(4).

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### 231. Applications for licences.

An application for an abstraction licence<sup>1</sup> or an impounding licence<sup>2</sup> must be made to the Environment Agency<sup>3</sup> on a form issued by the Agency for the purpose of the application being made<sup>4</sup>, must be accompanied by any fee payable<sup>5</sup> in relation to making the application<sup>6</sup>, and may be made electronically in a form accessible by the Agency<sup>7</sup>. An application for an abstraction licence or an impounding licence must include such information, including maps<sup>8</sup>, and must be accompanied by such reports<sup>9</sup>, as the Agency reasonably requires in order to determine it<sup>10</sup>.

Where an application relates to abstraction<sup>11</sup> or impounding<sup>12</sup> in the area of a National Park<sup>13</sup> or the Norfolk or Suffolk Broads, the Environment Agency must serve notice in writing<sup>14</sup> of the application on the National Park authority<sup>15</sup> for that National Park or the Broads Authority<sup>16</sup> (as the case may be) within 14 days beginning on the relevant date<sup>17</sup>. The notice must include a copy of the application<sup>18</sup>, and a statement that the authority may make representations in writing to the Agency in relation to the application within 28 days beginning on the date on which the notice is served<sup>19</sup>. However, the notice must not include any information which appears to the Agency to be information that is commercially confidential<sup>20</sup>. The Agency or, in the case of a called-in application<sup>21</sup>, the Secretary of State or the Welsh Ministers (as the case may be) must not determine the application until after the end of the 28 day period within which the authority may make representations<sup>22</sup>, and in determining the application, must have regard to any representations duly made by the authority in relation to the application<sup>23</sup>.

The Agency must serve on the applicant an acknowledgement in writing:

- 408 (1) in a case of an application for a full licence, a transfer licence or an impounding licence, other than a case falling within head (3) below, by the date 28 days after the relevant date<sup>24</sup>;
  - 409 (2) in a case of an application for variation of a licence<sup>25</sup>, by the date 28 days after the relevant date<sup>26</sup>; and
  - 410 (3) in a case of an application for a full licence or transfer licence where, after the relevant date but on or before the date referred to in head (1) above, the Agency serves notice on the applicant of a decision<sup>27</sup>:
- 45
52. (a) if no notice of appeal is served, by the date 28 days after the end of the period within which notice of appeal against that decision may be served<sup>28</sup>; or
  53. (b) if notice of appeal is so served, by the date 28 days after the day on which the Agency receives notice of the determination or withdrawal of that appeal<sup>29</sup>.
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The acknowledgement must state: (i) the relevant date<sup>30</sup>; (ii) whether a notice of the application has been, or is to be<sup>31</sup>, published<sup>32</sup>; (iii) the date, if known, by which the application is required to be determined<sup>33</sup>; and (iv) the applicant's entitlement to appeal should the Agency fail<sup>34</sup> to serve on the applicant notice of the Agency's decision on the application or its reference to the Secretary of State or the Welsh Ministers<sup>35</sup>.

- 1 'Abstraction licence' means a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 227): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 2(1).
  - 2 'Impounding licence' means a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72) to obstruct or impede the flow of inland waters by means of impounding works: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 2(1). As to the meaning of 'flow' see PARA 215 note 4. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'impounding works' see PARA 215 note 4.
  - 3 As to the Environment Agency see PARA 17.
  - 4 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 4(1)(a). The form and the information and reports referred to in reg 3 (see the text to notes 8-10) must be provided in duplicate unless the Agency agrees to accept a single copy (reg 4(2)(a)), or they are provided electronically (reg 4(2)(b)).
  - 5 le under the Environment Act 1995 s 41(1)(a): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 97.
  - 6 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 4(1)(b).
  - 7 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 4(1)(c).
  - 8 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 3(1)(a).
  - 9 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 3(1)(b).
  - 10 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 3(1). See also note 4. An application for a licence may require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.
  - 11 As to the meaning of 'abstraction' see PARA 192 note 2.
  - 12 'Impounding' means the obstruction or impeding of the flow of inland waters by means of impounding works or the construction or alteration of impounding works: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 2(1).
  - 13 As to National Parks see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq.
  - 14 As to the meaning of 'writing' see PARA 22 note 1.
  - 15 As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.
  - 16 As to the Broads Authority see PARA 734.
  - 17 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(1). Regulation 9(1) does not apply if: (1) the application is one to which the Water Resources Act 1991 s 51(4) (see PARA 257) applies (Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(5)(a)); or (2) in the case of an application in relation to abstraction or to impounding works, the relevant authority notifies the Environment Agency that giving such notice in relation to that application would be contrary to the interests of national security (reg 9(5)(b)). 'Relevant authority' means in the case of an application in relation to abstraction or to impounding works in England, the Secretary of State; and in the case of an application in relation to abstraction or to impounding works in Wales, the Secretary of State or the Welsh Ministers: reg 9(6); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'England' see PARA 19 note 8. As to the Secretary of State see PARA 15 note 1.
- The 'relevant date' in relation to an application for a full licence, a transfer licence or an impounding licence is: (a) except in the cases mentioned in head (b) below, the date 21 days after the day on which the Agency receives a valid application or such earlier date after the day on which the Agency receives a valid application as the Agency may determine (reg 5(1)(a)); and (b) in a case where, within 21 days beginning on the day the Agency receives a valid application for a full licence or transfer licence, the Agency serves notice on the applicant of a decision under the Water Resources Act 1991 s 36A(1) (see PARA 232) (i) if no notice of appeal is served, the date of the day after the end of the period within which notice of appeal against that decision may be served (Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 5(1)(b)(i)); or (ii) if notice of appeal is so served, the date of the day on which the Agency receives notice of the determination or withdrawal of that appeal (reg 5(1)(b)(ii)). The 'relevant date' in relation to an application for a temporary licence is the date on which the Agency receives a valid application: reg 5(2). The 'relevant date' in relation to an application under the Water Resources Act 1991 s 51(2) (see PARA 257) is the date on which the Agency

receives the application: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 5(3). As to the meanings of 'full licence', 'transfer licence' and 'temporary licence' see PARA 227. As to appeals see PARA 244. 'Valid application' means an application for an abstraction licence or an impounding licence that complies with the requirements of regs 3 and 4 (see the text to notes 1-10): reg 2(1).

18 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(2)(a).

19 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(2)(b).

20 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(3).

21 'Called-in application' means an application referred to the Secretary of State or the Welsh Ministers (as the case may be) in accordance with directions given under the Water Resources Act 1991 s 41 (power to call in applications: see PARA 243): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 2(1); Government of Wales Act 2006 Sch 11 para 32.

22 See the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(4)(a).

23 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(4)(b).

24 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(1)(a).

25 Is an application under the Water Resources Act 1991 s 51(2): see PARA 257.

26 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(1)(b).

27 Is a decision under the Water Resources Act 1991 s 36A(1): see PARA 232.

28 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(1)(c)(i).

29 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(1)(c)(ii).

30 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(2)(a).

31 Is in accordance with the Water Resources Act 1991 s 37(1): see PARA 233.

32 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(2)(b).

33 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(2)(c).

34 Is within the period referred to in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(2), (3) or (4) (see PARA 236), as the case may be.

35 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 8(2)(d); Government of Wales Act 2006 Sch 11 para 32.

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### **232. Applications; types of abstraction licence.**

The Environment Agency<sup>1</sup> may decide that:

- 411 (1) an application for a full licence, a transfer licence or a temporary licence<sup>2</sup> ought to be for one of the other types of licence<sup>3</sup>;
- 412 (2) a number of applications for licences, of any type or types, to abstract water<sup>4</sup> from a particular source of supply<sup>5</sup> ought to be treated as an application for a single such licence (of any type)<sup>6</sup>;
- 413 (3) an application for a single licence (of any type) to abstract water from a particular source of supply ought to be treated as a number of applications for such licences (of any type or types)<sup>7</sup>; or
- 414 (4) any such application as is referred to above ought to be accompanied by an application for revocation of an existing licence to abstract water<sup>8</sup>.

The Agency may arrive at the decision referred to in heads (1) to (4) above on the basis of its assessment of any one or more of the following:

- 415 (a) the likely effect of the abstraction or abstractions for which the applicant has applied for a licence or licences<sup>9</sup>;
- 416 (b) the likely effect of that abstraction, or those abstractions, taken together with abstractions under any other licence held by the applicant, or abstractions which would be authorised under any other licence for which the applicant has applied<sup>10</sup>;
- 417 (c) any other prescribed<sup>11</sup> matter<sup>12</sup>.

If the Agency does so decide, it must serve a notice<sup>13</sup> of its decision on the applicant; and, subject to the following provisions, must deal with the application or applications accordingly<sup>14</sup>. If the Agency serves such a notice, it may not publish any notice of the application or applications<sup>15</sup>, or take any further step in connection with it or them, before the end of the period within which notice of an appeal may be served on the Secretary of State<sup>16</sup> or, in relation to Wales, on the Welsh Ministers<sup>17</sup> or, if notice of an appeal is so served, before the appeal has been determined<sup>18</sup>.

The applicant may by notice appeal to the Secretary of State or, where appropriate, the Welsh Ministers against the decision, and must serve a copy of any such notice on the Agency<sup>19</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may allow or dismiss the appeal, or vary any part of the decision of the Agency, whether the appeal relates to that part of the decision or not<sup>20</sup>; and must direct the Agency to deal with the application or applications accordingly<sup>21</sup>.

1 As to the Environment Agency see PARA 17. As to the power of the Secretary of State or the Welsh Ministers to call-in applications see PARA 243.

2 As to the meanings of 'full licence', 'transfer licence' and 'temporary licence' see PARA 227.

3 Water Resources Act 1991 s 36A(1)(a) (s 36A added by the Water Act 2003 s 13(1)).

- 4 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.
- 5 As to the meaning of 'source of supply' see PARA 187.
- 6 Water Resources Act 1991 s 36A(1)(b) (as added: see note 3).
- 7 Water Resources Act 1991 s 36A(1)(c) (as added: see note 3).
- 8 Water Resources Act 1991 s 36A(1)(d) (as added: see note 3).
- 9 Water Resources Act 1991 s 36A(2)(a) (as added: see note 3).
- 10 Water Resources Act 1991 s 36A(2)(b) (as added: see note 3).
- 11 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers (see note 17): see the Water Resources Act 1991 s 221(1). As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.
- 12 Water Resources Act 1991 s 36A(2)(c) (as added: see note 3).
- 13 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 14 Water Resources Act 1991 s 36A(3) (as added: see note 3). If the Agency made the decision referred to in s 36A(1)(d) (see head (4) in the text) in relation to any application (or applications), dealing with the application or applications accordingly means not publishing any notice under s 37 (see PARA 233), or taking any further step in connection with the application (or applications), until the application for revocation has been received: see s 36A(3) (as so added).
- 15 le under the Water Resources Act 1991 s 37: see PARA 233.
- 16 As to the Secretary of State see PARA 15 note 1.
- 17 Water Resources Act 1991 s 36A(6)(a) (as added: see note 3). The functions of the Secretary of State under the Water Resources Act 1991 s 36A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 18 Water Resources Act 1991 s 36A(6)(b) (as added: see note 3).
- 19 Water Resources Act 1991 s 36A(4) (as added: see note 3). The notice, and the copy of it, must be served in such manner and within such period as may be prescribed: s 36A(5) (as so added). The period within which any such notice of appeal must be served is 28 days beginning on the date on which notice of the decision to which the appeal relates is served on the applicant: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 12(1). A notice of appeal must state the grounds on which the appeal is being made (reg 13(1)(a)); and be accompanied by a copy of the application to which the appeal relates, any information or report submitted to the Environment Agency with the application, the notice of the decision on the application, if any, and all other relevant correspondence with the Agency (reg 13(1)(b)). As to applications see PARAS 229-231.
- 20 Water Resources Act 1991 s 36A(7)(a) (as added: see note 3). Section 44(2), (7) (see PARA 246) applies in relation to an appeal under s 36A as it applies in relation to an appeal under s 43: s 36A(8) (as so added). Section 36A is subject to the Environment Act 1995 s 114 (delegation or reference of appeals: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65): Water Resources Act 1991 s 36A(9) (as so added).
- 21 Water Resources Act 1991 s 36A(7)(b) (as added: see note 3). If the Agency's decision was made under s 36A(1)(d) (see head (4) in the text) in relation to any such application, and that decision is upheld, dealing with the application or applications accordingly may mean not publishing any notice under s 37 (see PARA 233), or taking any further step in connection with the application, until the application for revocation has been received: see s 36A(7)(b) (as so added).

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### **233. Publication of an application for a licence.**

Subject to the power to dispense with publication requirements<sup>1</sup>, the Environment Agency must publish a notice<sup>2</sup> of an application for:

- 418 (1) a full licence or a transfer licence<sup>3</sup>; or
- 419 (2) a licence<sup>4</sup> to obstruct or impede the flow<sup>5</sup> of any inland waters<sup>6</sup> by means of impounding works<sup>7</sup>,

in the prescribed<sup>8</sup> way or, if no way is prescribed, in a way calculated to bring the application to the attention of persons<sup>9</sup> who in the Agency's view are likely to be affected by the licence<sup>10</sup>. Not later than the date on which that notice is first published, the Agency must also serve<sup>11</sup> a copy of it on the following persons<sup>12</sup>:

- 420 (a) any water undertaker<sup>13</sup> within whose area any proposed point of abstraction or impounding<sup>14</sup> is situated<sup>15</sup>;
- 421 (b) any navigation authority, harbour authority or conservancy authority<sup>16</sup> having functions in relation to any inland waters at any such proposed point<sup>17</sup>; and
- 422 (c) the drainage board for any internal drainage district<sup>18</sup> within which any such proposed point is situated<sup>19</sup>,

but heads (b) and (c) above do not apply if the licence applied for is exclusively for the abstraction of water from a source of supply<sup>20</sup> that does not form part of any inland waters<sup>21</sup>.

A notice for these purposes must be in the prescribed form and must include any prescribed matters<sup>22</sup>; and must state that any person may make representations in writing<sup>23</sup> to the Agency with respect to the application at any time before the end of a period specified in the notice<sup>24</sup>.

1 The subject to the Water Resources Act 1991 s 37A: s 37(8) (s 37 substituted by the Water Act 2003, s 14(1)). The Secretary of State or, in relation to Wales, the Welsh Ministers, may by regulations make provision for: (1) enabling the Environment Agency; or (2) enabling him or the Welsh Ministers, in the case of applications referred to him or them in accordance with the Water Resources Act 1991 s 41 (see PARA 243), to direct or determine that the requirements of s 37(1), (2) (see the text to notes 2-12) may in any case (except where the Agency is the applicant) be dispensed with, if in that case it appears to the Agency (or, as the case may be, the Secretary of State or the Welsh Ministers) to be appropriate to do so: s 37A (added by the Water Act 2003 s 14(2)). As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Water Resources Act 1991 ss 37, 37A, 66, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the Environment Agency see PARA 17. As to applications see PARAS 229-231.

2 As to the meaning of 'notice' see PARA 22 note 1.

3 Water Resources Act 1991 s 37(1)(a) (as substituted: see note 1). As to the meanings of 'full licence' and 'transfer licence' see PARA 227.

- 4 le under the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 5 As to the meaning of 'flow' see PARA 215 note 4.
- 6 As to the meaning of 'inland waters' see PARA 187 note 2.
- 7 Water Resources Act 1991 s 37(1)(b) (as substituted: see note 1). As to the meaning of 'impounding works' see PARA 215 note 4.
- 8 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). As to the regulations made see PARA 234.
- 9 As to the meaning of 'person' see PARA 13 note 29.
- 10 Water Resources Act 1991 s 37(1) (as substituted: see note 1). See also note 12.
- 11 As to the service of documents see PARA 22.
- 12 le the persons specified in the Water Resources Act 1991 s 37(3) (see heads (a)-(c) in the text), except the applicant, if the applicant is one of those persons: s 37(2) (as substituted: see note 1). The Secretary of State or the Welsh Ministers may make regulations providing for the requirements of s 37(2), or of both s 37(1), (2), not to apply in prescribed cases: s 37(6)(a) (as so substituted). As to the regulations made see PARA 235.
- 13 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 14 'Proposed point of abstraction or impounding', in relation to an application for a licence referred to in the Water Resources Act 1991 s 37(1) (see the text to notes 2-10), means a place where a licence, if granted in accordance with the application, would authorise: (1) water to be abstracted (s 37(7)(a) (as substituted: see note 1)); or (2) the flow of inland waters to be obstructed or impeded by means of impounding works (as the case may be) (s 37(7)(b) (as so substituted)). As to the meaning of 'abstract' see PARA 192 note 2.
- 15 Water Resources Act 1991 s 37(3)(a) (as substituted: see note 1).
- 16 As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.
- 17 Water Resources Act 1991 s 37(3)(b) (as substituted: see note 1).
- 18 As to internal drainage districts and boards see PARA 569 et seq.
- 19 Water Resources Act 1991 s 37(3)(c) (as substituted: see note 1).
- 20 As to the meaning of 'source of supply' see PARA 187.
- 21 Water Resources Act 1991 s 37(3) (as substituted: see note 1). In respect of abstraction from any inland waters owned or managed by the British Waterways Board (the 'Board'), except any such inland waters to which the Secretary of State or, in relation to Wales, the Welsh Ministers may by order made by statutory instrument direct that this provision does not apply, in relation to any application by the Board for a licence under Pt II Ch II (ss 24-72) s 37 applies as if s 37(3)(b) and (c) (see the text to notes 16-19), and the succeeding words of that section were omitted: s 66(1), (2)(c)(ii) (amended by the Water Act 2003 s 14(3)(d)). Before making an order, the Secretary of State or, where appropriate, the Welsh Ministers must consult the Board and the Environment Agency: Water Resources Act 1991 s 66(3) (amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the British Waterways Board see PARA 725 et seq. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. At the date at which this volume states the law no such order had been made.
- 22 Water Resources Act 1991 s 37(4)(a) (as substituted: see note 1). The Secretary of State or, where appropriate, the Welsh Ministers may make regulations providing for notices of applications to exclude prescribed classes of information, either generally or as respects prescribed classes of application: s 37(6)(b) (as so substituted). As to the meaning of 'information' see PARA 117 note 13. As to the regulations made see PARA 234.
- 23 As to the meaning of 'writing' see PARA 22 note 1.
- 24 Water Resources Act 1991 s 37(4)(b) (as substituted: see note 1). The period specified in the notice begins on the date the notice referred to in s 37(1) (see the text to notes 2-10) is first published as mentioned there (s 37(5)(a) (as so substituted)), and must not end before the end of the period of 28 days beginning with



that date (s 37(5)(b) (as so substituted)). The application may not be determined before the end of that period: see s 38(1); and PARA 239.

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### **234. Advertisement of an application.**

Where the requirements as to publication<sup>1</sup> apply in relation to an application<sup>2</sup>, and those requirements have not been dispensed with<sup>3</sup>, notice of that application must be published in at least one newspaper circulating in the locality of the proposed point of abstraction or impounding<sup>4</sup>, and on the Environment Agency's website<sup>5</sup>. Except in the cases specified below<sup>6</sup>, the notice of application must be published by the date 28 days after the relevant date<sup>7</sup>.

In a case where, after the relevant date but on or before the date referred to above<sup>8</sup>, the Agency serves notice on the applicant of a decision<sup>9</sup>, the notice of the application must be published: (1) if no notice of appeal is served, by the date 28 days after the end of the period within which notice of appeal against that decision may be served<sup>10</sup>; and (2) if notice of appeal is so served, by the date 28 days after the day on which the Agency receives notice of the determination or withdrawal of the appeal<sup>11</sup>.

In a case where a matter in relation to a valid application<sup>12</sup> falls to be determined under the provisions relating to the exclusion from registers of information affecting national security<sup>13</sup>, the notice of the application must be published by the date 28 days after the day on which the Agency receives notice of that determination<sup>14</sup>. In a case where a matter in relation to a valid application falls to be determined under the provisions relating to the exclusion from registers of certain confidential information<sup>15</sup> the notice of the application must be published: (a) if the Agency determines<sup>16</sup> that the information in question might be commercially confidential, by the date 28 days after the day on which the Agency serves notice on the applicant of that determination<sup>17</sup>; and (b) if the Agency determines<sup>18</sup> that the information in question is not commercially confidential (i) if no notice of appeal is served, by the date 28 days after the end of the period within which notice of appeal against that determination may be served<sup>19</sup>; or (ii) if notice of appeal is so served, by the date 28 days after the day on which the Agency receives notice of the determination or withdrawal of the appeal<sup>20</sup>.

The notice must:

- 423 (A) state the name of the applicant<sup>21</sup>;
- 424 (B) specify the type of application being made including, if appropriate, the type of licence being applied for<sup>22</sup>; the purpose of the proposed abstraction or impounding<sup>23</sup>; the proposed point of abstraction or impounding<sup>24</sup>; in the case of an application for an abstraction licence<sup>25</sup>, the period over which abstraction would take place<sup>26</sup>; in the case of an application for a full licence<sup>27</sup>, the quantity of water to be abstracted<sup>28</sup>; and in the case of an application for an impounding licence<sup>29</sup>, the proposed means of impounding<sup>30</sup>;
- 425 (C) include such other particulars (if any) as the Agency considers necessary to explain the application<sup>31</sup>; and
- 426 (D) state where and when the application documents and the register containing details of the application may be inspected, and that such inspection is free of charge<sup>32</sup>; and the address to which any representations in relation to the application should be sent<sup>33</sup>.

However, the notice must not include any information that is not to be included<sup>34</sup> in a register<sup>35</sup>.

- 1    Ie the requirements of the Water Resources Act 1991 s 37(1) (see PARA 233) including that section as applied by s 51(3), subject to the modifications made by s 51(4) (see PARA 257).
- 2    As to applications see PARAS 229-231.
- 3    Ie under the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(4): see PARA 235.
- 4    Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(1)(a). As to the meaning of 'proposed point of abstraction or impounding' see PARA 233 note 14. As to exemptions from the advertising requirements see PARA 235.
- 5    Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(1)(b). As to the Environment Agency see PARA 17. The Agency's website is at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).
- 6    Ie in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(3)-(5): see the text to notes 8-20.
- 7    Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(2). As to the meaning of 'relevant date' see PARA 231 note 17.
- 8    Ie in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(2) (see the text to note 7): reg 6(3) (amended by SI 2008/165).
- 9    Ie a decision under the Water Resources Act 1991 s 36A(1): see PARA 232.
- 10   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(3)(a). As to appeals in such cases see PARA 232.
- 11   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(3)(b).
- 12   As to the meaning of 'valid application' see PARA 231 note 17.
- 13   Ie under the Water Resources Act 1991 s 191A: see PARA 269.
- 14   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(4).
- 15   Ie under the Water Resources Act 1991 s 191B: see PARA 270.
- 16   Ie under the Water Resources Act 1991 s 191B(4): see PARA 270.
- 17   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(5)(a).
- 18   Ie under the Water Resources Act 1991 s 191B(4): see PARA 270.
- 19   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(5)(b)(i).
- 20   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(5)(b)(ii).
- 21   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(a).
- 22   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(b)(i).
- 23   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(b)(ii).
- 24   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(b)(iii).
- 25   As to the meaning of 'abstraction licence' see PARA 231 note 1.
- 26   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(b)(iv).
- 27   As to the meaning of 'full licence' see PARA 227.
- 28   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(b)(v).
- 29   As to the meaning of 'impounding licence' see PARA 231 note 2.

30 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(b)(vi). As to the meaning of 'impounding' see PARA 231 note 12.

31 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(c).

32 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(d)(i). As to the register of applications see PARA 268.

33 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(6)(d)(ii).

34 le by virtue of the Water Resources Act 1991 s 191A (exclusion from registers of information affecting national security: see PARA 269) or s 191B (exclusion from registers of information of certain confidential information: see PARA 270).

35 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(7).

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### 235. Exemptions from advertising requirements.

The requirements as to the publication of a notice of an application for a licence<sup>1</sup> do not apply:

- 427 (1) to an application for a full licence or transfer licence<sup>2</sup> if:
- 47
- 54. (a) the proposed point of abstraction<sup>3</sup> in relation to the application is the place where an existing licence held by the applicant authorises water to be abstracted<sup>4</sup>; and
- 55. (b) the licence to which the application relates would take effect immediately after the expiry of the existing licence<sup>5</sup>, would not permit a greater quantity of water to be abstracted than may be abstracted under the existing licence<sup>6</sup>, and would otherwise be subject to materially the same terms as the existing licence<sup>7</sup>;
- 48
- 428 (2) to an application to vary a licence<sup>8</sup> in relation to an existing abstraction licence<sup>9</sup> that is to remain in force until revoked if:
- 49
- 56. (a) the application is for the existing licence to be varied so as to specify a date on which that licence will expire<sup>10</sup>;
- 57. (b) the varied licence would not permit the quantity of water that may be abstracted under the existing licence to be increased<sup>11</sup>; and
- 58. (c) the varied licence would otherwise be subject to materially the same terms as the existing licence<sup>12</sup>;
- 50
- 429 (3) to an application for a full licence, a transfer licence or an impounding licence<sup>13</sup>, or the variation of such a licence, if the relevant authority<sup>14</sup> notifies the Environment Agency<sup>15</sup> that complying with those requirements in relation to that application would be contrary to the interests of national security<sup>16</sup>.

Those requirements may be dispensed with if it appears to the Environment Agency or, in the case of a called-in application<sup>17</sup>, the Secretary of State or the Welsh Ministers (as the case may be) that the proposed abstraction or impounding<sup>18</sup> would have no appreciable adverse effect on<sup>19</sup>: (i) the environment<sup>20</sup>; (ii) any licensed abstraction<sup>21</sup>; or (iii) any abstraction to which the restriction on abstraction<sup>22</sup> does not apply<sup>23</sup>.

1 le the requirements of the Water Resources Act 1991 s 37(1) and (2): see PARA 233.

2 As to the meanings of 'full licence' and 'transfer licence' see PARA 227.

3 As to the meaning of 'proposed point of abstraction' see PARA 233 note 14. As to the meaning of 'abstraction' see PARA 192 note 2.

4 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(1)(a).

5 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(1)(b)(i).

6 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(1)(b)(ii).

7 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(1)(b)(iii).

- 8    le an application under the Water Resources Act 1991 s 51(2): see PARA 257.
- 9    As to the meaning of 'abstraction licence' see PARA 231 note 1.
- 10   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(2)(a).
- 11   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(2)(b).
- 12   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(2)(c).
- 13   As to the meaning of 'impounding licence' see PARA 231 note 2.
- 14   'Relevant authority' means, in the case of an application in relation to abstraction or to impounding works in England, the Secretary of State; and, in the case of an application in relation to abstraction or to impounding works in Wales, the Secretary of State or the Welsh Ministers: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(5); Government of Wales Act 2006 Sch 11 para 32. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'England' see PARA 19 note 8. Functions under the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meaning of 'impounding works' see PARA 215 note 4.
- 15   As to the Environment Agency see PARA 17.
- 16   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(3).
- 17   As to the meaning of 'called-in application' see PARA 231 note 21.
- 18   As to the meaning of 'impounding' see PARA 231 note 12.
- 19   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(4); Government of Wales Act 2006 Sch 11 para 32.
- 20   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(4)(a).
- 21   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(4)(b).
- 22   As to the meaning of 'restriction on abstraction' see PARA 214 note 9.
- 23   Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 7(4)(c).

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### **236. Duties on the Environment Agency in dealing with applications.**

The Environment Agency<sup>1</sup> must serve<sup>2</sup> notice in writing<sup>3</sup> on the applicant of: (1) its decision on the application<sup>4</sup>; or (2) the reference<sup>5</sup> of the application to the Secretary of State or the Welsh Ministers<sup>6</sup>.

In the case of an application for a temporary licence<sup>7</sup>, the notice must be served;

- 430 (a) except in a case mentioned in head (b) below:
- 51
59. (i) in a case where<sup>8</sup> notice of that application is served on a National Park authority or the Broads Authority, by the date 14 days after the end of the period<sup>9</sup> within which that authority may make representations in relation to the application<sup>10</sup>; and
60. (ii) in a case where no notice as mentioned in head (i) above is served, by the date 28 days after the relevant date<sup>11</sup>; and
- 52
- 431 (b) in a case where, on or before the date referred to in head (a)(i) or (ii) above (as the case may be), the Agency serves notice on the applicant<sup>12</sup> that it requires him to provide information<sup>13</sup> in relation to the application, by the date 28 days after that information is received by the Agency<sup>14</sup>.

In a case where the requirement as to advertisement of the application applies<sup>15</sup>, the notice must be served by the date four months<sup>16</sup> after the relevant date or (if later):

- 432 (A) in a case where, on or before the date four months after the relevant date, the Agency serves notice on the applicant<sup>17</sup> that it requires him to provide information in relation to the application, the date two months after that information is received by the Agency<sup>18</sup>;
- 433 (B) in a case where the Agency serves on the applicant notice of a decision<sup>19</sup>, the date two months after the date calculated in accordance with the relevant provisions<sup>20</sup>; and
- 434 (C) in a case relating to the exclusion of information from registers<sup>21</sup>, the date two months after the date calculated in accordance with the relevant provisions<sup>22</sup>.

Except in a case mentioned above<sup>23</sup>, the notice must be served by the date three months after the relevant date or (if later): (aa) in a case where, on or before the date three months after the relevant date, the Agency serves notice on the applicant<sup>24</sup> that it requires him to provide information in relation to the application, the date two months after that information is received by the Agency<sup>25</sup>; and (bb) in a case where, on or before the date three months after the relevant date, the Agency serves notice on the applicant of a decision<sup>26</sup>, if no notice of appeal is served, the date two months after the end of the period within which notice of appeal against that decision may be served<sup>27</sup>, or, if notice of appeal is so served, the date two months after the day on which the Agency receives notice of the determination or withdrawal of the appeal<sup>28</sup>.

- 1 As to the Environment Agency see PARA 17.
- 2 As to the service of documents see PARA 22.
- 3 As to the meaning of 'writing' see PARA 22 note 1.
- 4 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(1)(a). Where the Agency grants a licence subject to conditions or on terms which are different in any material respect from the application, or it refuses an application, the notice referred to in reg 10(1)(a) must: (1) include a statement of the Agency's reasons for doing so (reg 10(5)(a)); and (2) state the applicant's entitlement to appeal to the Secretary of State or the Welsh Ministers (as the case may be) if he is dissatisfied with the Agency's decision on the application (reg 10(5)(b); Government of Wales Act 2006 Sch 11 para 32). As to the Secretary of State see PARA 15 note 1. Functions under the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.
- 5 Ie under the Water Resources Act 1991 s 41: see PARA 243.
- 6 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(1)(b); Government of Wales Act 2006 Sch 11 para 32. Where the Agency refers an application to the Secretary of State or the Welsh Ministers under the Water Resources Act 1991 s 41 (see PARA 243), the notice referred to in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(1)(b) must state: (1) the reasons, if any, given by the Secretary of State or the Welsh Ministers for directing that reference to be made (reg 10(6)(a); Government of Wales Act 2006 Sch 11 para 32); (2) the applicant's entitlement to request to appear before, and be heard by, a person appointed for the purpose of determining the application (Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(6)(b)); and (3) that the decision on the application will be final (reg 10(6)(c)).
- 7 As to the meaning of 'temporary licence' see PARA 227.
- 8 Ie in accordance with the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(1): see PARA 231.
- 9 Ie the period referred to in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(2)(b): see PARA 231.
- 10 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(2)(a)(i).
- 11 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(2)(a)(ii). As to the meaning of 'relevant date' see PARA 231 note 17.
- 12 Ie under the Water Resources Act 1991 s 201: see PARA 195.
- 13 As to the meaning of 'information' see PARA 117 note 13.
- 14 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(2)(b).
- 15 Ie a case where the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(1) applies: see PARA 234.
- 16 As to the meaning of 'month' see PARA 23 note 10.
- 17 Ie under the Water Resources Act 1991 s 201: see PARA 195.
- 18 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(3)(a).
- 19 Ie a case referred to in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(3): see PARA 234.
- 20 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(3)(b). The relevant provisions are those of reg 6(3) (see PARA 234): see reg 10(3)(b).
- 21 Ie a case referred to in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 6(4) or (5): see PARA 234.
- 22 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(3)(c). The relevant provisions are those of reg 6(4) or (5) (see PARA 234) as the case may be: see reg 10(3)(c).



- 23    le a case mentioned in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(2) or (3): see the text to notes 7-22.
- 24    le under the Water Resources Act 1991 s 201: see PARA 195.
- 25    Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(4)(a).
- 26    le under the Water Resources Act 1991 s 36A(1): see PARA 232.
- 27    Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(4)(b)(i).
- 28    Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(4)(b)(ii).

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### **237. Abstracting and impounding by the Environment Agency.**

The provisions generally applicable to the abstraction and impounding of water<sup>1</sup> have effect:

- 435 (1) in relation to the abstraction of water by the Environment Agency<sup>2</sup> from sources of supply<sup>3</sup>; and
- 436 (2) in relation to the construction or alteration by the Agency of impounding works<sup>4</sup>, and the obstruction or impeding by the Agency of the flow<sup>5</sup> of inland waters<sup>6</sup> by means of impounding works<sup>7</sup>,

subject to such exceptions and modifications as may be prescribed<sup>8</sup>. In particular, regulations under this provision may provide for securing:

- 437 (a) that any licence required by the Agency in relation to such matters is granted (or is deemed to be granted) by the Secretary of State or, in relation to Wales, by the Welsh Ministers, and not granted by the Agency<sup>9</sup>;
- 438 (b) that, in such cases and subject to such conditions as may be prescribed, any licence so required by the Agency is deemed to be granted by the Secretary of State or the Welsh Ministers unless he or they require an application for the licence to be made to him or to them by the Agency<sup>10</sup>; and
- 439 (c) that where a licence is so deemed to be granted, the Agency must give such notice of that fact as may be prescribed<sup>11</sup>.

1 le the provisions of the Water Resources Act 1991 Pt II Ch II (ss 24-72). As to the meaning of 'abstraction' see PARA 192 note 2.

2 As to the Environment Agency see PARA 17.

3 Water Resources Act 1991 s 64(1)(a) (s 64(1)(a), (2) amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the meaning of 'source of supply' see PARA 187.

4 Water Resources Act 1991 s 64(1)(b)(i) (s 64(1)(b) substituted by the Water Act 2003 s 2(7)). As to the meaning of 'impounding works' see PARA 215 note 4.

5 As to the meaning of 'flow' see PARA 215 note 4.

6 As to the meaning of 'inland waters' see PARA 187 note 2.

7 Water Resources Act 1991 s 64(1)(b)(ii) (as substituted: see note 4).

8 Water Resources Act 1991 s 64(1). 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). As to the making of regulations see PARA 21. The Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, Sch 2, and the exceptions from, and modifications to, the Water Resources Act 1991 made by it, has effect in relation to proposals for abstraction or impounding by the Agency for which an abstraction licence or impounding licence is required: reg 16(a), Sch 2. As to the meaning of 'impounding' see PARA 231 note 12. As to the meaning of 'impounding licence' see PARA 231 note 2. As to the meaning of 'abstraction licence' see PARA 231 note 1.

The functions of the Secretary of State under the Water Resources Act 1991 s 64, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh

Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the Secretary of State see PARA 15 note 1. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

9 Water Resources Act 1991 s 64(2)(a) (as amended: see note 3).

10 Water Resources Act 1991 s 64(2)(b) (as amended: see note 3).

11 Water Resources Act 1991 s 64(2)(c) (as amended: see note 3). Without prejudice to the provisions of s 64(1), (2), s 52 (see PARA 258) does not apply in relation to any licence which by virtue of any regulations under s 64 is granted or deemed to have been granted by the Secretary of State or, where appropriate, the Welsh Ministers, except in accordance with such regulations: s 64(3).

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### **238. Licences of right.**

Where a person had<sup>1</sup> abstracted water from a source of supply at any time within the period of five years ending with 1 September 1989, and could establish to the reasonable satisfaction of the former National Rivers Authority<sup>2</sup> that his abstractions would require licensing only by reason of legislative amendments made by the Water Act 1989<sup>3</sup>, he was entitled to the grant of such a licence as would authorise those abstractions<sup>4</sup>. Similar transitional provision was made in order to authorise abstractions required or authorised by a contract for the sale of water made by the British Waterways Board and which would also be affected by those legislative amendments<sup>5</sup>. Those transitional provisions continue to apply in relation to any application made under them which was outstanding immediately before the coming into force of the Water Resources Act 1991 on 1 December 1991, and to any appeal against a determination made on such an application<sup>6</sup> and any licence granted by virtue of this provision has effect as a licence under the Water Resources Act 1991<sup>7</sup>. Such licences are known as 'licences of right'<sup>8</sup>.

1    Ie in pursuance of the Water Resources Act 1963 s 24(2) or (3) (repealed).

2    As to the former National Rivers Authority and the transfer of its functions, assets and liabilities to the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 70-71. As to the Environment Agency see PARA 17.

3    Ie by reason of the amendments made by the Water Act 1989 s 128, Sch 13 para 6(3) or (4) (repealed).

4    See the Water Act 1989 Sch 26 para 30 (repealed with savings).

5    See the Water Act 1989 Sch 26 para 31 (repealed with savings). As to the British Waterways Board see PARA 725 et seq.

6    See the Water Resources Act 1991 s 65, Sch 7 para 1(1). As to the disposal of such an application see Sch 7 para 1(2), (3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7    See the Water Resources Act 1991 Sch 7 para 1(4). For most practical purposes, such a licence is the same as any other abstraction licence.

8    See the Water Resources Act 1991 Sch 7 para 6. References to 'licences of right' are references to: (1) any Water Act 1989 licence of right, ie a licence granted, whether or not by virtue of the Water Resources Act 1991 Sch 7 para 1 (see the text to note 6), under the Water Act 1989 Sch 26 para 30 or Sch 26 para 31 (both repealed); or (2) any licence which, having been granted in pursuance of an application under the Water Resources Act 1963 s 33 (repealed), or in pursuance of an appeal consequential on such an application, has effect after 1 December 1991 by virtue of the Water Resources Act 1991 Sch 7 para 6(2): Sch 7 para 6(1). The repeal by the Water Consolidation (Consequential Provisions) Act 1991 of the Water Act 1989 Sch 26 para 29(4) does not prevent any licence granted on an appeal against a determination made on an application under Sch 26 para 30 or 31 (repealed with savings) from continuing, in accordance with the Water Consolidation (Consequential Provisions) Act 1991 Sch 2 para 1 and subject to the Water Resources Act 1991 Sch 7 paras 1-5 to have effect after 1 December 1991 as a licence under Pt II Ch II (ss 24-72): Sch 7 para 6(2).

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## **C. CONSIDERATION OF LICENCE APPLICATIONS**

### **239. General consideration of applications.**

The Environment Agency<sup>1</sup> must not determine any application for a licence<sup>2</sup> before the end of the period specified in the notice<sup>3</sup> for the making of representations with respect to the application<sup>4</sup>.

An application must be determined in two stages<sup>5</sup> if it is an application for a full licence or a transfer licence<sup>6</sup> which, if granted: (1) would take effect immediately after the expiry of an existing licence of the same type (the 'existing licence') and be held by the same person<sup>7</sup> as the holder of that licence<sup>8</sup>; but (2) would in any other respect be different from the existing licence in a way which, if the existing licence were to continue without expiring, would require an application to be made<sup>9</sup> for a variation of the licence<sup>10</sup>.

Subject as provided<sup>11</sup>, on any application to the Agency for a licence, the Agency: (a) may grant a licence containing such provisions as it considers appropriate<sup>12</sup>; or (b) if, having regard to the statutory provisions<sup>13</sup>, the Agency considers it necessary or expedient to do so, may refuse to grant a licence<sup>14</sup>. In dealing with any application for a licence, the Agency must<sup>15</sup> have regard to all the relevant circumstances, including any duty imposed by or under any enactment<sup>16</sup> on bodies having functions in relation to inland waters<sup>17</sup> (for example, navigation authorities<sup>18</sup> and internal drainage boards<sup>19</sup>), and must have regard in particular to<sup>20</sup>:

- 440 (i) any representations in writing<sup>21</sup> relating to the application which are received by the Agency before the end of the period<sup>22</sup> specified for the making of representations with respect to the application<sup>23</sup>; and
- 441 (ii) the requirements of the applicant, in so far as they appear to the Agency to be reasonable requirements<sup>24</sup>,

and may have regard to any failure on the part of the applicant to make an application<sup>25</sup> for a bulk supply of water pursuant to a proposal made<sup>26</sup> by the Agency<sup>27</sup>.

1 As to the Environment Agency see PARA 17.

2 I.e a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72). As to applications see PARAS 229-231.

3 I.e as referred to in the Water Resources Act 1991 s 37(4)(b): see PARA 233.

4 Water Resources Act 1991 s 38(1) (amended by the Water Act 2003 s 14(3)(a)(i)). Section 38(1) and (3)(a) (see the text to notes 21-23), do not apply if in relation to the application in question the requirements of s 37(1) (see PARA 233) do not apply by virtue of s 37(6)(a) (see PARA 233) or have been dispensed with by virtue of s 37A (see PARA 233): s 38(4) (added by the Water Act 2003 s 14(3)(a)(ii)).

5 I.e in accordance with the Water Resources Act 1991 s 38(1B) and (1C): s 38(1A) (s 38(1A)-(1C) added by the Water Act 2003 s 15(1), (2)). So far as the application relates to any such difference as is mentioned in the Water Resources Act 1991 s 38(1A)(b) (see the text to notes 9-10), it must first be treated for determination purposes as if it were an application for a variation under s 51(2) (see PARA 257) (but as if the existing licence were to continue without expiring): s 38(1B) (as so added). If the result of that would have been the grant of the application for variation of the licence, the application referred to in s 38(1) (see the text to notes 1-4) must be

treated as one for a licence with that variation, and its determination concluded accordingly; and otherwise its determination must be concluded as if it were an application for a licence with no such variation: s 38(1C) (as so added).

6 As to the meanings of 'full licence' and 'transfer licence' see PARA 227.

7 As to the meaning of 'person' see PARA 13 note 29.

8 Water Resources Act 1991 s 38(1A)(a) (as added: see note 5). As to who is the holder of a licence see s 47; and PARA 250.

9 le under the Water Resources Act 1991 s 51(2): see PARA 257.

10 Water Resources Act 1991 s 38(1A)(b) (as added: see note 5).

11 le subject to the Water Resources Act 1991 ss 39-72.

12 Water Resources Act 1991 s 38(2)(a) (s 38(2) amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the form and content of licences see PARA 248.

13 le the provisions of the Water Resources Act 1991 Pt II Ch II (ss 24-72).

14 Water Resources Act 1991 s 38(2)(b) (as amended: see note 12). As to appeals in respect of decisions on applications see PARA 244.

15 le without prejudice to the Water Resources Act 1991 s 39(1) (see PARA 240): s 38(3).

16 As to the meaning of 'enactment' see PARA 14 note 31.

17 As to the meaning of 'inland waters' see PARA 187 note 2.

18 As to the meaning of 'navigation authority' see PARA 189 note 1.

19 As to internal drainage boards see PARA 569 et seq.

20 Water Resources Act 1991 s 38(3) (amended by the Environment Act 1995 s 120, Sch 22 para 128; the Water Act 2003 s 15(1), (3)).

21 As to the meaning of 'writing' see PARA 22 note 1.

22 le the period mentioned in the Water Resources Act 1991 s 38(1): see the text to notes 1-4.

23 Water Resources Act 1991 s 38(3)(a) (s 38(3)(a), (b) amended by the Environment Act 1995 s 120, Sch 22 para 128). See also note 4.

24 Water Resources Act 1991 s 38(3)(b) (as amended: see note 23).

25 le under the Water Industry Act 1991 s 40: see PARA 330.

26 le under the Water Resources Act 1991 s 20C: see PARA 330.

27 Water Resources Act 1991 s 38(3) (amended by the Environment Act 1995 s 120, Sch 22 para 128; the Water Act 2003 s 31(2)). As to the obligation of the Agency to take account of river flow and related matters see the Water Resources Act 1991 s 40; and PARA 242.

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#### **240. Obligation to have regard to existing rights and privileges.**

Except with the consent of the person<sup>1</sup> entitled to the rights, and subject to certain exceptions<sup>2</sup>, the Environment Agency<sup>3</sup> must not grant a licence authorising the abstraction<sup>4</sup> of water<sup>5</sup>, or the flow<sup>6</sup> of any inland waters<sup>7</sup> to be obstructed or impeded by means of impounding works<sup>8</sup>, so as to derogate<sup>9</sup> from any rights which, at the time when the application is determined by the Agency, are<sup>10</sup> protected rights<sup>11</sup>.

In a case where an application for a licence<sup>12</sup> relates to abstraction from underground strata<sup>13</sup>, the Agency, in dealing with the application, must have regard to the requirements of existing lawful uses of water<sup>14</sup> abstracted from those strata, whether for agriculture<sup>15</sup>, industry, water supply or other purposes<sup>16</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 Ie subject to the Water Resources Act 1991 s 39(1A): s 39(1) (amended by the Water Act 2003 s 16(1), (2)). The Water Resources Act 1991 s 39(1) does not apply when: (1) the application to be determined is one which does not fall within s 38(1A) (see PARA 239) only because s 38(1A)(b) is not satisfied; or (2) the determination of an application is being concluded in accordance with s 38(1C) (see PARA 239): s 39(1A) (added by the Water Act 2003 s 16(1), (3)).

3 As to the Environment Agency see PARA 17.

4 As to the meaning of 'abstraction' see PARA 192 note 2.

5 Water Resources Act 1991 s 39(1)(a).

6 As to the meaning of 'flow' see PARA 215 note 4.

7 As to the meaning of 'inland waters' see PARA 187 note 2.

8 Water Resources Act 1991 s 39(1)(b). As to the meaning of 'impounding works' see PARA 215 note 4.

9 Any reference in the Water Resources Act 1991 Pt II Ch II (ss 24-72), in relation to the abstraction of water or obstructing or impeding the flow of any inland waters by means of impounding works, to derogating from a right which is a protected right for the purposes of that Chapter is a reference to, as the case may be, abstracting water or so obstructing or impeding the flow of any such waters, in such a way, or to such an extent, as to prevent the person entitled to that right from abstracting water to the extent mentioned in (as the case may be) s 39A(2) or (7) (see PARA 241), s 48(1) (see PARA 251) or s 59C(10) (see PARA 254) or the Water Act 2003 s 102(3) (see PARA 228), or in a provision made in an order by virtue of s 10(5)(b) of that Act (see PARA 226), in each case subject to any limitations mentioned there: Water Resources Act 1991 s 39(4) (amended by the Water Act 2003 s 16(1), (5)). 'Derogate', in relation to a protected right, is to be construed accordingly: Water Resources Act 1991 s 72(1). As to the meaning of 'protected right' see PARA 241.

10 Ie for the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72).

11 Water Resources Act 1991 s 39(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Breach of this duty gives rise to a right of action against the Agency: see s 60; and PARA 267.

12 Ie under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

13 As to the meaning of 'underground strata' see PARA 187 note 5.

14 For these purposes, the Agency is entitled (but is not bound) to treat as lawful any existing use of water from underground strata unless by a decision given in any legal proceedings, it has been held to be unlawful,

and that decision has not been quashed or reversed: Water Resources Act 1991 s 39(5) (amended by the Environment Act 1995 s 120, Sch 22 para 128). As to common law rights in subterranean water see PARA 104 et seq.

15 As to the meaning of 'agriculture' see PARA 209 note 20.

16 Water Resources Act 1991 s 39(2) (amended by the Environment Act 1995 s 120, Sch 22 para 128).



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## 241. Protected rights.

A right is a protected right for the purposes of the provisions relating to abstraction and impounding<sup>1</sup> if:

- 442 (1) it is such a right as a person<sup>2</sup> who is the holder of a full licence<sup>3</sup> is taken to have<sup>4</sup> by virtue of that licence and to the extent authorised by it<sup>5</sup>;
- 443 (2) it is such a right as a person is taken to have by virtue of the statutory provision<sup>6</sup> allowing him to abstract water in respect of a maximum quantity per day<sup>7</sup>;
- 444 (3) it is such a right as a person continues to be taken to have<sup>8</sup> where he was the holder of a full licence which has ceased to have effect by virtue of certain statutory provisions or orders<sup>9</sup>;
- 445 (4) it is such a right as a person is taken to have<sup>10</sup> where he proposes to carry on part of an abstraction in the specified circumstances<sup>11</sup>;
- 446 (5) it is such a right as a person continues to be taken to have by virtue of a provision made<sup>12</sup> in an order<sup>13</sup> revoking an exception order<sup>14</sup>; or
- 447 (6) it is such a right as a person continues to be taken to have<sup>15</sup> by virtue of certain transitional provisions<sup>16</sup>.

A person who was the holder of a full licence which has ceased to have effect, or has ceased in part to have effect, by virtue of any provision made<sup>17</sup> in an order varying the small quantity threshold<sup>18</sup>, or any provision made<sup>19</sup> in regulations providing for further exemptions<sup>20</sup>, and who was taken in consequence of that licence, or that part of the licence, to have a right to abstract water<sup>21</sup> continues to be taken to have that right for the statutory purposes<sup>22</sup>; but the person who was the holder of the licence in question (the 'old licence')<sup>23</sup> ceases to continue to be taken to have such a right to abstract water if:

- 448 (a) during a specified period<sup>24</sup> he does not carry out any such abstraction as would have been authorised by the old licence if it had still been in force<sup>25</sup>; or
- 449 (b) following a further order<sup>26</sup> or further regulations<sup>27</sup>, he is granted another full licence in respect of abstraction from the same point as that authorised by the old licence<sup>28</sup>.

Any reference in the relevant statutory provisions<sup>29</sup> to the person entitled to a protected right must be construed in accordance with the above provisions<sup>30</sup>.

The Secretary of State<sup>31</sup> or, in relation to Wales, the Welsh Ministers<sup>32</sup>, may by regulations<sup>33</sup> make provision for and in connection with the establishment, and for the keeping and maintenance by the Environment Agency, of one or more registers of protected rights which arise otherwise than by virtue of a licence<sup>34</sup> to abstract water<sup>35</sup>. The regulations may, in particular, provide for:

- 450 (i) a register to relate to a prescribed<sup>36</sup> geographical area, or for different sections of a register to relate to different geographical areas, whether prescribed or not<sup>37</sup>;

- 451 (ii) the inclusion of protected rights which arise other than by virtue of any provision of the Water Resources Act 1991<sup>38</sup>;
- 452 (iii) the form and contents of the register, and its inspection by members of the public<sup>39</sup>;
- 453 (iv) the procedure for applying for a protected right to be included in the register, including any information<sup>40</sup> which is to accompany the application<sup>41</sup>;
- 454 (v) cases in which it is the duty of the Agency to include a protected right in the register without an application for inclusion having been made<sup>42</sup>.

The Secretary of State or, where appropriate, the Welsh Ministers may by order designate any geographical area in respect of which a register, or a section of a register, relates as an area of compulsory registration<sup>43</sup>. If the Secretary of State or the Welsh Ministers make such an order, a protected right in that area which is not registered does not have effect<sup>44</sup> as a protected right for any purpose of the Water Resources Act 1991, other than that of registering it, for so long as it is not registered<sup>45</sup>.

1    Ie for the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72). As to the meaning of 'abstraction' see PARA 192 note 2.

2    As to the meaning of 'person' see PARA 13 note 29.

3    As to the meaning of 'full licence' see PARA 227. As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

4    Ie by virtue of the Water Resources Act 1991 s 48(1): see PARA 251.

5    See the Water Resources Act 1991 s 39A(1)(a) (s 39A added by the Water Act 2003 s 17(1)).

6    Ie by virtue of the Water Resources Act 1991 s 39A(2): see note 7.

7    See the Water Resources Act 1991 s 39A(1)(b) (as added: see note 5). A person who is in a position to carry out an abstraction of a quantity of water which: (1) by virtue of s 27(1) (see PARA 221) is not subject to the restriction on abstraction; and (2) also falls within s 39A(4) or (5), will be taken, for the purposes of Pt II Ch II (ss 24-72), to have a right to do so in respect of the maximum quantity mentioned in s 39A(3): s 39A(2) (as so added). The maximum quantity is the lower of the following: (a) 20 cubic metres; (b) if, by virtue of an order under s 27A(1) (see PARA 221), s 27(1) (see PARA 221) has, or has ever had, effect in relation to the source of supply and point of abstraction in question as if it referred to a quantity lower than 20 cubic metres, that lower quantity (or, if more than one, the lowest of them): s 39A(3) (as so added). An abstraction falls within s 39A(4) if it is an abstraction from inland waters carried out by or on behalf of an occupier of land contiguous to those waters at the place where the abstraction is effected ('contiguous land'), and (i) the water is abstracted for use on a holding consisting of the contiguous land with or without other land held with that land; and (ii) it is abstracted for use on that holding for either or both of the following purposes, ie the domestic purposes of the occupier's household and/or agricultural purposes other than spray irrigation: s 39A(4) (as so added). An abstraction falls within s 39A(5) if it is an abstraction from underground strata and the water is abstracted by or on behalf of an individual as a supply of water for the domestic purposes of his household: s 39A(5) (as so added). Section 39A(2) does not apply to a person in respect of an abstraction which that person is, or was at any time, taken to have a right to carry out by virtue of any provision mentioned in s 39A(1)(a), (c), (d), (e) or (f) (see heads (1), (3)-(6) in the text): s 39A(6) (as so added). As to the meaning of 'restriction on abstraction' see PARA 214 note 9. As to the meaning of 'source of supply' see PARA 187. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'land contiguous to inland waters' see PARA 229 note 6. As to the meaning of 'agricultural' see PARA 209 note 20. As to the meaning of 'spray irrigation' see PARA 262. As to the meaning of 'underground strata' see PARA 187 note 5.

8    Ie by virtue of the Water Resources Act 1991 s 39A(7): see the text to notes 17-22.

9    See the Water Resources Act 1991 s 39A(1)(c) (as added: see note 5).

10   Ie by virtue of the Water Resources Act 1991 s 59C(10): see PARA 254.

11   See the Water Resources Act 1991 s 39A(1)(d) (as added: see note 5).

12   Ie made under the Water Act 2003 s 10(5)(b): see PARA 226.

- 13    Ie an order made under the Water Act 2003 s 10: see PARA 226.
- 14    See the Water Resources Act 1991 s 39A(1)(e) (as added: see note 5).
- 15    Ie by virtue of the Water Act 2003 s 102(3): see PARA 228.
- 16    See the Water Resources Act 1991 s 39A(1)(f) (as added: see note 5).
- 17    Ie made by virtue of the Water Resources Act 1991 27A(5): see PARA 221.
- 18    Water Resources Act 1991 s 39A(7)(a) (as added: see note 5). The order referred to in the text is one made under s 27A(1): see PARA 221.
- 19    Ie made by virtue of the Water Resources Act 1991 s 33A(5): see PARA 225.
- 20    Water Resources Act 1991 s 39A(7)(a) (as added: see note 5). The regulations referred to in the text are those made under s 33A: see PARA 225.
- 21    Ie by virtue of the Water Resources Act 1991 s 48(1): see PARA 251.
- 22    Water Resources Act 1991 s 39A(7) (as added: see note 5). The statutory purposes are those of Pt II Ch II (ss 24-72).
- 23    In the Water Resources Act 1991 s 39A(8), (9), references to the old licence, in the case of a licence which ceased to have effect only to the extent specified in the order or regulations referred to s 39A(7) (see the text to notes 17-22), are to the part of the licence which ceased to have effect: s 39A(10) (as added: see note 5).
- 24    The period referred to is four years or, if the abstractions authorised under the old licence were abstractions planned to be carried out at intervals of more than four years, or abstractions for emergency purposes only, such longer period as the Environment Agency may determine on the application of the holder of the old licence: Water Resources Act 1991 s 39A(9) (as added: see note 5). As to the Environment Agency see PARA 17.
- 25    Water Resources Act 1991 s 39A(8)(a) (as added: see note 5).
- 26    Ie under the Water Resources Act 1991 s 27A(1): see PARA 221.
- 27    Ie under the Water Resources Act 1991 s 33A: see PARA 225.
- 28    Water Resources Act 1991 s 39A(8)(b) (as added: see note 5).
- 29    Ie in the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 30    Water Resources Act 1991 s 39A(11) (as added: see note 5). Section 39A is subject to any provision made by virtue of s 39B(3) (see the text to note 43), and to s 39B(4), (5) (see the text to notes 44-45): s 39A(12) (as so added).
- 31    As to the Secretary of State see PARA 15 note 1.
- 32    The functions of the Secretary of State under the Water Resources Act 1991 s 39B, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 33    As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.
- 34    Ie a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 35    Water Resources Act 1991 s 39B(1) (s 39B added by the Water Act 2003 s 18).
- 36    'Prescribed' means prescribed by the regulations: see the Water Resources Act 1991 s 221(1).
- 37    Water Resources Act 1991 s 39B(2)(a) (as added: see note 35).

38 Water Resources Act 1991 s 39B(2)(b) (as added: see note 35).

39 Water Resources Act 1991 s 39B(2)(c) (as added: see note 35).

40 As to the meaning of 'information' see PARA 117 note 13.

41 Water Resources Act 1991 s 39B(2)(d) (as added: see note 35).

42 Water Resources Act 1991 s 39B(2)(e) (as added: see note 35).

43 Water Resources Act 1991 s 39B(3) (as added: see note 35). Such an order may be made only on the application of the Agency; but the Secretary of State or the Welsh Ministers may direct the Agency to make such an application: s 39A(6) (as so added). Schedule 6 (see PARA 222) has effect with respect to applications for orders under s 39B(3) and with respect to the making of such orders: s 39B(7) (as so added). The power to make such orders is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 39B(8) (as so added). Section 219(2)(d)-(f) (see PARA 21) applies in relation to orders under s 39B as it applies to regulations made under the Water Resources Act 1991: s 39B(9) (as so added). As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. At the date at which this volume states the law no such order had been made.

44 The Water Resources Act 1991 s 39B(4) does not apply in relation to any protected right until after the expiry of the period of two years beginning with the date on which the order under s 39B(3) (see the text to note 43) was made, or such longer period as may be specified in the order: s 39B(5) (as added: see note 35).

45 Water Resources Act 1991 s 39B(4) (as added: see note 35).

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## 242. Obligations to take river flow etc into account.

Where<sup>1</sup> any application for a licence<sup>2</sup> relates to abstraction<sup>3</sup> from any inland waters<sup>4</sup> or to obstructing or impeding the flow<sup>5</sup> of any inland waters by means of impounding works<sup>6</sup>, and that application is made at a time when no minimum acceptable flow<sup>7</sup> for the inland waters in question has been determined<sup>8</sup>, the Environment Agency<sup>9</sup>, in dealing with the application, must have regard to the considerations by reference to which<sup>10</sup> a minimum acceptable flow for those waters would fall to be determined<sup>11</sup>.

If such an application is made at a time after a minimum acceptable flow for the inland waters in question has been determined<sup>12</sup>, the Agency, in dealing with the application, must have regard to the need to secure or, as the case may be, secure in relation to the different times or periods for which the flow is determined<sup>13</sup>: (1) that the flow at any control point<sup>14</sup> will not be reduced below the minimum acceptable flow at that point<sup>15</sup>; or (2) if it is already less than that minimum acceptable flow, that the flow at any control point will not be further reduced below the minimum acceptable flow at that point<sup>16</sup>.

Where<sup>17</sup>: (a) an application for a licence relates to abstraction from underground strata<sup>18</sup>; and (b) it appears to the Agency that the proposed abstraction is likely to affect the flow, level or volume of any inland waters which are neither discrete waters<sup>19</sup> nor waters comprised in an order<sup>20</sup>, the above provisions apply as if the application related to abstraction from those waters<sup>21</sup>.

1    Ie without prejudice to the Water Resources Act 1991 s 38(3) (see PARA 239) and s 39(1) (see PARA 240): s 40(1).

2    Ie under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

3    As to the meaning of 'abstraction' see PARA 192 note 2.

4    As to the meaning of 'inland waters' see PARA 187 note 2.

5    As to the meaning of 'flow' see PARA 215 note 4.

6    Water Resources Act 1991 s 40(1). As to the meaning of 'impounding works' see PARA 215 note 4.

7    As to the meaning of 'minimum acceptable flow' see PARA 211 note 18.

8    Ie under the Water Resources Act 1991 Pt II Ch I (ss 20-23): see PARA 209 et seq.

9    As to the Environment Agency see PARA 17.

10   Ie in accordance with the Water Resources Act 1991 s 21(4) and (5): see PARA 209.

11   Water Resources Act 1991 s 40(2) (s 40(2)-(4) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

12   Ie under the Water Resources Act 1991 Pt II Ch I (ss 20-23): see PARA 209 et seq.

13   Water Resources Act 1991 s 40(1), (3) (as amended: see note 11).

14   As to control points for the measurement of flow see the Water Resources Act 1991 s 21(2); and PARA 209.

15 Water Resources Act 1991 s 40(3)(a).

16 Water Resources Act 1991 s 40(3)(b).

17 le without prejudice to the Water Resources Act 1991 s 38(3) (see PARA 239) and s 39(1) (see PARA 240): s 40(4).

18 Water Resources Act 1991 s 40(4)(a). As to the meaning of 'underground strata' see PARA 187 note 5.

19 As to the meaning of 'discrete waters' see PARA 187 note 4.

20 Water Resources Act 1991 s 40(4)(b) (as amended: see note 11). The order referred to in the text is one under s 33 (repealed). As from a day to be appointed s 40(4)(b) is amended so as to substitute for the words 'neither discrete waters nor waters comprised in an order under s 33' the words 'not discrete waters': s 40(4)(b) prospectively amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 3). At the date at which this volume states the law no such day had been appointed.

21 Water Resources Act 1991 s 40(4).

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## ***D. CALLING IN OF APPLICATIONS; APPEALS***

### **243. Powers of the Secretary of State or Welsh Ministers to call in applications.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may give directions to the Environment Agency<sup>3</sup> requiring applications for licences<sup>4</sup> to be referred to him or them instead of being dealt with by the Agency<sup>5</sup>. Such a direction may relate either to a particular application or to applications of a class specified in the direction<sup>6</sup>, and may except from the operation of the direction such classes of applications as may be specified in the direction in such circumstances as may be so specified<sup>7</sup>.

However, an application may not be referred under these provisions:

- 455 (1) if in relation to the application the Agency is still considering whether to make any decision as to the type of abstraction licence to which the application ought to relate<sup>8</sup>, or if it has made such a decision but has not yet served notice<sup>9</sup> of that decision on the applicant<sup>10</sup>; or
- 456 (2) where the Agency has served such a notice on the applicant, until the period for appealing<sup>11</sup> has expired or, if the applicant appeals, the appeal has been determined<sup>12</sup>.

Subject as provided<sup>13</sup>, on considering a called-in application<sup>14</sup>, the Secretary of State or, where appropriate, the Welsh Ministers: (a) may determine that a licence should be granted containing such provisions as he or they consider appropriate<sup>15</sup>; or (b) if, having regard to the provisions of the Water Resources Act 1991, he or they consider it necessary or expedient to do so, may determine that no licence is to be granted<sup>16</sup>. Before determining a called-in application, the Secretary of State or the Welsh Ministers may, if he or they think fit, and must, if a request is made by the applicant or the Agency to be heard with respect to the application<sup>17</sup>: (i) cause a local inquiry to be held<sup>18</sup>; or (ii) afford to the applicant and the Agency an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State or, as the case may be, the Welsh Ministers for the purpose<sup>19</sup>.

In determining any called-in application and, in particular, in determining what (if any) direction to give<sup>20</sup>, the Secretary of State or the Welsh Ministers must consider whether any such direction would require the grant of a licence which would so authorise the abstraction<sup>21</sup> of water<sup>22</sup>, or the flow<sup>23</sup> of any inland waters<sup>24</sup> to be obstructed or impeded by means of impounding works<sup>25</sup>, so as to derogate<sup>26</sup> from rights which, at the time when the direction in question is given, are protected rights<sup>27</sup>.

Where the decision of the Secretary of State or the Welsh Ministers on a called-in application is that a licence is to be granted, the decision must include a direction to the Agency to grant a licence containing such provisions as may be specified in the direction<sup>28</sup>. The decision of the Secretary of State or the Welsh Ministers on any called-in application is final<sup>29</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 ss 41, 42 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the Environment Agency see PARA 17.

4 Ie under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq.

5 Water Resources Act 1991 s 41(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

6 Water Resources Act 1991 s 41(2)(a).

7 Water Resources Act 1991 s 41(2)(b).

8 Ie any such decision as is referred to in the Water Resources Act 1991 s 36A(1): see PARA 232.

9 Ie the notice referred to in the Water Resources Act 1991 s 36A(3): see PARA 232.

10 Water Resources Act 1991 s 41(3)(a) (s 41(3) added by the Water Act 2003 s 13(2)).

11 Ie under the Water Resources Act 1991 s 36A: see PARA 232.

12 Water Resources Act 1991 s 41(3)(b) (as added: see note 10).

13 Ie subject to the provisions of the Water Resources Act 1991 s 42(2)-(6) (see the text to notes 17-29) and to s 46 (see PARA 248).

14 'Called-in application' means an application referred to the Secretary of State or, as the case may be, the Welsh Ministers in accordance with directions under the Water Resources Act 1991 s 41 (see the text to notes 1-12): s 42(7). The provisions of s 37 (publication of applications for licences: see PARA 233), s 38(1) and (3) (consideration of applications: see PARA 239), s 39(2) (obligation to have regard to existing rights and privileges: see PARA 240), s 40 (obligation to take river flow, etc into account: see PARA 242) apply in relation to any called-in application as if: (1) any reference in those provisions to the Agency, except the references in s 37 and s 38(3)(a), were a reference to the Secretary of State or the Welsh Ministers; and (2) any reference to s 39(1) (forbidding derogation from existing rights and privileges: see PARA 240) were a reference to s 42(4) (see the text to notes 20-27): s 42(3) (amended by the Environment Act 1995 s 120, Sch 22, para 128; the Water Act 2003 s 14(3)(b)). The provisions of the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, regs 6(7) and 8 (see PARA 272) apply in relation to any called-in application as if any reference in those provisions to the Agency were a reference to the appropriate minister: reg 13. As to the meaning of 'appropriate minister' see PARA 271 note 22.

15 Water Resources Act 1991 s 42(1)(a).

16 Water Resources Act 1991 s 42(1)(b).

17 See the Water Resources Act 1991 s 42(2) (s 42(2), (5) amended by the Environment Act 1995 s 120, Sch 22, para 128).

18 Water Resources Act 1991 s 42(2)(a).

19 Water Resources Act 1991 s 42(2)(b) (as amended: see note 17).

20 Ie under the Water Resources Act 1991 s 42(5): see the text to note 28.

21 As to the meaning of 'abstraction' see PARA 192 note 2.

22 Water Resources Act 1991 s 42(4)(a).

23 As to the meaning of 'flow' see PARA 215 note 4.

24 As to the meaning of 'inland waters' see PARA 187 note 2.

25 Water Resources Act 1991 s 42(4)(b). As to the meaning of 'impounding works' see PARA 215 note 4.



26 As to the meaning of 'derogate' see PARA 240 note 9.

27 Water Resources Act 1991 s 42(4) (amended by the Water Act 2003 s 16(6)(a)). The Water Resources Act 1991 39(1A) (see PARA 240) applies in relation to s 42(4) as it applies in relation to s 39(1): s 42(4A) (added by the Water Act 2003 s 16(6)(b)). As to the meaning of 'protected rights' see PARA 241.

28 Water Resources Act 1991 s 42(5) (as amended: see note 17).

29 Water Resources Act 1991 s 42(6). The validity of such a decision may not be questioned in any legal proceedings whatsoever except as provided by s 69: see s 69(1); and PARA 247.

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#### **244. Appeals to the Secretary of State or the Welsh Ministers.**

Where an application has been made to the Environment Agency<sup>1</sup> for a licence<sup>2</sup>, the applicant may by notice<sup>3</sup> appeal to the Secretary of State<sup>4</sup> or, in relation to Wales, the Welsh Ministers<sup>5</sup> if:

- 457 (1) the applicant is dissatisfied with the decision of the Agency on the application<sup>6</sup>; or
- 458 (2) the Agency fails within the specified period<sup>7</sup>, or within such extended period as may be agreed in writing between the applicant and the Agency at any time, to give to the applicant either notice of its decision on the application<sup>8</sup>, or notice that the application has been referred<sup>9</sup> to the Secretary of State or the Welsh Ministers<sup>10</sup>.

A notice of appeal must be served<sup>11</sup> in such manner as may be prescribed<sup>12</sup>, and within such period as may be prescribed<sup>13</sup>. Within that prescribed period, the applicant must also serve a copy of the notice of appeal on the Agency<sup>14</sup>.

Where any representations in writing with respect to an application were made within the period specified in any notice of the application<sup>15</sup>, the Secretary of State or, where appropriate, the Welsh Ministers must, before determining an appeal in respect of the application, require the Agency to serve a copy of the notice of appeal on each of the persons who made those representations<sup>16</sup>.

1 As to the Environment Agency see PARA 17. As to applications see PARAS 229-231.

2 Is a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

3 As to the meaning of 'notice' see PARA 22 note 1.

4 As to the Secretary of State see PARA 15 note 1.

5 The functions of the Secretary of State under the Water Resources Act 1991 s 43, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. The Water Resources Act 1991 s 43 is subject to the Environment Act 1995 s 114 (delegation or reference of appeals etc: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65): Water Resources Act 1991 s 43(1A) (added by the Environment Act 1995 s 120(1), Sch 22 para 134).

6 Water Resources Act 1991 s 43(1)(a) (s 43(1), (2), (4), (5) amended by the Environment Act 1995 s 120, Sch 22 para 128).

7 The specified period is: (1) except in a case falling within head (2) below, such period as may be prescribed (Water Resources Act 1991 s 43(2)(a)); and (2) where an extended period is at any time agreed in writing between the applicant and the Agency, the extended period (s 43(2)(b)). As to the meaning of 'writing' see PARA 22 note 1. 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). As to the prescribed period see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10; and PARA 236.

8 Water Resources Act 1991 s 43(1)(b)(i) (as amended: see note 6).

9 le in accordance with any direction under the Water Resources Act 1991 s 41: see PARA 243.

10 Water Resources Act 1991 s 43(1)(b)(ii). As to the determination of appeals see PARA 246.

11 As to the service of documents see PARA 22.

12 Water Resources Act 1991 s 43(3)(a). A notice of appeal under s 43 must state the grounds on which the appeal is being made, and be accompanied by a copy of the application to which the appeal relates, any information or report submitted to the Agency with the application, the notice of the decision on the application, if any, and all other relevant correspondence with the Agency: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 13(1). The Agency must, within 14 days beginning on the date on which it receives a notice of appeal, serve a copy of that notice on: (1) any person who, within the period referred to in the Water Resources Act 1991 s 37(4)(b) (publication of application for licence: see PARA 233), made representations in writing in relation to the application; and (2) any authority served with a notice in accordance with the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 9(1) (see PARA 231) that, within the period referred to in reg 9(2)(b) (see PARA 231), made representations in writing in relation to the application: reg 13(2). When so serving a copy of a notice of appeal, the Agency must notify the recipient in writing that he may make further representations in writing in relation to the appeal, of where any such representations must be sent, and of the date by which those representations must be received: reg 13(4). As to the meaning of 'person' see PARA 13 note 29.

13 Water Resources Act 1991 s 43(3)(b). The period must be a period of not less than 28 days from, as the case may be: (1) the date on which the decision to which it relates was notified to the applicant (s 43(3)(b)(i)); or (2) the end of the period which, by virtue of s 43(2) (see note 7), is applicable for the purposes of s 43(1)(b) (s 43(3)(b)(ii)). The period within which any notice of appeal under s 43(1) must be served is 28 days: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 12(2).

14 Water Resources Act 1991 s 43(4) (as amended: see note 6).

15 le any such notice as is referred to in the Water Resources Act 1991 s 37(4)(b): see PARA 233.

16 Water Resources Act 1991 s 43(5) (as amended (see note 6); and further amended by the Water Act 2003 s 14(3)(c)).

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## 245. Regulations with respect to appeals.

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may by regulations<sup>3</sup> make provision as to the manner in which appeals against decisions of the Environment Agency<sup>4</sup> as to the type of licence to which an application relates<sup>5</sup>, or on applications for the grant, revocation or variation of licences<sup>6</sup> are to be dealt with, including provision requiring the giving of notices of, and information relating to, the making of such appeals or decisions on any such appeals<sup>7</sup>.

Without prejudice to the generality of this power, provision must be made by regulations for securing that, in prescribed<sup>8</sup> circumstances, being circumstances in which it appears to the Secretary of State or, where appropriate, the Welsh Ministers that applications for such licences would be of special concern to National Park authorities<sup>9</sup>: (1) notice of any appeal against the decision on such an application must be served on any National Park authority which duly made representations<sup>10</sup> on receipt of notice of the original application<sup>11</sup>; and (2) the Secretary of State or the Welsh Ministers, in determining the appeal, must take account of any further representations made by such an authority within such period and in such manner as may be prescribed<sup>12</sup>.

These provisions have effect subject to any express provision contained in, or having effect by virtue of, any other enactment<sup>13</sup> contained in the relevant provisions of the Water Resources Act 1991<sup>14</sup>; and any regulations made under these provisions have effect subject to any such express provision<sup>15</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 s 45, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21.

4 As to the Environment Agency see PARA 17.

5 Ie decisions under the Water Resources Act 1991 s 36A: see PARA 232.

6 Ie licences under the Water Resources Act 1991 Pt II Ch II (ss 24-72).

7 Water Resources Act 1991 s 45(1) (amended by the Water Act 2003 s 13(3)(a)). As to the provision made see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, regs 12, 13; and PARA 244.

8 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1).

9 Water Resources Act 1991 s 45(2) (amended by the Environment Act 1995 s 120(3), Sch 24). The Water Resources Act 1991 s 45(2) does not apply in relation to appeals against decisions of the Agency under s 36A (see PARA 232): s 45(2A) (added by the Water Act 2003 s 13(3)(b)). As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

10    le representations falling within the Water Resources Act 1991 s 34(3)(b): see PARA 230.

11    Water Resources Act 1991 s 45(2)(a) (amended by the Environment Act 1995 s 120(3), Sch 24).

12    Water Resources Act 1991 s 45(2)(b). The period within which the recipient of a copy of a notice of appeal may make further representations in writing is 21 days beginning on the date on which that notice is served on that person: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 13(3). See also reg 9; and PARA 231. As to the meaning of 'writing' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29.

13    As to the meaning of 'enactment' see PARA 14 note 31.

14    le the Water Resources Act 1991 Pt II Ch II (ss 24-72).

15    Water Resources Act 1991 s 34(4); applied by s 45(3) (amended by the Environment Act 1995 s 120(3), Sch 24).

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## **246. Determination of appeals.**

Subject as provided<sup>1</sup>, where an appeal is brought<sup>2</sup>, the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup>:

- 459 (1) may allow or dismiss the appeal or reverse or vary any part of the decision of the Environment Agency<sup>5</sup>, whether the appeal relates to that part of the decision or not<sup>6</sup>; and
- 460 (2) may deal with the application as if it had been made to the Secretary of State or the Welsh Ministers in the first instance<sup>7</sup>.

Before determining an appeal, the Secretary of State or, where appropriate, the Welsh Ministers may, if he or they think fit, and must if a request is made by the applicant or the Agency to be heard with respect to the appeal<sup>8</sup>, cause a local inquiry to be held<sup>9</sup>, or afford to the applicant and the Agency an opportunity to appear before, and be heard by, a person appointed by the Secretary of State or, as the case may be, the Welsh Ministers for the purpose<sup>10</sup>.

In determining an appeal the Secretary of State or the Welsh Ministers must take into account: (a) any further representations in writing received by him or them within the prescribed period<sup>11</sup> from the persons<sup>12</sup> who made representations in respect of the application<sup>13</sup>; and (b) the requirements of the applicant, in so far as they appear to the Secretary of State or, as the case may be, the Welsh Ministers to be reasonable requirements<sup>14</sup>. In determining an appeal and, in particular, in determining what, if any, direction to give as to whether a licence is to be granted, varied or revoked<sup>15</sup>, the Secretary of State or the Welsh Ministers must<sup>16</sup> consider whether any such direction would require such a grant or variation of a licence as would authorise the abstraction<sup>17</sup> of water<sup>18</sup>, or authorise the flow<sup>19</sup> of any inland waters<sup>20</sup> to be obstructed or impeded by means of impounding works<sup>21</sup>, so as to derogate<sup>22</sup> from rights which, at the time when the direction in question is given, are protected rights<sup>23</sup>.

Where the decision on an appeal is that a licence is to be granted or to be varied or revoked, that decision must include a direction to the Agency, as the case may be<sup>24</sup>:

- 461 (i) to grant a licence containing such provisions as may be specified in the direction<sup>25</sup>;
- 462 (ii) to vary the licence so as to contain such provisions as may be so specified<sup>26</sup>;
- or
- 463 (iii) to revoke the licence<sup>27</sup>.

The decision of the Secretary of State or the Welsh Ministers on any appeal is final<sup>28</sup>; but its validity may be questioned in certain circumstances on an application to the High Court<sup>29</sup>.

1    Ie subject to the provisions of the Water Resources Act 1991 ss 45-72.

2    Ie under the Water Resources Act 1991 s 43: see PARA 244. For the purposes of s 44 an appeal by virtue of s 43(1)(b) must be taken to be an appeal against a refusal of the application: s 44(1).

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 s 44, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to the Environment Agency see PARA 17.

6 Water Resources Act 1991 s 44(1)(a) (s 44(1), (2), (5), (6) amended by the Environment Act 1995 s 120, Sch 22 para 128).

7 Water Resources Act 1991 s 44(1)(b). Section 39(2) (see PARA 240), and s 40 (see PARA 242) apply in relation to any appeal under s 43 as if: (1) any reference in those provisions to the Agency were a reference to the Secretary of State or the Welsh Ministers (s 44(5)(a) (as amended: see note 6)); and (2) the references to s 38(3) (see PARA 239) and s 39(1) (see PARA 240) were references to s 44(3), (4) (see the text to notes 11-23) (s 44(5)(b) (as so amended)).

8 See the Water Resources Act 1991 s 44(2) (as amended: see note 6).

9 Water Resources Act 1991 s 44(2)(a).

10 Water Resources Act 1991 s 44(2)(b) (as amended: see note 6).

11 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). The period within which the recipient of a copy of a notice of appeal may make further representations in writing is 21 days beginning on the date on which that notice is served on that person: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 13(3). As to the meaning of 'writing' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29.

12 I.e. the persons mentioned in the Water Resources Act 1991 s 43(5): see PARA 244.

13 Water Resources Act 1991 s 44(3)(a).

14 Water Resources Act 1991 s 44(3)(b).

15 I.e. a direction under the Water Resources Act 1991 s 44(6): see the text to notes 24-27.

16 I.e. subject to the Water Resources Act 1991 s 44(4A): see note 23.

17 As to the meaning of 'abstraction' see PARA 192 note 2.

18 Water Resources Act 1991 s 44(4)(a).

19 As to the meaning of 'flow' see PARA 215 note 4.

20 As to the meaning of 'inland waters' see PARA 187 note 2.

21 Water Resources Act 1991 s 44(4)(b). As to the meaning of 'impounding works' see PARA 215 note 4.

22 As to the meaning of 'derogate' see PARA 240 note 9.

23 Water Resources Act 1991 s 44(4) (amended by the Water Act 2003 s 16(7)(a)). The Water Resources Act 1991 s 39(1A) (see PARA 240) applies in relation to s 44(4) as it applies in relation to 39(1): s 44(4A) (added by the Water Act 2003 s 16(7)(b)). As to the meaning of 'protected right' see PARA 241.

24 Water Resources Act 1991 s 44(6) (as amended: see note 6). As to provisions applying where the licence so granted authorises derogation from protected rights see s 60; and PARA 267.

25 Water Resources Act 1991 s 44(6)(a).

26 Water Resources Act 1991 s 44(6)(b).

27 Water Resources Act 1991 s 44(6)(c).

- 28 Water Resources Act 1991 s 44(7).
- 29 See the Water Resources Act 1991 s 69; and PARA 247.



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## **247. Applications to the High Court.**

Except as provided by the following provisions, the validity of a decision<sup>1</sup> of the Secretary of State<sup>2</sup> or, in relation to Wales, of the Welsh Ministers<sup>3</sup> on any appeal<sup>4</sup> or any reference<sup>5</sup> to him or them<sup>6</sup>, may not be questioned in any legal proceedings whatsoever<sup>7</sup>.

If, in the case of any such appeal or reference, the Environment Agency<sup>8</sup> or the other party<sup>9</sup> desires to question the validity of the decision of the Secretary of State or the Welsh Ministers on the grounds:

464 (1) that the decision is not within the statutory powers<sup>10</sup>; or

465 (2) that any of the requirements of, or of any regulations made under, the statutory provisions<sup>11</sup> which are applicable to the appeal or reference have not been complied with<sup>12</sup>,

the Agency or, as the case may be, the other party may, at any time within the period of six weeks beginning with the date on which the decision is made, make an application to the High Court<sup>13</sup>.

On any such application, the High Court may by interim order suspend the operation of the decision to which the application relates until the final determination of the proceedings<sup>14</sup>. If the High Court is satisfied on such an application:

466 (a) that the decision to which the application relates is not within the powers of the Water Resources Act 1991<sup>15</sup>; or

467 (b) that the interests of the person<sup>16</sup> making the application have been substantially prejudiced by a failure to comply with any of the requirements mentioned in head (2) above<sup>17</sup>,

the High Court may quash the decision<sup>18</sup>.

1 'Decision' includes a direction: Water Resources Act 1991 s 69(6).

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 s 69, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4 Ie any appeal under the Water Resources Act 1991 Pt II Ch II (ss 24-72). As to appeals see PARAS 244-246.

5 Ie in pursuance of a direction under the Water Resources Act 1991 s 41 (see PARA 243) or in pursuance of s 53(4) (see PARA 259).

6 See the Water Resources Act 1991 s 69(1)(a), (b).

7 Water Resources Act 1991 s 69(1). As to judicial review of decisions expressed to be subject to such a limitation see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

8 As to the Environment Agency see PARA 17.

9 'Other party': (1) in relation to an appeal, means the appellant; (2) in relation to a reference in pursuance of a direction under the Water Resources Act 1991 s 41 (see PARA 243), means the applicant for the licence or, where s 41 applies by virtue of s 51(3) (see PARA 257), for the revocation or variation; and (3) in relation to a reference in pursuance of s 53(4) (see PARA 259), means (subject, without prejudice to its application to the other provisions of Pt II Ch II (ss 24-72), to s 25(6), (7) (see PARA 215)) the holder of the licence: s 69(6). As to who is the holder of a licence see s 47; and PARA 250.

10 Water Resources Act 1991 s 69(2)(a).

11 Ie the Water Resources Act 1991 Pt II Ch II (ss 24-72).

12 Water Resources Act 1991 s 69(2)(b).

13 Water Resources Act 1991 s 69(2) (amended by the Environment Act 1995 s 120, Sch 22 para 128). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

14 Water Resources Act 1991 s 69(3).

15 Water Resources Act 1991 s 69(4)(a).

16 As to the meaning of 'person' see PARA 13 note 29.

17 Water Resources Act 1991 s 69(4)(b).

18 Water Resources Act 1991 s 69(4).

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## ***E. FORM, CONTENTS AND EFFECT OF LICENCES***

### **248. Form and contents of licences.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may by regulations<sup>3</sup> make provision as to the form of licences<sup>4</sup> or of any class of such licences; but any regulations so made have effect subject to the following provisions and to any other express provision contained in, or having effect by virtue of, any other relevant enactment<sup>5</sup>.

Every full licence<sup>6</sup> must, and any other licence to abstract water<sup>7</sup> may, make provision<sup>8</sup>:

- 468 (1) as to the quantity of water authorised to be abstracted in pursuance of the licence from the source of supply<sup>9</sup> to which the licence relates during a period or periods specified in the licence, including provision as to the way in which that quantity is to be measured or assessed for the statutory purposes<sup>10</sup>; and
- 469 (2) for determining, by measurement or assessment, what quantity of water is to be taken to have been abstracted during any such period by the holder of the licence<sup>11</sup> from the source of supply to which the licence relates<sup>12</sup>.

Every licence to abstract water must:

- 470 (a) indicate the means by which water is authorised to be abstracted in pursuance of the licence, by reference either to specified works, machinery or apparatus or to works, machinery or apparatus fulfilling specified requirements<sup>13</sup>;
- 471 (b) also specify the purposes for which water abstracted in pursuance of the licence is to be used<sup>14</sup>;
- 472 (c) state the date on which it takes effect<sup>15</sup> and the date on which it expires<sup>16</sup>.

Different provision may be made by the same licence with respect to any one or more of the following matters:

- 473 (i) the abstraction of water during different periods<sup>17</sup>;
- 474 (ii) the abstraction of water from the same source of supply but at different points or by different means<sup>18</sup>;
- 475 (iii) the abstraction of water for use for different purposes<sup>19</sup>,

and any such provision as is mentioned in heads (1) and (2) above may be made separately in relation to each of the matters for which different provision is so made in the licence<sup>20</sup>.

<sup>1</sup> As to the Secretary of State see PARA 15 note 1.

<sup>2</sup> The functions of the Secretary of State under the Water Resources Act 1991 s 46, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to

intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

4 The licences under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

5 Water Resources Act 1991 s 46(1). The relevant enactments referred to in the text are any other enactments contained in Pt II Ch II (ss 24-72): s 46(1). As to the meaning of 'enactment' see PARA 14 note 31.

6 As to the meaning of 'full licence' see PARA 227.

7 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

8 Water Resources Act 1991 s 46(2) (amended by the Water Act 2003 s 19(1), (2)).

9 As to the meaning of 'source of supply' see PARA 187.

10 Water Resources Act 1991 s 46(2)(a). The statutory purposes are those of the Water Resources Act 1991 Pt II Ch II (ss 24-72): s 46(2)(a). For the purposes of 61(4A) (see PARA 263) every full licence under Pt II Ch II which is for a term exceeding 12 years must, and any transfer licence under Pt II Ch II which is for a term exceeding 12 years may, specify a minimum value for the quantity referred to in s 46(2)(a): s 46(2A) (added, by the Water Act 2003 s 19(1), (3)). As to the meaning of 'transfer licence' see PARA 227.

11 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

12 Water Resources Act 1991 s 46(2)(b). Where the provisions contained in a licence in pursuance of s 46(2)(b), or of that provision as modified by s 46(6) (see the text to note 20), require the use of a meter, gauge or other device, and such a device is used for the purposes of those provisions, any person who wilfully alters or interferes with that device so as to prevent it from measuring correctly is guilty of an offence: s 206(3). A person who is guilty of such an offence is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or to both: s 206(5) (substituted by the Environment Act 1995 s 112, Sch 19 para 5(5)). As to the meaning of 'person' see PARA 13 note 29. As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

Where, in accordance with the provisions contained in a licence in pursuance of the Water Resources Act 1991 s 46(2)(b), or in pursuance of s 46(2)(b) as read with s 46(6), it has been determined what quantity of water is to be taken (a) to have been abstracted during any period from a source of supply by the holder of the licence; or (b) to have been so abstracted at a particular point or by particular means, or for use for particular purposes, that determination is, for the purposes of any proceedings under Pt II Ch II or any of the related water resources provisions, to be conclusive evidence of the matters to which it relates: s 209(3). As to the meaning of 'related water resources provisions' see PARA 188 note 15.

13 Water Resources Act 1991 s 46(3).

14 Water Resources Act 1991 s 46(4) (s 46(4), (5) substituted, (5A) added, by the Water Act 2003 s 19(1), (4)).

15 Water Resources Act 1991 s 46(5)(a) (as substituted: see note 14).

16 Water Resources Act 1991 s 46(5)(b) (as substituted: see note 14). Every licence to obstruct or impede any inland waters remains in force until revoked: s 46(5A) (as added: see note 14). As to the meaning of 'inland waters' see PARA 187 note 2. As to the extension of the validity of licences see PARA 249.

17 Water Resources Act 1991 s 46(6)(a).

18 Water Resources Act 1991 s 46(6)(b).

19 Water Resources Act 1991 s 46(6)(c).

20 Water Resources Act 1991 s 46(6). Nothing in s 46(6) is to be construed as preventing two or more licences from being granted to the same person to be held concurrently in respect of the same source of supply, if the licences authorise the abstraction of water at different points, by different means or for different purposes: s 46(7) (amended by the Water Act 2003 s 19(1), (5)).

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#### **249. Limited extension of abstraction licence validity.**

A full licence or a transfer licence<sup>1</sup> whose term exceeded 12 months<sup>2</sup> but whose expiry date (the 'expiry date') has passed is to be treated for all the purposes of the Water Resources Act 1991 as not expiring until the specified date<sup>3</sup>, provided that the following condition is met<sup>4</sup>. That condition is that the Environment Agency receives, not later than the beginning of the period of three months ending on the expiry date, or such later date before the expiry date as the Agency agrees, a valid application<sup>5</sup> for a new licence:

- 476 (1) for abstraction<sup>6</sup> from the same point as the abstraction licensed by the expiring licence<sup>7</sup>;
- 477 (2) whose holder would be the same as the holder of the expiring licence<sup>8</sup>; and
- 478 (3) which would take effect immediately after the expiry date<sup>9</sup>.

1 As to the meanings of 'full licence' and 'transfer licence' see PARA 227.

2 As to the meaning of 'month' see PARA 23 note 10.

3 The specified date is whichever is the later of: (1) if a new licence is granted (whether or not on the terms applied for), the date on which it takes effect (Water Resources Act 1991 s 46A(4)(a) (s 46A added by the Water Act 2003 s 20)); (2) otherwise (a) except where the Secretary of State or the Welsh Ministers call in an application under the Water Resources Act 1991 s 41 (see PARA 243), the expiry of the period for appealing under s 43 (see PARA 244), or if an appeal is brought, the date of its withdrawal; or (b) where the Secretary of State or the Welsh Ministers decide (under s 42 (see PARA 243) or s 44 (see PARA 246)) that no licence is to be granted, the date on which that decision is notified to the applicant (s 46A(4)(b) (as so added)). As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16.

4 Water Resources Act 1991 s 46A(1) (as added: see note 3). Section 46A has effect in relation to a full licence or transfer licence held by the Environment Agency with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 17. As to the Environment Agency see PARA 17. As to abstracting and impounding by the Agency see PARA 237.

5 For these purposes, a 'valid' application is one which complies with all the requirements of the Water Resources Act 1991 in relation to the making of applications for licences of the type in question: s 46A(3) (as added: see note 3). As to applications see PARAS 229-231.

6 As to the meaning of 'abstraction' see PARA 192 note 2.

7 Water Resources Act 1991 s 46A(2)(a) (as added: see note 3).

8 Water Resources Act 1991 s 46A(2)(b) (as added: see note 3). As to who is the holder of a licence see s 47; and PARA 250.

9 Water Resources Act 1991 s 46A(2)(c) (as added: see note 3).

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## 250. Holders of licences.

Every licence<sup>1</sup> must specify the person<sup>2</sup> to whom the licence is granted<sup>3</sup>. The person to whom a licence is granted to abstract water<sup>4</sup> or to obstruct or impede any inland waters<sup>5</sup> is the holder of the licence for the statutory purposes<sup>6</sup>.

Where the relevant land<sup>7</sup> is vested in the incumbent of an ecclesiastical benefice of the Church of England<sup>8</sup> or, in the case of a licence to abstract water, where it is a benefice which has a right of access to the relevant land, any licence must provide that<sup>9</sup> whoever is for the time being the incumbent of the benefice is the holder of the licence<sup>10</sup>. Where a licence so provides, that licence is not required to specify the person to whom it is granted<sup>11</sup>, and the licence is deemed to be held by the Diocesan Board of Finance for the diocese in which the land is situated at any time when the benefice in question is vacant<sup>12</sup>.

1    le under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

2    As to the meaning of 'person' see PARA 13 note 29.

3    Water Resources Act 1991 s 47(1) (amended by the Water Act 2003 ss 19(6), 101(2), Sch 9 Pt 1).

4    As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

5    As to the meaning of 'inland waters' see PARA 187 note 2.

6    Water Resources Act 1991 s 47(2) (substituted by the Water Act 2003 s 23(2)(a)). The statutory purposes are those of the Water Resources Act 1991 subject to ss 59A-59C (see PARAS 252-254) and to s 67 (see the text to notes 7-12): see s 47(2).

7    As to the meaning of 'relevant land' see PARA 229 note 3.

8    As to the Church of England see **ECCLESIASTICAL LAW** vol 14 PARA 345 et seq.

9    le notwithstanding anything in the Water Resources Act 1991 ss 24-66.

10   Water Resources Act 1991 s 67(2), (8) (s 67(2) amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 8(1), (2); the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30(b)).

11   Water Resources Act 1991 s 67(3)(a).

12   Water Resources Act 1991 s 67(3)(b) (amended by the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30(a)). Where a Diocesan Board of Finance is required, by virtue of the Water Resources Act 1991 s 67(3)(b), to pay any fee or other charge in respect of a licence, and any moneys are then payable by the Board to the incumbent of the benefice in question or subsequently become so payable, the Board is entitled to retain out of those moneys an amount not exceeding the amount of that fee or other charge: s 67(6) (amended by the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30(e), (f)). As to Diocesan Boards of Finance see **ECCLESIASTICAL LAW** vol 14 PARA 517 et seq.

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## **251. General effect of licence.**

A person<sup>1</sup> who is for the time being the holder of a licence<sup>2</sup> to abstract water<sup>3</sup> is taken<sup>4</sup> to have a right<sup>5</sup> to abstract the water to the extent authorised by the licence and in accordance with the provisions contained in it<sup>6</sup>.

In any action brought against a person in respect of the abstraction of water from a source of supply<sup>7</sup> (other than an abstraction in respect of which an action which could be brought under the statutory provisions giving civil remedies for loss or damage due to water abstraction<sup>8</sup>) it is a defence for him to prove that the water was abstracted in pursuance of a licence<sup>9</sup>, and that the provisions of the licence were complied with<sup>10</sup>.

In any action brought against a person in respect of any obstruction or impeding of the flow<sup>11</sup> of any inland waters<sup>12</sup> at any point by means of impounding works<sup>13</sup>, it is a defence for him to prove:

- 479 (1) that the flow was so obstructed or impeded in pursuance of a licence<sup>14</sup>;
- 480 (2) that the obstructing or impeding was in the manner specified in that licence and to an extent not exceeding the extent so specified<sup>15</sup>; and
- 481 (3) that the other requirements of the licence (if any) were complied with<sup>16</sup>.

Nothing in the above provisions exonerates a person from any claim for negligence or breach of contract<sup>17</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 I.e. under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227. As to who is the holder of a licence see s 47; and PARA 250.

3 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

4 I.e. for the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72).

5 Such a right is a protected right: see PARA 241.

6 Water Resources Act 1991 s 48(1). As to the meaning of 'the doing of anything in pursuance of a licence' see PARA 214 note 7. As to the form and content of licences see PARA 248.

7 As to the meaning of 'source of supply' see PARA 187.

8 I.e. an action which could be brought under the Water Resources Act 1991 s 48A (see PARA 220) in which case s 48A will apply: see s 48(2) (amended by the Water Act 2003 s 24(2)).

9 Water Resources Act 1991 s 48(2)(a).

10 Water Resources Act 1991 s 48(2)(b).

11 As to the meaning of 'flow' see PARA 215 note 4.

12 As to the meaning of 'inland waters' see PARA 187 note 2.

- 13 As to the meaning of 'impounding works' see PARA 215 note 4.
- 14 Water Resources Act 1991 s 48(3)(a).
- 15 Water Resources Act 1991 s 48(3)(b).
- 16 Water Resources Act 1991 s 48(3)(c).
- 17 Water Resources Act 1991 s 48(4).



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## ***F. TRANSFER AND APPORTIONMENT OF LICENCES***

### **252. Transfer of licence.**

A full licence<sup>1</sup>, a transfer licence<sup>2</sup>, or a licence to obstruct or impede the flow<sup>3</sup> of inland waters<sup>4</sup> by means of impounding works<sup>5</sup>, may be transferred by the holder of the licence<sup>6</sup> to another person<sup>7</sup> (the 'transferee') in accordance with the following provisions<sup>8</sup>.

The holder and the proposed transferee must give notice<sup>9</sup> (a 'transfer notice') to the Environment Agency<sup>10</sup> of their agreement that the licence should be transferred<sup>11</sup>. The transfer notice must include such information as the Agency reasonably requires<sup>12</sup>; and, in the case of the transfer of a full licence or of a transfer licence, a declaration by the proposed transferee that:

- 482 (1) he has, or at the time when the proposed transfer is to take effect will have, a right of access<sup>13</sup> in relation to each point of abstraction<sup>14</sup>; and
- 483 (2) he will continue to have such a right for the period of at least one year beginning with the date on which the proposed transfer is to take effect, or until the licence is to expire (if sooner)<sup>15</sup>.

The transfer notice may specify the date on which the holder and the transferee wish the transfer to take effect<sup>16</sup>.

If the holder is a person in whom the licence has vested on the death or bankruptcy of the prior holder<sup>17</sup>, a transfer notice is of no effect unless the required notice of vesting<sup>18</sup> has been given to the Agency<sup>19</sup>. Subject to that, if the Agency receives a transfer notice which complies with the requirements set out above, it must amend the licence by substituting the name of the transferee as holder of the licence<sup>20</sup>. The transfer takes effect from the date on which the Agency amends the licence<sup>21</sup> or from the date specified in the transfer notice, if later<sup>22</sup>.

Nothing in the above provisions affects the liability of the holder of the licence for any failure by him, before the transfer took effect, to comply with any condition or requirement of that licence<sup>23</sup>.

1 Water Resources Act 1991 s 59A(1)(a) (s 59A added by the Water Act 2003 s 23(1)). As to the meaning of 'full licence' see PARA 227.

2 Water Resources Act 1991 s 59A(1)(b) (as added: see note 1). As to the meaning of 'transfer licence' see PARA 227.

3 As to the meaning of 'flow' see PARA 215 note 4.

4 As to the meaning of 'inland waters' see PARA 187 note 2.

5 Water Resources Act 1991 s 59A(1)(c) (as added: see note 1). As to the meaning of 'impounding works' see PARA 215 note 4.

6 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

7 As to the meaning of 'person' see PARA 13 note 29.

8 Water Resources Act 1991 s 59A(1) (as added: see note 1). Section 59A has effect in relation to any licence referred to in s 59A(1)(a), (b) or (c) (see the text to notes 1-5) held by the Environment Agency or that it is proposed to transfer to the Agency with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 21. As to abstracting and impounding by the Agency see PARA 237.

9 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

10 As to the Environment Agency see PARA 17.

11 Water Resources Act 1991 s 59A(2) (as added: see note 1).

12 Water Resources Act 1991 s 59A(3)(a) (as added: see note 1). As to the meaning of 'information' see PARA 117 note 13.

13 'Right of access' means, in relation to a point of abstraction, a right of access to land of the kind referred to in the Water Resources Act 1991 s 35(2)(a) or, as the case may be, s 35(3)(a) (see PARA 229); and references to a person who will have such a right of access are to be construed in accordance with s 35 (including s 35(4)-(6)) (see PARA 229): s 59A(8) (as added: see note 1).

14 Water Resources Act 1991 s 59A(3)(b)(i) (as added: see note 1). 'Point of abstraction' means a place where the licence authorises water to be abstracted from inland waters or (as the case may be) a place consisting of or comprising underground strata from which the licence authorises water to be abstracted: s 59A(8) (as so added). As to the meaning of 'underground strata' see PARA 187 note 5.

15 Water Resources Act 1991 s 59A(3)(b)(ii) (as added: see note 1).

16 Water Resources Act 1991 s 59A(3) (as added: see note 1).

17 Ie under the Water Resources Act 1991 s 59B: see PARA 253.

18 Ie under the Water Resources Act 1991 s 59B(4): see PARA 253.

19 See the Water Resources Act 1991 s 59A(4) (as added: see note 1).

20 Water Resources Act 1991 s 59A(5) (as added: see note 1).

21 Water Resources Act 1991 s 59A(6)(a) (as added: see note 1).

22 Water Resources Act 1991 s 59A(6)(b) (as added: see note 1).

23 Water Resources Act 1991 s 59A(7) (as added: see note 1).

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### **253. Vesting of licence on death or bankruptcy of holder.**

On the death of the holder of a licence<sup>1</sup>, the licence is to be regarded as property forming part of the deceased's personal estate, whether or not it would otherwise be so regarded, and accordingly vests in his personal representatives<sup>2</sup>. If a bankruptcy order is made against the holder of a licence, the licence is to be regarded for the statutory purposes<sup>3</sup> as property forming part of the bankrupt's estate, whether or not it would otherwise be so regarded, and accordingly vests as such in the trustee in bankruptcy<sup>4</sup>. A person<sup>5</sup> in whom a licence vests under these provisions becomes the holder of the licence, in place of the prior holder, from the date of the vesting<sup>6</sup>.

Where a licence other than a temporary licence<sup>7</sup> vests in any person under the above provisions, that person must give notice of that fact to the Environment Agency<sup>8</sup> not later than the end of the period of 15 months<sup>9</sup> beginning with the date of the vesting<sup>10</sup>. If a licence vests in any person under these provisions<sup>11</sup>, but that person fails to give the notice so required within that period<sup>12</sup>, the licence will cease to have effect<sup>13</sup>.

1    Ie a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227. As to who is the holder of a licence see s 47; and PARA 250.

2    Water Resources Act 1991 s 59B(1) (s 59B added by the Water Act 2003 s 23(1)). As to personal representatives see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 1 et seq.

3    Ie for the purposes of any of the Second Group of Parts of the Insolvency Act 1986 (Pts VII-XI) (ss 252-385) (insolvency of individuals; bankruptcy): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

4    Water Resources Act 1991 s 59B(2) (as added: see note 2). As to trustees in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

5    As to the meaning of 'person' see PARA 13 note 29.

6    Water Resources Act 1991 s 59B(3) (as added: see note 2).

7    As to the meaning of 'temporary licence' see PARA 227.

8    As to the Environment Agency see PARA 17.

9    As to the meaning of 'month' see PARA 23 note 10.

10   Water Resources Act 1991 s 59B(4) (as added: see note 2).

11   Water Resources Act 1991 s 59B(5)(a) (as added: see note 2).

12   Water Resources Act 1991 s 59B(5)(b) (as added: see note 2).

13   Water Resources Act 1991 s 59B(5) (as added: see note 2).

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#### **254. Apportionment of licence to abstract.**

The holder of a full licence or of a transfer licence<sup>1</sup> (the 'old licence') may apply to the Environment Agency<sup>2</sup> for the division of the holder's right to abstract<sup>3</sup> water in accordance with the old licence and for the transfer:

- 484 (1) to another person<sup>4</sup> of part, or to a number of other persons of parts not amounting to the whole, of that right<sup>5</sup>; or
- 485 (2) to a number of other persons of parts amounting in all to the whole of that right<sup>6</sup>.

The holder of the old licence and any person proposing to carry on a part of the abstraction authorised by the old licence in place of the holder (a 'successor') must give notice<sup>7</sup> to the Agency of their agreement to the division and transfer (an 'apportionment notice')<sup>8</sup>. The apportionment notice must, in relation to the abstraction authorised by the old licence:

- 486 (a) specify, for each proposed successor, what quantity of water he proposes to abstract, and, if the holder of the old licence is to continue the abstraction in part, what quantity of water that holder proposes to abstract<sup>9</sup>;
- 487 (b) specify the purpose or purposes for which those persons referred to in head (a) above who would require a new licence<sup>10</sup> would abstract water (being one or more of the purposes for which abstraction is authorised under the old licence)<sup>11</sup>;
- 488 (c) specify the point (or points) of abstraction<sup>12</sup> from which it is proposed that the persons referred to in head (a) above would abstract water (being one or more of the points from which abstraction is authorised under the old licence)<sup>13</sup>;
- 489 (d) include a declaration by each of those persons who requires a licence<sup>14</sup> in order to carry on the abstraction that:

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- 61. (i) he has, or at the time when the proposed grant to him of a new licence<sup>15</sup> is to take effect will have, a right of access<sup>16</sup> in relation to each such point of abstraction<sup>17</sup>; and
- 62. (ii) he will continue to have such a right for the period of at least one year beginning with the date on which the new licence is to take effect, or until it is to expire (if sooner)<sup>18</sup>; and

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- 490 (e) include such other information<sup>19</sup> as the Agency reasonably requires<sup>20</sup>,

and may specify the date on which the holder and the successor (or successors) wish the division and transfer (or transfers) to take effect<sup>21</sup>. The apportionment notice must be accompanied by an application on the part of the holder of the old licence for its revocation<sup>22</sup>. If the holder of the old licence is a person in whom the old licence has vested on the death or bankruptcy of the prior holder<sup>23</sup>, an apportionment notice is of no effect unless the required notice of vesting<sup>24</sup> has been given to the Agency<sup>25</sup>.

If the Agency receives an apportionment notice and the application for revocation referred to above, the Agency must<sup>26</sup>:

- 491 (A) revoke the old licence<sup>27</sup>;
- 492 (B) if the holder is to continue the abstraction in part and a licence is required<sup>28</sup> for that purpose, grant to the holder of the old licence a licence relating to that part of the abstraction<sup>29</sup>; and
- 493 (C) grant to each successor who requires a licence<sup>30</sup> in order to carry on his part of the abstraction a licence relating to that part of the abstraction<sup>31</sup>.

Each new licence to be so granted must be granted<sup>32</sup> subject to provisions which correspond as nearly as practicable to those of the old licence in relation to the part of the abstraction to be authorised by the new licence<sup>33</sup>. The revocation of the old licence and the grant of the new licences takes effect from the date on which the Agency revokes the old licence and grants the new ones<sup>34</sup>, or from the date specified in the apportionment notice, if later<sup>35</sup>. Nothing in these provisions affects the liability of the holder of the old licence for any failure by him, before the revocation of that licence took effect, to comply with any condition or requirement of that licence<sup>36</sup>.

The Agency must not grant a new licence to the holder of the old licence or to a successor if, by virtue of an exemption<sup>37</sup>, the restriction on abstraction would not apply to that part of the abstraction proposed in relation to him in the apportionment notice<sup>38</sup>. A person (whether the holder of the old licence or a successor) who proposes to carry on a part of the abstraction in such circumstances is, if the old licence was a full licence, to be taken to have the right to do so in relation to that part<sup>39</sup>. However, a person ceases to be so taken to have a right to carry on an abstraction if: (aa) during a specified period<sup>40</sup>, he does not carry out any such abstraction<sup>41</sup>; or (bb) following an order varying the small quantity threshold<sup>42</sup> or regulations providing for further exemptions<sup>43</sup>, he is granted a full licence in respect of abstraction from the same point<sup>44</sup>.

1 As to the meanings of 'full licence' and 'transfer licence' see PARA 227. As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'abstract' see PARA 192 note 2.

4 As to the meaning of 'person' see PARA 13 note 29.

5 Water Resources Act 1991 s 59C(1)(a) (ss 59C, 59D added by the Water Act 2003 s 23(1)). As to the transfer of a whole licence see PARA 252.

6 Water Resources Act 1991 s 59C(1)(b) (as added: see note 5). The Water Resources Act 1991 s 59C has effect in relation to the apportionment of a licence held by the Environment Agency subject to modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 22. As to abstracting and impounding by the Agency see PARA 237.

7 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

8 Water Resources Act 1991 s 59C(2) (as added: see note 5).

9 Water Resources Act 1991 s 59C(3)(a) (as added: see note 5).

10 Ie a new licence granted under the Water Resources Act 1991 s 59C(5): see the text to notes 26-31.

11 Water Resources Act 1991 s 59C(3)(b) (as added: see note 5).

12 As to the meaning of 'point of abstraction' see PARA 252 note 14: definition applied by the Water Resources Act 1991 s 59C(14) (as added: see note 5).

13 Water Resources Act 1991 s 59C(3)(c) (as added: see note 5).

14 Ie under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227.

- 15    le under the Water Resources Act 1991 s 59C(5): see the text to notes 26-31.
- 16    As to the meaning of 'right of access' see PARA 252 note 13: definition applied by the Water Resources Act 1991 s 59C(14) (as added: see note 5).
- 17    Water Resources Act 1991 s 59C(3)(d)(i) (as added: see note 5).
- 18    Water Resources Act 1991 s 59C(3)(d)(ii) (as added: see note 5).
- 19    As to the meaning of 'information' see PARA 117 note 13.
- 20    Water Resources Act 1991 s 59C(3)(e) (as added: see note 5).
- 21    Water Resources Act 1991 s 59C(3) (as added: see note 5).
- 22    Water Resources Act 1991 s 59C(4) (as added: see note 5).
- 23    le under the Water Resources Act 1991 s 59B: see PARA 253.
- 24    le the notice under the Water Resources Act 1991 s 59B(4): see PARA 253.
- 25    Water Resources Act 1991 s 59D(3) (as added: see note 5).
- 26    le subject to the Water Resources Act 1991 s 59C(9): see the text to note 38.
- 27    Water Resources Act 1991 s 59C(5)(a) (as added: see note 5).
- 28    le under the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 29    Water Resources Act 1991 s 59C(5)(b) (as added: see note 5). Sections 34-45 (see PARA 229 et seq) do not apply to the grant of a new licence under s 59C(5): s 59C(6) (as so added). For the purposes of s 39A (protected rights: see PARA 241), a new licence granted under s 59C(5) is to be treated: (1) as if it had been granted at the time the old licence was granted (s 59C(13)(a) (as so added)); and (2) as if it and any other new licence granted by virtue of the relevant apportionment notice had been granted in place of the old licence (s 59C(13)(b) (as so added)).
- 30    le under the Water Resources Act 1991 Pt II Ch II (ss 24-72).
- 31    Water Resources Act 1991 s 59C(5)(c) (as added: see note 5). See also note 29.
- 32    le subject to the Water Resources Act 1991 s 46 (see PARA 248) and to any provision of regulations made under s 59D(1) (see note 33).
- 33    Water Resources Act 1991 s 59C(7) (as added: see note 5). The Secretary of State or, in relation to Wales, the Welsh Ministers may make regulations about the provisions to be contained in licences granted under s 59C: s 59D(1) (as so added). As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made. The functions of the Secretary of State under the Water Resources Act 1991 s 59D, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 34    Water Resources Act 1991 s 59C(8)(a) (as added: see note 5).
- 35    Water Resources Act 1991 s 59C(8)(b) (as added: see note 5).
- 36    Water Resources Act 1991 s 59D(2) (as added: see note 5).
- 37    'Exemption' means the disapplication of the restriction on abstraction under or by virtue of the Water Resources Act 1991 s 27 (see PARA 221) or s 33A (see PARA 225). As to the meaning of 'restriction on abstraction' see PARA 214 note 9.
- 38    Water Resources Act 1991 s 59C(9) (as added: see note 5).
- 39    Water Resources Act 1991 s 59C(10) (as added: see note 5).

40 The specified period is: (1) four years; or (2) if the abstractions authorised under the old licence were abstractions planned to be carried out at intervals of more than four years, or abstractions for emergency purposes only, such longer period as the Agency may determine on the application of the person in question: Water Resources Act 1991 s 59C(12) (as added: see note 5).

41 Water Resources Act 1991 s 59C(11)(a) (as added: see note 5).

42 Ie an order under the Water Resources Act 1991 s 27A(1): see PARA 221.

43 Ie regulations under the Water Resources Act 1991 s 33A: see PARA 225.

44 Water Resources Act 1991 s 59C(11)(b) (as added: see note 5).

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## ***G. MODIFICATION ETC OF LICENCES***

### **255. Power to make regulations.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may by regulations<sup>3</sup> make provision as to the manner in which applications for the revocation or variation of licences<sup>4</sup> are to be dealt with, including provision requiring the giving of notices of, and information relating to, the making of such applications or decisions on any such applications<sup>5</sup>. This power has effect subject to any express provision contained in, or having effect by virtue of, any other relevant enactment<sup>6</sup>; and any regulations so made have effect subject to any such express provision<sup>7</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 s 59, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. The Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, have been made: see PARA 256.

4 I.e. licences under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227. In relation to the variation or revocation of a licence, 'licence' must be construed subject to s 25(6), (7) (see PARA 215): s 72(1).

5 Water Resources Act 1991 s 59(1).

6 I.e. any other enactment contained in the Water Resources Act 1991 Pt II Ch II (ss 24-72). As to the meaning of 'enactment' see PARA 14 note 31.

7 Water Resources Act 1991 s 59(2).



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## 256. Revocation of licence on application of holder.

The holder of a licence<sup>1</sup> to abstract water<sup>2</sup> may apply to the Environment Agency<sup>3</sup> to revoke the licence and, on any such application, the Agency must revoke the licence accordingly<sup>4</sup>.

The holder of a licence<sup>5</sup> to obstruct or impede the flow<sup>6</sup> of inland waters<sup>7</sup> (an 'impounding licence'<sup>8</sup>) may apply to the Agency to revoke the licence and, on any such application, the Agency may revoke the licence accordingly<sup>9</sup>. The Agency may require conditions to be met to its satisfaction before revocation of an impounding licence takes effect, and those conditions may in particular include conditions: (1) requiring the removal of all or part of the impounding works<sup>10</sup>; (2) as to the restoration of the site of the impounding works to a state which is satisfactory to the Agency<sup>11</sup>; (3) relating to the inland waters the flow of which is obstructed or impeded by means of the impounding works<sup>12</sup>. The person<sup>13</sup> making an application for the revocation of an impounding licence (the 'applicant') may by notice<sup>14</sup> appeal to the Secretary of State or, in relation to Wales, to the Welsh Ministers<sup>15</sup> if:

- 494 (a) he is dissatisfied with the decision of the Agency as to whether his licence may be revoked<sup>16</sup> or as to any conditions imposed by virtue of heads (1) to (3) above<sup>17</sup>; or
- 495 (b) the Agency fails to give notice of its decision to the applicant within the prescribed period<sup>18</sup> or within such extended period as may be agreed in writing<sup>19</sup> between the Agency and the applicant<sup>20</sup>.

Where an appeal is so brought, the Secretary of State or, as the case may be, the Welsh Ministers may allow or dismiss the appeal or reverse or vary any part of the decision of the Agency, whether the appeal relates to that part of the decision or not<sup>21</sup>, and may deal with the application as if it had been made to them in the first place<sup>22</sup>. The decision of the Secretary of State or the Welsh Ministers on any such appeal is final<sup>23</sup>, but may be challenged on certain grounds<sup>24</sup>.

1    Ie a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227. As to who is the holder of a licence see s 47; and PARA 250.

2    As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

3    As to the Environment Agency see PARA 17.

4    Water Resources Act 1991 s 51(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128; Water Act 2003 s 21(1), (2)). The Water Resources Act 1991 s 51 has effect in relation to an abstraction licence or an impounding licence held by the Environment Agency subject to modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 18. As to abstraction and impounding by the Agency see PARA 237.

5    Ie a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227.

6    As to the meaning of 'flow' see PARA 215 note 4.

7    As to the meaning of 'inland waters' see PARA 187 note 2.

8 The Water Resources Act 1991 s 51(1A)-(1G) applies, as regards any act or omission after 1 April 2006 (ie the date on which the Water Act 2003 s 21 came into force), in respect of impounding licences, regardless of when the impounding works were constructed: s 21(5); Water Act 2003 (Commencement No 6, Transitional Provisions and Savings) Order 2006, SI 2006/984, art 2(k). As to the meaning of 'impounding works' see PARA 215 note 4.

9 Water Resources Act 1991 s 51(1A) (s 51(1A)-(1G) added by the Water Act 2003 s 21(1), (3)).

10 Water Resources Act 1991 s 51(1B)(a) (as added: see note 9).

11 Water Resources Act 1991 s 51(1B)(b) (as added: see note 9).

12 Water Resources Act 1991 s 51(1B)(c) (as added: see note 9).

13 As to the meaning of 'person' see PARA 13 note 29.

14 As to the meaning of 'notice' see PARA 22 note 1. The Secretary of State, or in relation to Wales, the Welsh Ministers may by regulations make provision with respect to: (1) the manner in which notices of appeal under the Water Resources Act 1991 s 51(1C) must be served (s 51(1D)(a) (as added: see note 9)); (2) the period within which such notices must be served (s 51(1D)(b) (as so added)). A notice of appeal under s 51(1C) must: (a) state the grounds on which the appeal is being made; and (b) be accompanied by a copy of the application to which the appeal relates, any information or report submitted to the Agency with the application, the notice of the decision on the application, if any, and all other relevant correspondence with the Agency: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 13(1). As to the meaning of 'information' see PARA 117 note 13. The period within which any notice of appeal under the Water Resources Act 1991 s 51(1C) must be served is: (i) in a case falling within s 51(1C)(a) (see head (a) in the text), 28 days beginning on the date on which the decision to which the notice relates is served on the applicant; and (ii) in a case falling within s 51(1C)(b) (see head (b) in the text), 28 days beginning on the date which is the day after the expiry of the period referred to in the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 10(4) (see PARA 236) by which the Agency must serve notice under reg 10(1): reg 12(3).

The functions of the Secretary of State under the Water Resources Act 1991 s 51, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

15 The Water Resources Act 1991 s 51(1C)-(1F) are subject to the Environment Act 1995 s 114 (delegation or reference of appeals: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65): Water Resources Act 1991 s 51(1G) (as added: see note 9).

16 Water Resources Act 1991 s 51(1C)(a)(i) (as added: see note 9).

17 Water Resources Act 1991 s 51(1C)(a)(ii) (as added: see note 9).

18 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). The period within which the Agency must give notice of its decision on an application under s 51(1A), except where a longer period is agreed, is four months beginning on the date on which the application is received by the Agency: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 11. As to the meaning of 'month' see PARA 23 note 10.

19 As to the meaning of 'writing' see PARA 22 note 1.

20 Water Resources Act 1991 s 51(1C)(b) (as added: see note 9).

21 Water Resources Act 1991 s 51(1E)(a) (as added: see note 9).

22 Water Resources Act 1991 s 51(1E)(b) (as added: see note 9).

23 Water Resources Act 1991 s 51(1F) (as added: see note 9).

24 See the Water Resources Act 1991 s 69; and PARA 247.

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## **257. Variation of licence on application of holder.**

The holder of a licence<sup>1</sup> may apply to the Environment Agency<sup>2</sup> to vary that licence<sup>3</sup>. However, such an application may not be made to convert an abstraction<sup>4</sup> licence of one type into an abstraction licence of a different type<sup>5</sup>.

Unless the variation proposed in the application is limited to reducing the quantity of water authorised to be abstracted in pursuance of the licence during one or more periods<sup>6</sup>, the provisions of the Water Resources Act 1991 relating to applications for licences<sup>7</sup> apply (with the necessary modifications<sup>8</sup>) to applications by holders of licences to vary those licences, and to the variation of licences in pursuance of such applications, as they apply to applications for, and the grant of, such licences<sup>9</sup>.

1   Ie the holder of a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227. As to who is the holder of a licence see s 47; and PARA 250.

2   As to the Environment Agency see PARA 17.

3   Water Resources Act 1991 s 51(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, Sch 2, and the exceptions from, and modifications to, the Water Resources Act 1991 made by it, has effect in relation to proposals under s 51(2) (modified in accordance with the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 18) in relation to a licence held by the Environment Agency, other than where the Water Resources Act 1991 s 51(4) (see note 6) applies: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 16(b), Sch 2. The Water Resources Act 1991 s 51(2) has effect in relation to an abstraction licence or an impounding licence held by the Agency subject to modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 18. As to abstraction and impounding by the Agency see PARA 237.

4   As to the meaning of 'abstraction' see PARA 192 note 2.

5   Water Resources Act 1991 s 51(2A) (added by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 4). As to the types of abstraction licences see PARA 227.

6   Where the variation proposed in an application is limited to reducing the quantity of water authorised to be abstracted in pursuance of the licence during one or more periods, the Water Resources Act 1991 ss 37, 38(1) (see PARAS 233, 239) do not apply; and ss 43, 44 (see PARAS 244, 246), as applied by s 51(3), have effect as if s 43(5) and s 44(3)(a) were omitted: s 51(4).

7   Ie the Water Resources Act 1991 ss 37-44: see PARA 233 et seq.

8   As to the meaning of 'modifications' see PARA 141 note 20.

9   See the Water Resources Act 1991 s 51(3).

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**258. Proposals for revocation or variation at instance of the Secretary of State, Welsh Ministers or Environment Agency.**

Where it appears to the Environment Agency<sup>1</sup> that a licence<sup>2</sup> should be revoked or varied<sup>3</sup>, the Agency may formulate proposals for revoking or varying the licence<sup>4</sup>. Where it appears to the Secretary of State<sup>5</sup> or, in relation to Wales, to the Welsh Ministers<sup>6</sup> (either in consequence of representations made to him or them or otherwise) that a licence ought to be reviewed<sup>7</sup>, but no proposals for revoking or varying the licence have been formulated by the Agency<sup>8</sup>, the Secretary of State or, where appropriate, the Welsh Ministers may, as he or they may consider appropriate in the circumstances, direct the Agency<sup>9</sup> to formulate proposals for revoking the licence in question<sup>10</sup>, or for varying that licence in such manner as may be specified in the direction<sup>11</sup>.

Notice in the prescribed form<sup>12</sup> of any proposals so formulated with respect to any licence must be served on the holder of the licence<sup>13</sup> and be published in the prescribed way<sup>14</sup>. If a licence with respect to which any such proposals are formulated relates to any inland waters<sup>15</sup> and the proposals provide for variation of that licence<sup>16</sup>, a copy of the notice must be served, not later than the date on which it is first published<sup>17</sup>, on any navigation, harbour or conservancy authority<sup>18</sup> having functions in relation to those waters at a place where the licence, if varied in accordance with the proposals, would authorise water to be abstracted or impounded<sup>19</sup>.

Where proposals are formulated under the above provisions for the variation of an abstraction or impounding licence<sup>20</sup>, the Agency must determine whether those proposals would amount to or form part of a relevant project<sup>21</sup>; and in making that determination the Agency must take into account such of the prescribed selection criteria as are relevant<sup>22</sup>. The Agency must give written notice of its determination to the licence holder and to the Secretary of State or, in relation to Wales, to the Welsh Ministers<sup>23</sup>. The Secretary of State, or as the case may be, the Welsh Ministers may review the determination of the Agency, by giving notice to the Agency not later than four weeks after the receipt of such a notice; and where they do so, having taken into account such of the prescribed selection criteria as are relevant, must by notice in writing given to the licence holder and the Agency either uphold the determination of the Agency or substitute their own determination<sup>24</sup>. The required notice of the proposals formulated<sup>25</sup> must not, in the case of such a review, be served before notice is so given to the Agency and must include notice of the determination under these provisions<sup>26</sup>.

1 As to the Environment Agency see PARA 17.

2 I.e. a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

3 In the case of a licence to obstruct or impede any inland waters, a variation may take the form of a requirement that the impounding works be modified in ways specified in the proposed new provision of the licence: Water Resources Act 1991 s 52(1A) (added by the Water Act 2003 s 22(1), (2)). As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'impounding works' see PARA 215 note 4.

4 Water Resources Act 1991 s 52(1) (s 52(1)-(3) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

5 As to the Secretary of State see PARA 15 note 1.

6 The functions of the Secretary of State under the Water Resources Act 1991 s 52, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7 Water Resources Act 1991 s 52(2)(a).

8 Water Resources Act 1991 s 52(2)(b).

9 See the Water Resources Act 1991 s 52(2) (as amended: see note 4). Section 52 has effect in relation to an abstraction licence or an impounding licence held by the Agency with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 19(1). As to the meaning of 'abstraction licence' see PARA 231 note 1. As to the meaning of 'impounding licence' see PARA 231 note 2. As to abstraction and impounding by the Agency see PARA 237.

10 Water Resources Act 1991 s 52(3)(a) (as amended: see note 4).

11 Water Resources Act 1991 s 52(3)(b) (as amended: see note 4).

12 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). A notice for these purposes must: (1) include any prescribed matters; and (2) state that, before the end of a period specified in the notice the holder of the licence may give notice in writing to the Agency objecting to the proposals, and any other person may make representations in writing to the Agency with respect to the proposals: s 52(6) (substituted by the Water Act 2003 s 22(1), 5)). The period referred to in head (2) above begins on the date the notice is first published as mentioned in the Water Resources Act 1991 s 52(4), and must not end before the end of the period of 28 days beginning with that date: s 52(7) (substituted by the Water Act 2003 s 22(1), (6)). As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250. As to the meaning of 'writing' see PARA 22 note 1. As to the meaning of 'person' see PARA 13 note 29.

Where proposals have been formulated under the Water Resources Act 1991 s 52 (including that section as modified by the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 19: see note 9), the notice must: (a) explain the general effect of the proposals; (b) in the case of proposals for varying the licence, specify the current point of abstraction or impounding and, if different, that which is proposed, in relation to a full licence, the proposed quantity of water to be abstracted, and in relation to an impounding licence, the object and means of impounding; (c) state where and when the register containing brief particulars about the proposals may be inspected and that such inspection is free of charge, and the address to which any representations with respect to the proposals may be sent; and (d) be published in at least one newspaper circulating in the locality of the current (and, if different, proposed) point of abstraction or impounding, and on the Agency's website: reg 31(1). However, the notice must not include any information: (i) that is not to be included in a register by virtue of the Water Resources Act 1991 s 191A (exclusion from registers of information affecting national security: see PARA 269) or s 191B (exclusion from registers of certain confidential information: see PARA 270); or (ii) of which, in the case of proposals in relation to a licence relating to abstraction or impounding, the relevant authority has notified the Agency that publication would be contrary to the interests of national security: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 31(2). 'Relevant authority' means (A) in the case of an application in relation to abstraction or to impounding works in England, the Secretary of State; and (B) in the case of an application in relation to abstraction or to impounding works in Wales, the Secretary of State or the Welsh Ministers: reg 31(3); Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'abstraction' see PARA 192 note 2. As to the meaning of 'impounding' see PARA 231 note 12. As to the meaning of 'full licence' see PARA 227. As to the register see PARA 268.

13 Water Resources Act 1991 s 52(4)(a). As to the service of documents see PARA 22.

14 Water Resources Act 1991 s 52(4)(b) (substituted by the Water Act 2003 s 22(1), (3)). If no way is prescribed, publication must be in a way calculated to bring it to the attention of persons likely to be affected if the licence were revoked or varied as proposed: Water Resources Act 1991 s 52(4)(b) (as so substituted). As to the prescribed way of publication see note 12.

15 Water Resources Act 1991 s 52(5)(a).

16 Water Resources Act 1991 s 52(5)(b).

17 It is not later than the date on which it is first published as mentioned in the Water Resources Act 1991 s 52(4)(b) (see the text to note 14): s 52(5) (amended by the Water Act 2003 s 22(1), (4)).

18 As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

19 Water Resources Act 1991 s 52(5).

20 'Abstraction or impounding licence' means a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 2.

21 As to the meaning of 'relevant project' see the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3; and PARA 271.

22 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 14(1). The selection criteria are those set out in Sch 1: see PARA 272 note 10.

23 See the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, regs 2, 14(2); Government of Wales Act 2006 Sch 11 para 32.

24 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 14(3).

25 Ie the notice required by the Water Resources Act 1991 s 52(4): see the text to notes 12-14.

26 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 14(4).

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## **259. Revocation or variation of licence in pursuance of proposals.**

Subject to the following provisions, where the Environment Agency<sup>1</sup> has formulated any proposals<sup>2</sup> with respect to any licence<sup>3</sup>, it may<sup>4</sup>:

- 496 (1) if the proposals are for the revocation of the licence, revoke the licence<sup>5</sup>; and
- 497 (2) if the proposals are proposals for varying the licence, vary the licence in accordance with those proposals or, with the consent of the holder<sup>6</sup> of the licence, in any other way<sup>7</sup>.

The Agency must not, however, proceed with any proposals it has formulated before the end of the period specified<sup>8</sup> for the purpose in relation to those proposals<sup>9</sup>.

If the holder of the licence gives notice<sup>10</sup> to the Agency objecting to the proposals before the end of that specified period, the Agency must refer the proposals to the Secretary of State<sup>11</sup> or, in relation to Wales, to the Welsh Ministers<sup>12</sup>, with a copy of the notice of objection<sup>13</sup>; but if no such notice is given to the Agency before the end of that period, the Agency may proceed with the proposals<sup>14</sup>.

Where, however, it is determined<sup>15</sup> that the proposals would amount to or form part of a relevant project<sup>16</sup>, the Agency must prepare<sup>17</sup> an environmental statement<sup>18</sup>; and the relevant statutory provisions<sup>19</sup> apply as if the environmental statement were part of the proposals formulated by the Agency<sup>20</sup>. The Agency must, not later than the date of publication of the required notice of the proposals formulated<sup>21</sup> send to the Secretary of State or, in relation to Wales, the Welsh Ministers, and the consultation bodies<sup>22</sup> a copy of the proposals and the environmental statement under cover of a letter stating that any representations on the proposals should be made in writing<sup>23</sup> to the Agency within a period of 28 days beginning on the date of that notice<sup>24</sup>. The Agency or, as the case may be, the Secretary of State or the Welsh Ministers may not determine an application for, or for the variation of, an authorisation relating to a relevant project before the latest date allowed<sup>25</sup> for making representations or concluding any consultation<sup>26</sup>. In determining whether a licence should be varied, the Agency or, as the case may be, the Secretary of State or the Welsh Ministers must have regard to the environmental statement and any representations relating to the environmental effects of the project made within the prescribed period<sup>27</sup>. Where a licence is varied in pursuance of proposals to which these provisions apply, the Agency must within 28 days of the variation, publish in those newspapers in which a notice of the proposals formulated was published<sup>28</sup> a notice stating that the Agency has varied the licence, and stating a place where any person<sup>29</sup> may inspect:

- 498 (a) the document by which the determination was made<sup>30</sup>;
- 499 (b) written notice of the main reasons and considerations on which the determination is based, and information about the public participation process that has taken place<sup>31</sup>;
- 500 (c) where necessary, a description of the main measures to avoid, reduce and if possible offset the major adverse effects of the project<sup>32</sup>; and
- 501 (d) information regarding any right to challenge the validity of the decision and the procedures for doing so<sup>33</sup>.

- 1 As to the Environment Agency see PARA 17.
- 2 Ie under the Water Resources Act 1991 s 52: see PARA 258.
- 3 Ie any licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.
- 4 Water Resources Act 1991 s 53(1) (s 53 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). In relation to an abstraction licence or an impounding licence held by the Agency the Water Resources Act 1991 s 53 has effect with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 19(2). As to the meaning of 'abstraction licence' see PARA 231 note 1. As to the meaning of 'impounding licence' see PARA 231 note 2. As to abstraction and impounding by the Agency see PARA 237.
- 5 Water Resources Act 1991 s 53(1)(a).
- 6 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.
- 7 Water Resources Act 1991 s 53(1)(b).
- 8 Ie specified in accordance with the Water Resources Act 1991 s 52(7) for the purposes in relation to those proposals of s 52(6): see PARA 258.
- 9 Water Resources Act 1991 s 53(2) (as amended: see note 4).
- 10 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 11 As to the Secretary of State see PARA 15 note 1.
- 12 The functions of the Secretary of State under the Water Resources Act 1991 s 53, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 13 Water Resources Act 1991 s 53(4) (as amended: see note 4). As to challenges to the validity of such a reference see s 69(1); and PARA 247. As to the consideration of such references see PARA 260.
- 14 Water Resources Act 1991 s 53(3) (as amended: see note 4). Where the Agency proceeds with any proposals under s 53(3) and the proposals are proposals for varying the licence, the provisions of s 38(3) (see PARA 239), s 39(1), (2) (see PARA 240) and s 40 (see PARA 242) apply (with the necessary modifications) to any action of the Agency in proceeding with the proposals as they apply to the action of the Agency in dealing with an application for a licence: s 53(5) (as so amended). As to the meaning of 'modifications' see PARA 141 note 20.
- 15 Ie under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 14: see PARA 258.
- 16 As to the meaning of 'relevant project' see the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3; and PARA 271.
- 17 Ie in accordance with the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(1): see PARA 272.
- 18 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15(1), (2). Regulations 6(2)-(7), 7, 8 (see PARA 272) do not apply: reg 15(3).
- 19 Ie the Water Resources Act 1991 s 52(4)-(8): see PARA 258.
- 20 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15(4). Where a notice is published in accordance with the Water Resources Act 1991 s 52(4) (see PARA 258) in respect of proposals in relation to which the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15 applies, the notice must specify any other arrangements that have been made for informing the public of the proposals and for consulting them in relation to them: reg 15(4A) (added by SI 2006/3124).
- 21 Ie the notice required under the Water Resources Act 1991 s 52(4): see PARA 258.



22 As to the meaning of 'consultation bodies' see PARA 272 note 22.

23 As to the meaning of 'writing' see PARA 22 note 1.

24 See the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, regs 2, 15(5); Government of Wales Act 2006 Sch 11 para 32.

25 Ie under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164.

26 See the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, regs 2, 15(6); Government of Wales Act 2006 Sch 11 para 32.

27 See the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, regs 2, 15(7); Government of Wales Act 2006 Sch 11 para 32. The prescribed period is the period referred to in reg 15(5): see the text to notes 21-24.

28 Ie under the Water Resources Act 1991 s 52(4): see PARA 258.

29 As to the meaning of 'person' see PARA 13 note 29.

30 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15(8)(a).

31 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15(8)(b) (reg 15(8)(b), (c) amended, (8)(d) added, by SI 2006/3124).

32 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15(8)(c) (as amended: see note 31).

33 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 15(8)(d) (as added: see note 31).

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## **260. Reference of Environment Agency's proposals to the Secretary of State or Welsh Ministers.**

Where any proposals of the Environment Agency<sup>1</sup> with respect to a licence are referred<sup>2</sup> to the Secretary of State<sup>3</sup> or, in relation to Wales, to the Welsh Ministers<sup>4</sup>, he or they must consider the proposals<sup>5</sup> together with the objection of the holder of the licence<sup>6</sup> and any representations in writing<sup>7</sup> relating to the proposals which were received by the Agency before the end of the appropriate period<sup>8</sup>, and must determine, according to whether the proposals are for the revocation or variation of the licence, the question whether the licence should be revoked or the question whether it should be varied<sup>9</sup>. Before determining whether a licence should be revoked or varied in a case in which proposals have been formulated by the Agency<sup>10</sup>, the Secretary of State or, where appropriate, the Welsh Ministers may, if he or they think fit, and must if a request is made by the holder of the licence or the Agency to be heard with respect to the proposals, either cause a local inquiry to be held<sup>11</sup>, or afford to the holder of the licence and the Agency an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State or, as the case may be, the Welsh Ministers for the purpose<sup>12</sup>.

In determining whether a licence should be varied and, if so, what directions to the Agency should be included in the decision<sup>13</sup>, the Secretary of State or the Welsh Ministers must consider whether any such direction would require such a variation of the licence as would authorise the abstraction of water<sup>14</sup>, or authorise the flow<sup>15</sup> of any inland waters<sup>16</sup> to be obstructed or impeded by means of impounding works<sup>17</sup>, so as to derogate<sup>18</sup> from rights which, at the time when the direction is given, are protected rights<sup>19</sup>. Where the decision of the Secretary of State or the Welsh Ministers on such a reference is that the licence in question should be revoked or varied, the decision must include a direction to the Agency to revoke the licence or, as the case may be, to vary it so as to contain such provisions as may be specified in the direction<sup>20</sup>. Compensation may be payable by the Agency<sup>21</sup>.

A decision of the Secretary of State or the Welsh Ministers with respect to any modification proposals is final<sup>22</sup>; but may be challenged on certain grounds<sup>23</sup>.

1 As to the Environment Agency see PARA 17.

2 In accordance with the Water Resources Act 1991 s 53(4); see PARA 259.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 ss 53, 54, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 Water Resources Act 1991 s 54(1)(a).

6 Water Resources Act 1991 s 54(1)(b). As to who is the holder of a licence see s 47; and PARA 250.

- 7 As to the meaning of 'writing' see PARA 22 note 1.
- 8 Water Resources Act 1991 s 54(1)(c). The appropriate period is the period mentioned in s 53(2): see PARA 259.
- 9 Water Resources Act 1991 s 54(1) (s 54(1), (2), (4), (5) amended by the Environment Act 1995 s 120, Sch 22 para 128). As to variation of licences see the Water Resources Act 1991 s 53(1)(b); and PARA 259. Section 54 has effect in relation to an abstraction licence or an impounding licence held by the Agency with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 19(3). As to the meaning of 'abstraction licence' see PARA 231 note 1. As to the meaning of 'impounding licence' see PARA 231 note 2. As to abstraction and impounding by the Agency see PARA 237.
- 10 Ie under the Water Resources Act 1991 s 52: see PARA 258.
- 11 Water Resources Act 1991 s 54(2)(a).
- 12 Water Resources Act 1991 s 54(2)(b) (as amended: see note 9).
- 13 Ie under the Water Resources Act 1991 s 54(5): see the text to note 20.
- 14 Water Resources Act 1991 s 54(3)(a). As to the meaning of 'abstraction' see PARA 192 note 2.
- 15 As to the meaning of 'flow' see PARA 215 note 4.
- 16 As to the meaning of 'inland waters' see PARA 187 note 2.
- 17 Water Resources Act 1991 s 54(3)(b). As to the meaning of 'impounding works' see PARA 215 note 4.
- 18 As to the meaning of 'derogate' see PARA 240 note 9.
- 19 Water Resources Act 1991 s 54(3). As to the meaning of 'protected rights' see PARA 241. The provisions of s 39(2) (see PARA 240) and s 40 (see PARA 242) apply in relation to any proposals referred to the Secretary of State or the Welsh Ministers in accordance with s 53(4) (see PARA 259) as if in those provisions: (1) any reference to the Agency were a reference to the Secretary of State or the Welsh Ministers; (2) any reference to the application were a reference to the proposals; and (3) the references to ss 38(3), 39(1) (see PARAS 239, 240) were references to s 54(1), (3): s 54(4) (as amended: see note 9).
- 20 Water Resources Act 1991 s 54(5) (as amended: see note 9).
- 21 See PARA 263.
- 22 Water Resources Act 1991 s 54(6).
- 23 See the Water Resources Act 1991 s 69; and PARA 247.

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**261. Application by owner of fishing rights for revocation or variation of abstraction licence.**

Subject to the following provisions and to the provisions relating to licences of right<sup>1</sup>, where a licence<sup>2</sup> authorises abstraction<sup>3</sup> from any inland waters<sup>4</sup> in respect of which no minimum acceptable flow<sup>5</sup> has been determined<sup>6</sup>, any person<sup>7</sup> who is the owner of fishing rights<sup>8</sup> in respect of those inland waters may apply to the Secretary of State<sup>9</sup> or, in relation to Wales, to the Welsh Ministers<sup>10</sup>, for the revocation or variation of the licence<sup>11</sup>. No such application may, however, be made in respect of any licence except at a time after the end of the period of one year beginning with the date on which the licence was granted but before a minimum acceptable flow has been determined in relation to the waters in question<sup>12</sup>.

Any application made by a person as owner of fishing rights in respect of any inland waters must be made on the grounds that, in his capacity as owner of those rights, he has sustained loss or damage which is directly attributable to the abstraction of water in pursuance of the licence in question and either: (1) he is not entitled to a protected right<sup>13</sup> in respect of those inland waters<sup>14</sup>; or (2) the loss or damage which he has sustained in his capacity as owner of those rights is not attributable to any relevant breach of statutory duty<sup>15</sup> or is in addition to any loss or damage attributable to any such breach<sup>16</sup>. Where such an application is made in respect of any licence, the applicant must serve<sup>17</sup> notice in the prescribed form<sup>18</sup> on the Environment Agency and on the holder of the licence<sup>19</sup>, stating that each of them is entitled, at any time before the end of the period of 28 days beginning with the date of service of the notice, to make representations in writing<sup>20</sup> to the Secretary of State or, as appropriate, the Welsh Ministers with respect to the application<sup>21</sup>. In determining any application, the Secretary of State or, as the case may be, the Welsh Ministers must take into account any representations in writing received by him or them, within that period, from the Agency or from the holder of the licence<sup>22</sup>.

Before determining on an application whether a licence should be revoked or varied, the Secretary of State or the Welsh Ministers may, if he or they think fit, and must if a request is made by the applicant, the holder of the licence or the Agency to be heard with respect to the proposals, cause a local inquiry to be held<sup>23</sup>, or afford to the applicant, the holder of the licence and the Agency an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State or the Welsh Ministers for the purpose<sup>24</sup>.

On an application in respect of any licence, the Secretary of State or the Welsh Ministers may not determine that the licence is to be revoked or varied:

- 502 (a) unless the grounds of the application<sup>25</sup> are established to his or their satisfaction<sup>26</sup> and he or they are satisfied that the extent of loss or damage which the applicant has sustained is such as to justify the revocation or variation of the licence<sup>27</sup>;
- 503 (b) unless he or they are satisfied that the fact that the abstraction of water in pursuance of the licence caused the loss or damage which the applicant has sustained was wholly or mainly attributable to exceptional shortage of rain or to an accident or other unforeseen act or event not caused by, and outside the control of, the Agency<sup>28</sup>.

Where the Secretary of State or the Welsh Ministers determine, on an application, that a licence is to be varied, the variation must be limited to that which, in his or their opinion, is requisite having regard to the loss or damage which the applicant has sustained<sup>29</sup>. Where the decision of the Secretary of State or the Welsh Ministers on an application in respect of any licence is that the licence should be revoked or varied, the decision must include a direction to the Agency to revoke the licence or, as the case may be, to vary it so as to contain such provisions as may be specified in the direction<sup>30</sup>. A decision of the Secretary of State or the Welsh Ministers on an application is final<sup>31</sup>.

Compensation may be payable by the Agency where a licence is revoked or varied under these provisions<sup>32</sup>.

1     I.e. the provisions of the Water Resources Act 1991 Sch 7: s 55(1). No application may be made under s 55 in respect of any licence of right granted under the Water Act 1989: Water Resources Act 1991 Sch 7 para 3. As to licences of right see PARA 238.

2     I.e. a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq. Section 55 has effect in relation to an abstraction licence held by the Environment Agency with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 20(1). As to the meaning of 'abstraction licence' see PARA 231 note 1. As to the Environment Agency see PARA 17. As to abstraction and impounding by the Agency see PARA 237.

3     As to the meaning of 'abstraction' see PARA 192 note 2.

4     As to the meaning of 'inland waters' see PARA 187 note 2.

5     As to the meaning of 'minimum acceptable flow' see PARA 211 note 18.

6     I.e. determined under the Water Resources Act 1991 Pt II Ch I (ss 20-23): see PARA 196 et seq.

7     As to the meaning of 'person' see PARA 13 note 29.

8     'Fishing rights', in relation to any inland waters, means any right (whether it is an exclusive right or a right in common with one or more other persons) to fish in those waters, where the right in question: (1) constitutes or is included in an interest in land; or (2) is exercisable by virtue of an exclusive licence granted for valuable consideration; and any reference to an owner of fishing rights is a reference to the person for the time being entitled to those rights: Water Resources Act 1991 s 55(5). Any reference to a right included in an interest in land is a reference to a right which is exercisable only by virtue of, and as a right incidental to, the ownership of that interest: s 55(6). As to the meaning of 'land' see PARA 14 note 21.

9     As to the Secretary of State see PARA 15 note 1.

10    The functions of the Secretary of State under the Water Resources Act 1991 ss 55, 56, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

11    Water Resources Act 1991 s 55(1).

12    Water Resources Act 1991 s 55(2).

13    As to the meaning of 'protected right' see PARA 241.

14    Water Resources Act 1991 s 55(3)(a).

15    I.e. such a breach as is mentioned in the Water Resources Act 1991 s 60(2) or (3): see PARA 267.

16    Water Resources Act 1991 s 55(3)(b).

17 As to the service of documents see PARA 22.

18 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). The notice must be given in such form as the Environment Agency determines: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 32.

19 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

20 As to the meaning of 'writing' see PARA 22 note 1.

21 Water Resources Act 1991 s 55(4) (ss 55(4), 56(1), (2), (4), (6) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

22 Water Resources Act 1991 s 56(1) (as amended: see note 21). Section 56 has effect in relation to a licence held by the Environment Agency with modifications: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 20(2).

23 Water Resources Act 1991 s 56(2)(a) (as amended: see note 21).

24 Water Resources Act 1991 s 56(2)(b) (as amended: see note 21).

25 Ie as mentioned in the Water Resources Act 1991 s 55(3): see the text to notes 13-16.

26 Water Resources Act 1991 s 56(3)(a).

27 Water Resources Act 1991 s 56(3)(b).

28 Water Resources Act 1991 s 56(4) (as amended: see note 21).

29 Water Resources Act 1991 s 56(5).

30 Water Resources Act 1991 s 56(6) (as amended: see note 21). As to the position where the licence so varied authorises derogation from protected rights see s 60; and PARA 267.

31 Water Resources Act 1991 s 56(7). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

32 See the Water Resources Act 1991 ss 61, 62; and PARAS 263-264.

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## **262. Emergency variation of licences for spray irrigation purposes.**

Where at any time one or more licences<sup>1</sup> is or are in force in relation to a source of supply<sup>2</sup> authorising water abstracted<sup>3</sup> in pursuance of the licences to be used for the purpose of spray irrigation<sup>4</sup>, or for that purpose together with other purposes<sup>5</sup>, and by reason of exceptional shortage of rain or other emergency it appears to the Environment Agency<sup>6</sup> that it is necessary to impose a temporary restriction on the abstraction of water for use for that purpose<sup>7</sup>, the Agency may serve a notice<sup>8</sup> on the holder of any of the licences<sup>9</sup> reducing, during a specified period, the quantity of water authorised to be abstracted in pursuance of the licence from the source of supply for use for the purpose of spray irrigation<sup>10</sup>. The Agency may not, however, serve such a notice in respect of abstraction from underground strata<sup>11</sup> unless it appears to the Agency that such abstraction is likely to affect the flow<sup>12</sup>, level or volume of any inland waters<sup>13</sup> which are neither discrete waters<sup>14</sup> nor inland waters comprised in an order<sup>15</sup>.

In the exercise of this power in a case where there are two or more licences in force authorising abstraction from the same source of supply either at the same point or at points which, in the Agency's opinion, are not far distant from each other, the Agency may not serve such a notice on the holder of one of the licences unless a like notice is served on the holders of the other licences in respect of the same period<sup>16</sup>. The reductions imposed by the notices on the holders of the licences must be so calculated as to represent, as nearly as appears to the Agency to be practicable, the same proportion of the quantity of water authorised by the licences (apart from the notices) to be abstracted for use for the purpose of spray irrigation<sup>17</sup>.

'Spray irrigation' means<sup>18</sup> the irrigation of land or plants (including seeds) by means of water or other liquid emerging, in whatever form, from apparatus designed or adapted to eject liquid into the air in the form of jets or spray<sup>19</sup>. The Secretary of State<sup>20</sup> or, in relation to Wales, the Welsh Ministers<sup>21</sup> may, however, by order<sup>22</sup> direct that references to 'spray irrigation'<sup>23</sup>: (1) are to be construed as not including spray irrigation if carried out by such methods or in such circumstances or for such purposes as may be specified in the order<sup>24</sup>; and (2) without prejudice to the exercise of the power so conferred, are to be construed as including references to the carrying out, by such methods or in such circumstances or for such purposes as may be specified in the order, of irrigation of any such description, other than spray irrigation, as may be so specified<sup>25</sup>.

References to 'spray irrigation' in the relevant provisions of the Water Resources Act 1991<sup>26</sup> are to be construed as not including spray irrigation if carried out:

- 504 (a) by means of a combination of water and substances used for protecting plants against pests or disease or for exterminating or restricting the growth of weeds or grass and emerging from apparatus that is movable<sup>27</sup>;
- 505 (b) by means of a combination of water and growth regulators<sup>28</sup> or nutrients<sup>29</sup> emerging from apparatus that is movable<sup>30</sup>;
- 506 (c) by means of a combination of water and manure or dung emerging from apparatus that is movable, or emerging from spray guns in so far as the water used by such guns in any period of 14 days does not exceed the aggregate capacity of the effluent<sup>31</sup> pits or tanks situated on the holding from which the manure or dung is derived<sup>32</sup>; or

507 (d) by means of a combination of water and quality additives<sup>33</sup> emerging from apparatus that is movable<sup>34</sup>.

1 le licences under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

2 As to the meaning of 'source of supply' see PARA 187.

3 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

4 As to the meaning of 'spray irrigation' generally see the text to notes 18-34. For these purposes, references to spray irrigation are to be construed as excluding, additionally, spray irrigation if carried out: (1) within a building or other structure, whether fixed or mobile, used for the production of agricultural produce, being a building or structure which excludes from the plants growing in or under it water falling as rain; (2) on land in the immediate vicinity of cloches, in or under which plants are growing, for the purpose of securing a supply of moisture to those plants; (3) on containers or pots in the open in which plants intended for sale are grown in such a way as to be unable to take moisture from the soil: Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 4.

5 Water Resources Act 1991 s 57(1)(a).

6 As to the Environment Agency see PARA 17.

7 Water Resources Act 1991 s 57(1)(b) (s 57(1)-(4) amended by the Environment Act 1995 s 120, Sch 22 para 128).

8 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

9 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

10 Water Resources Act 1991 s 57(2) (as amended: see note 7). In relation to the specified period, the licence has effect accordingly subject to that reduction: Water Resources Act 1991 s 57(2). These provisions have effect without prejudice to the exercise of any power conferred by ss 51-54 (see PARA 256-260): s 57(5). No compensation is payable with regard to the restrictions imposed by an emergency variation of an abstraction licence for the purposes of spray irrigation. As to the payment of compensation generally see PARA 263.

11 As to the meaning of 'underground strata' see PARA 187 note 5.

12 As to the meaning of 'flow' see PARA 215 note 4.

13 As to the meaning of 'inland waters' see PARA 187 note 2.

14 As to the meaning of 'discrete waters' see PARA 187 note 4.

15 Water Resources Act 1991 s 57(3) (as amended: see note 7). The order referred to in the text is one under s 33 (repealed): see s 57(3). As from a day to be appointed this provision is amended so that the words 'neither discrete waters nor inland waters comprised in an order' are replaced by the words 'not discrete waters': s 57(3) (prospectively amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 5). At the date at which this volume states the law no such day had been appointed.

16 Water Resources Act 1991 s 57(4)(a) (as amended: see note 7).

17 Water Resources Act 1991 s 57(4)(b) (as amended: see note 7).

18 le subject to the Water Resources Act 1991 s 72(5): see the text to notes 20-25.

19 Water Resources Act 1991 s 72(1).

20 As to the Secretary of State see PARA 15 note 1.

21 The functions of the Secretary of State under the Water Resources Act 1991 s 72, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to



intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

22 The power to make such orders is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Water Resources Act 1991 s 72(6). As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the provision made see the text to notes 26-34.

23 In references in the Water Resources Act 1991 Pt II Ch II (ss 24-72) and in any other enactments in which 'spray irrigation' is given the same meaning as in Pt II Ch II, or such of those references as may be specified in the order: s 72(5). As to the meaning of 'enactment' see PARA 14 note 31.

24 Water Resources Act 1991 s 72(5)(a).

25 Water Resources Act 1991 s 72(5)(b). As to the powers of the Secretary of State or the Welsh Ministers to modify existing local enactments in order to make them consistent with orders so made see PARA 14.

26 In the Water Resources Act 1991 s 27(4) (see PARA 221); s 57(1), (2), (4) (see the text to notes 1-10, 16-17); s 125(2) (see PARA 274); s 127(1), (4) (see PARA 275): Spray Irrigation (Definition) Order 1992, SI 1992/1096, Schedule.

27 Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 3(a). 'Movable' means, in relation to any apparatus, mounted on wheels or portable and in either case not connected by pipe to an inland water or to water contained in any underground strata: art 2.

28 'Growth regulators' means substances used for accelerating or retarding the normal growth of plants: Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 2.

29 'Nutrients' means substances (other than water) that are necessary for the healthy growth of plants: Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 2.

30 Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 3(b).

31 'Effluent' means any liquid, including particles of matter and other substances in suspension in the liquid: Water Resources Act 1991 s 221(1).

32 Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 3(c).

33 'Quality additives' means substances, other than water, growth regulators or nutrients, used for improving or maintaining the yield or quality of plants or for improving their quality when harvested and during any period of conservation and applied to the growing plants or to the soil in which they grow: Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 2.

34 Spray Irrigation (Definition) Order 1992, SI 1992/1096, art 3(d).

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## **H. COMPENSATION**

### **263. Compensation where licence revoked or varied on direction of the Secretary of State or Welsh Ministers.**

Where a licence is revoked or varied in pursuance of a direction<sup>1</sup> given by the Secretary of State<sup>2</sup> or, in relation to Wales, by the Welsh Ministers<sup>3</sup> and it is shown that the holder of the licence<sup>4</sup>: (1) has incurred expenditure in carrying out work<sup>5</sup> which is rendered abortive by the revocation or variation<sup>6</sup>; or (2) has otherwise sustained loss or damage which is directly attributable to the revocation or variation<sup>7</sup>, the Environment Agency<sup>8</sup> must pay him compensation in respect of that expenditure, loss or damage<sup>9</sup>.

No compensation may<sup>10</sup>, however, be paid under this provision in respect of any work carried out before the grant of the licence which is revoked or varied<sup>11</sup>, or in respect of any other loss or damage arising out of anything done or omitted to be done before the grant of that licence<sup>12</sup>; and no such compensation is payable in respect of a licence to abstract water<sup>13</sup>, if it shown that no water was abstracted in pursuance of the licence during the period of four years ending with the date on which notice of the proposals for revoking or varying the licence was served on the holder of the licence<sup>14</sup>. Further, no compensation is payable in respect of the variation of a full licence, or of a transfer licence<sup>15</sup> which specifies a minimum value<sup>16</sup>, so as to reduce the quantity of water which the holder of the licence is authorised by the licence to abstract from the source of supply<sup>17</sup> to which the licence relates if:

- 508 (a) the ground for varying the licence is that the Secretary of State or, as the case may be, the Welsh Ministers are satisfied that the variation is necessary in order to protect the availability of water in the source of supply to which the licence relates<sup>18</sup>;
- 509 (b) the variation does not reduce the quantity of water which the holder of the licence is authorised by the licence to abstract to less than the minimum value specified in the licence<sup>19</sup> for these purposes<sup>20</sup>; and
- 510 (c) the statutory conditions are satisfied<sup>21</sup>.

Any question of disputed compensation must be referred to and determined by the Lands Tribunal<sup>22</sup>. For the purpose of assessing any such compensation, in so far as it is in respect of loss or damage consisting of depreciation of the value of an interest in land, the normal rules for assessing compensation<sup>23</sup> have effect so far as applicable and subject to any necessary modifications, as they have effect for the purpose of assessing compensation for the compulsory acquisition of an interest in land<sup>24</sup>. Where, however, the interest in land in respect of which any compensation falls to be assessed is subject to a mortgage<sup>25</sup>:

- 511 (i) the compensation must be assessed as if the interest were not subject to the mortgage<sup>26</sup>;
- 512 (ii) a claim for the compensation may be made by any mortgagee of the interest, but without prejudice to the making of a claim by the person<sup>27</sup> entitled to the interest<sup>28</sup>;

- 513 (iii) no such compensation is payable in respect of the interest of the mortgagee, as distinct from the interest which is subject to the mortgage<sup>29</sup>; and
- 514 (iv) any such compensation which is payable in respect of the interest which is subject to the mortgage is to be paid to the mortgagee or, if there is more than one mortgagee, to the first mortgagee, and must in either case be applied by him as if it were proceeds of sale<sup>30</sup>.

These provisions do not apply in relation to the revocation or variation of a licence held by the Agency<sup>31</sup>; and the right to compensation is withdrawn in certain circumstances where a licence to abstract water is revoked or varied on or after 15 July 2012<sup>32</sup>.

Where compensation has been paid under the above provisions to the holder of a licence ('licence A') following its revocation, and the conditions set out below are satisfied, the Agency may, if the licence referred to in head (B) below is granted, recover from the qualifying person<sup>33</sup> the amount of that compensation, or such lesser amount as the Agency determines<sup>34</sup>. Those conditions are that:

- 515 (A) the holder of licence A was a water undertaker<sup>35</sup>;
- 516 (B) at the time of the revocation an application from a qualifying person for a licence to abstract water ('licence B') was outstanding<sup>36</sup>;
- 517 (C) if the Agency had granted licence B while licence A still had effect, the Agency would have been in breach of the duty imposed on it not to derogate from protected rights<sup>37</sup> which was owed to the holder of licence A<sup>38</sup>;
- 518 (D) the ground for revoking licence A was that the Agency was of the view that in the interests of greater efficiency in the use of water resources it would be better for licence B to be granted and licence A revoked<sup>39</sup>; and
- 519 (E) the Agency proposes to grant licence B<sup>40</sup>.

1 le a direction under the Water Resources Act 1991 s 54 (see PARA 260) or s 56 (see PARA 261): s 61(1) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 1 paras 1, 6).

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 ss 54, 56, 61, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4 As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

5 For these purposes, any expenditure incurred in the preparation of plans for the purposes of any work, or upon other similar matters preparatory to any work, is taken to be included in the expenditure incurred in carrying out that work: Water Resources Act 1991 s 61(2).

5 As to the meaning of 'damage' in relation to an individual see PARA 129 note 7.

6 Water Resources Act 1991 s 61(1)(a).

7 Water Resources Act 1991 s 61(1)(b).

8 As to the Environment Agency see PARA 17.

9 Water Resources Act 1991 s 61(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the indemnification of the Agency in certain cases see PARA 265.

10 le subject to the Water Resources Act 1991 s 61(2) (see note 5) and to Sch 7: s 61(3). No compensation is payable under s 61 in respect of the revocation or variation of a Water Act 1989 licence of right if the revocation or variation is for giving effect to the decision of the court in an action in respect of which the Water

Resources Act 1991 Sch 7 para 2 has effect or in any proceedings in consequence of such an action: Sch 7 para 5(1). As to licences of right see PARA 238.

11 Water Resources Act 1991 s 61(3)(a). Nothing in s 61(3) applies in relation to any licence of right: Sch 7 para 5(2).

12 Water Resources Act 1991 s 61(3)(b). See also note 11.

13 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2.

14 Water Resources Act 1991 s 61(4) (amended by the Water Act 2003 s 25(1), (2)).

15 As to the meanings of 'full licence' and 'transfer licence' see PARA 227.

16 *Ie* under the Water Resources Act 1991 46(2A): see PARA 248.

17 As to the meaning of 'source of supply' see PARA 187.

18 Water Resources Act 1991 s 61(4A)(a) (s 61(4A), (4B) added by the Water Act 2003 s 25(1), (3)).

19 *Ie* under the Water Resources Act 1991 46(2A): see PARA 248.

20 Water Resources Act 1991 s 61(4A)(b) (as added: see note 18).

21 Water Resources Act 1991 s 61(4A)(c) (as added: see note 18). The statutory conditions are that: (1) the licence was granted after 1 April 2006 (*ie* the date of the coming into force of the Water Act 2003 s 19); (2) the variation is made no sooner than the end of the period of six years beginning with the date on which the licence took effect; and (3) the variation takes effect no sooner than the end of the period of six years beginning with the date of the variation: Water Resources Act 1991 s 61(4B) (as so added).

22 Water Resources Act 1991 s 61(5). In relation to the determination of any such compensation, the provisions of the Land Compensation Act 1961 ss 2 and 4 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 716-717, 746) apply, subject to any necessary modifications: Water Resources Act 1991 s 61(5). As to the meaning of 'modifications' see PARA 141 note 20. As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 *et seq*. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

23 *Ie* the rules set out in the Land Compensation Act 1961 s 5: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 754.

24 Water Resources Act 1991 s 61(6).

25 'Mortgage' includes any charge or lien on any property for securing money or money's worth, and 'mortgagee' must be construed accordingly: Water Resources Act 1991 s 221(1). As to mortgages generally see **MORTGAGE**.

26 Water Resources Act 1991 s 61(7)(a).

27 As to the meaning of 'person' see PARA 13 note 29.

28 Water Resources Act 1991 s 61(7)(b).

29 Water Resources Act 1991 s 61(7)(c).

30 Water Resources Act 1991 s 61(7)(d).

31 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 24. As to abstraction and impounding by the Agency see PARA 237.

32 See the Water Act 2003 s 27. Section 27 applies where: (1) a licence to abstract water is revoked or varied on or after 15 July 2012 in pursuance of a direction under the Water Resources Act 1991 s 54 (see PARA 260) or s 56 (see PARA 261); (2) the licence was granted before 1 April 2006 (*ie* the date of the coming into force of the Water Act 2003 s 19); (3) the licence is one which is expressed to remain in force until revoked; and (4) the ground for revoking or varying the licence is that the Secretary of State or the Welsh Ministers are satisfied that the revocation or variation is necessary in order to protect from serious damage (a) any inland waters; (b) any water contained in underground strata; (c) any underground strata themselves, or any flora or fauna

dependent on any of them: s 27(1). Where s 27 applies, no compensation is payable under the Water Resources Act 1991 s 61 in respect of the revocation or variation of the licence: Water Act 2003 s 27(2). As to the meaning of 'inland waters' see PARA 187 note 2; and as to the meanings of 'underground strata' and 'water contained in underground strata' see PARA 187 note 5: definitions applied by s 27(3). For these purposes, 'waters', in relation to a lake, pond, river or watercourse which is for the time being dry, includes its bottom, channel or bed: s 27(3).

33 'Qualifying person' means: (1) a water undertaker; or (2) a person who has made an application for an appointment or variation replacing a company as a water undertaker under the Water Industry Act 1991 s 8 (see PARA 139) which has not been determined: Water Resources Act 1991 s 61A(4) (s 61A added by the Water Act 2003 s 26). As to the meaning of 'water undertaker' see PARA 137 note 4.

34 Water Resources Act 1991 s 61A(1), (2) (as added: see note 33). The Environment Act 1995 s 41(6) (which confers powers to make schemes imposing charges: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 97) applies to the amount referred to in the text as if it were a charge due and payable to the Agency in respect of the subsistence of licence B: Water Resources Act 1991 s 61A(3) (as so added).

35 Water Resources Act 1991 s 61A(1)(a) (as added: see note 33).

36 Water Resources Act 1991 s 61A(1)(b) (as added: see note 33).

37 ie the duty imposed by the Water Resources Act 1991 s 39(1): see PARA 240.

38 Water Resources Act 1991 s 61A(1)(c) (as added: see note 33).

39 Water Resources Act 1991 s 61A(1)(d) (as added: see note 33).

40 Water Resources Act 1991 s 61A(1)(e) (as added: see note 33).

## **UPDATE**

### **263 Compensation where licence revoked or varied on direction of the Secretary of State or Welsh Ministers**

TEXT AND NOTE 22--Reference to the Lands Tribunal is now to the Upper Tribunal; Land Compensation Act 1961 s 2 omitted: Water Resources Act 1991 s 61(5) (amended by SI 2009/1307).

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#### **264. Compensation for owner of fishing rights applying for revocation or variation of abstraction licence.**

Where a licence is revoked or varied on an application from the owner of fishing rights<sup>1</sup>, the applicant is entitled to compensation from the Environment Agency<sup>2</sup> in respect of the loss or damage<sup>3</sup> which he has sustained<sup>4</sup>. Where, on such an application for the revocation or variation of a licence, the Secretary of State<sup>5</sup> or, in relation to Wales, the Welsh Ministers<sup>6</sup>, determine that the grounds of the application<sup>7</sup> have been established to his or their satisfaction<sup>8</sup>, but that the licence is not to be revoked or varied in pursuance of that application<sup>9</sup>, he or they must certify accordingly for the purposes of the following provisions<sup>10</sup>.

Unless within the period of six months<sup>11</sup> from the date on which such a certificate is granted either:

- 520 (1) notice to treat for the acquisition of the fishing rights of the applicant, or of an interest in land which includes those rights<sup>12</sup> has been served by the Agency<sup>13</sup>; or
- 521 (2) an offer has been made by the Agency to the owner of those rights to acquire them on compulsory purchase terms<sup>14</sup> or, where the rights subsist only as rights included in an interest in land, to acquire that interest on such terms<sup>15</sup>,

the owner of the fishing rights is entitled to compensation from the Agency<sup>16</sup>, and the amount of the compensation so payable in respect of any fishing rights is the amount by which the value of those rights<sup>17</sup> or, where they subsist only as rights included in an interest in land, the value of that interest<sup>18</sup>, is depreciated<sup>19</sup> in relation to the licence to which the application related<sup>20</sup>.

Any question of disputed compensation must be referred to and determined by the Lands Tribunal<sup>21</sup>. Where the Secretary of State or the Welsh Ministers determine, on an application by the owner of fishing rights<sup>22</sup>, that the licence to which the application relates is not to be revoked or varied and grant a certificate accordingly<sup>23</sup>, and notice to treat for the acquisition of the fishing rights to which the application related, or of an interest in land in which those rights are included, has been served by the Agency within the period of six months from the date on which that certificate is granted<sup>24</sup>, then, for the purpose of assessing compensation in respect of any compulsory acquisition in pursuance of that notice to treat, no account is to be taken of any depreciation of the value of the fishing rights, or of the interest in question, which is applicable to the statutory effect<sup>25</sup> of that licence<sup>26</sup>.

1    Ie an application under the Water Resources Act 1991 s 55: see PARA 261. As to the meaning of 'fishing rights' see PARA 261 note 8: definition applied by s 62(8).

2    As to the Environment Agency see PARA 17. As to indemnification of the Agency in certain cases see PARA 265.

3    Ie as mentioned in the Water Resources Act 1991 s 55(3): see PARA 261.

4    Water Resources Act 1991 s 62(1) (s 62(1), (3), (6), (7) amended by the Environment Act 1995 s 120, Sch 22 para 128).

5 As to the Secretary of State see PARA 15 note 1.

6 The functions of the Secretary of State under the Water Resources Act 1991 s 55, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

7 le as mentioned in the Water Resources Act 1991 s 55(3): see PARA 261.

8 Water Resources Act 1991 s 62(2)(a).

9 Water Resources Act 1991 s 62(2)(b).

10 Water Resources Act 1991 s 62(2).

11 As to the meaning of 'month' see PARA 23 note 10.

12 As to the meaning of 'right included in an interest in land' see PARA 261 note 8: definition applied by the Water Resources Act 1991 s 62(8).

13 Water Resources Act 1991 s 62(3)(a) (as amended: see note 4). As to compulsory purchase by the Agency see in particular s 154; and PARA 453.

14 For these purposes, a right or interest is acquired on compulsory purchase terms if it is acquired on terms that the price payable is to be equal to and, in default of agreement, is to be determined in like manner as the compensation which would be payable in respect of it if the right or interest were acquired compulsorily by the Agency: Water Resources Act 1991 s 62(6) (as amended: see note 4).

15 Water Resources Act 1991 s 62(3)(b) (as amended: see note 4).

16 Water Resources Act 1991 s 62(3) (as amended: see note 4).

17 Water Resources Act 1991 s 62(4)(a).

18 Water Resources Act 1991 s 62(4)(b).

19 le by the operation of the Water Resources Act 1991 s 48(2): see PARA 251.

20 Water Resources Act 1991 s 62(4).

21 Water Resources Act 1991 s 62(5). In relation to the determination of any such compensation, the provisions of the Land Compensation Act 1961 ss 2 and 4 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 716-717, 746) apply, subject to any necessary modifications: Water Resources Act 1991 s 62(5). As to the meaning of 'modifications' see PARA 141 note 20. As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

22 le an application under the Water Resources Act 1991 s 55: see PARA 261.

23 Water Resources Act 1991 s 62(7)(a). The certificate referred to in the text is one under s 62(2): see the text to notes 5-10.

24 Water Resources Act 1991 s 62(7)(b) (as amended: see note 4).

25 le to the operation, in relation to that licence, of the Water Resources Act 1991 s 48(2): see PARA 251.

26 Water Resources Act 1991 s 62(7).

## UPDATE

### 264 Compensation for owner of fishing rights applying for revocation or variation of abstraction licence

TEXT AND NOTE 21--Reference to the Lands Tribunal is now to the Upper Tribunal; Land Compensation Act 1961 s 2 omitted: Water Resources Act 1991 s 62(5) (amended by SI 2009/1307).



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## **265. Power to indemnify the Environment Agency for compensation payable.**

If, in a case<sup>1</sup> where the Environment Agency<sup>2</sup> is liable to pay damages in consequence of its grant or variation in compliance with a direction given by the Secretary of State<sup>3</sup> or the Welsh Ministers<sup>4</sup>, proposals for revoking or varying a licence are formulated by the Agency, or if an application<sup>5</sup> with respect to any licence is made by the owner of fishing rights<sup>6</sup>, and:

522 (1) in consequence of those proposals or that application, the licence is revoked or varied<sup>7</sup>; and

523 (2) compensation in respect of the revocation or variation is payable<sup>8</sup> by the Agency<sup>9</sup>,

the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>10</sup> may, if he or they think fit, pay to the Agency the whole or such part as he or they consider appropriate of the relevant amount<sup>11</sup>.

Where the Secretary of State or the Welsh Ministers determine, on an application by the owner of fishing rights<sup>12</sup>, that a licence granted in compliance with a direction given by him or them is to be revoked or varied<sup>13</sup>, or that a licence is not to be revoked or varied<sup>14</sup>, and in consequence of that determination, compensation is payable<sup>15</sup> by the Agency<sup>16</sup>, the Secretary of State or, as the case may be, the Welsh Ministers may, if he or they think fit, pay to the Agency the whole or such part as he or they consider appropriate of the relevant amount<sup>17</sup>.

1    Ie in a case falling within the Water Resources Act 1991 s 63(1): see PARA 267.

2    As to the Environment Agency see PARA 17.

3    As to the Secretary of State see PARA 15 note 1.

4    As to the Welsh Ministers see PARA 16 note 5.

5    Ie an application under the Water Resources Act 1991 s 55: see PARA 261.

6    Water Resources Act 1991 s 63(2)(a) (s 63(2)-(4) amended by the Environment Act 1995 s 120, Sch 22 para 128).

7    Water Resources Act 1991 s 63(2)(b).

8    Ie under the Water Resources Act 1991 s 61: see PARA 263.

9    Water Resources Act 1991 s 63(2)(c) (as amended: see note 6).

10   The functions of the Secretary of State under the Water Resources Act 1991 s 63, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

11   Water Resources Act 1991 s 63(2) (as amended: see note 6). 'Relevant amount' means the amount of the compensation and, if any question relating to that compensation is referred to the Lands Tribunal, the amount

of any costs reasonably incurred by the Agency in connection with that reference (including any costs of the claimant which the Agency is required to pay): s 63(4)(b) (as so amended). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

12    le an application under the Water Resources Act 1991 s 55: see PARA 261.

13    Water Resources Act 1991 s 63(3)(a)(i).

14    Water Resources Act 1991 s 63(3)(a)(ii).

15    le under the Water Resources Act 1991 s 62: see PARA 264.

16    Water Resources Act 1991 s 63(3)(b) (as amended: see note 6).

17    Water Resources Act 1991 s 63(3) (as amended: see note 6).

## **UPDATE**

### **265 Power to indemnify the Environment Agency for compensation payable**

NOTE 11--Reference to the Lands Tribunal is now to the Upper Tribunal: Water Resources Act 1991 s 63(4)(b) (amended by SI 2009/1307).

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## 266. Compensation in respect of ecclesiastical property.

So much of any compensation falling to be paid under the provisions relating to the abstraction and impounding of water<sup>1</sup> as is payable in respect of damage to land<sup>2</sup> which is ecclesiastical property<sup>3</sup> and to the owner of the fee simple in the land<sup>4</sup>, or in respect of depreciation of the value of the fee simple in land which is ecclesiastical property<sup>5</sup>, must be paid (where the fee simple is vested in any person<sup>6</sup> other than the Diocesan Board of Finance for the diocese in which the land is situated) to it, instead of to the person in whom the fee simple is vested<sup>7</sup>. Any sums so paid to the Diocesan Board of Finance with reference to any land must, if the land is not consecrated<sup>8</sup>, be applied by it for the purposes for which the proceeds of sale by agreement of the fee simple in the land would be applicable under any enactment<sup>9</sup> or Measure<sup>10</sup> authorising such a sale or disposing of the proceeds of such a sale<sup>11</sup>. If the land is consecrated, those sums must be applied by the Board in such manner as it may determine<sup>12</sup>.

1    le under the Water Resources Act 1991 Pt II Ch II (ss 24-72). As to such compensation see PARAS 263-264.

2    As to the meaning of 'land' see PARA 14 note 21.

3    As to the meaning of 'ecclesiastical property' see PARA 22 note 14.

4    Water Resources Act 1991 s 67(4)(a).

5    Water Resources Act 1991 s 67(4)(b).

6    As to the meaning of 'person' see PARA 13 note 29.

7    Water Resources Act 1991 s 67(4) (amended by the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30(a), (c)). As to the Diocesan Board of Finance see **ECCLESIASTICAL LAW** vol 14 PARA 517 et seq.

8    As to consecrated land see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 1019 et seq; and **ECCLESIASTICAL LAW** vol 14 PARA 1054 et seq.

9    As to the meaning of 'enactment' see PARA 14 note 31.

10   As to legislation by Measure see **ECCLESIASTICAL LAW** vol 14 PARA 399.

11   Water Resources Act 1991 s 67(5)(a) (s 67(5) amended by the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 30(d)).

12   Water Resources Act 1991 s 67(5)(b) (as amended: see note 11).

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## **267. Liability of the Environment Agency for derogation from protected right.**

A breach of the duty not to derogate from protected rights<sup>1</sup> does not invalidate the grant or variation of a licence and is not enforceable by any criminal proceedings, by prohibition or injunction or by action against any person<sup>2</sup> other than the Environment Agency<sup>3</sup>. Instead, this duty is enforceable, at the suit of any person entitled to a protected right, by an action against the Agency for damages for breach of statutory duty<sup>4</sup>.

Where<sup>5</sup> the Agency is directed by the Secretary of State<sup>6</sup> or, in relation to Wales, by the Welsh Ministers<sup>7</sup>, to grant or vary a licence, and the licence, as granted or varied in compliance with the direction, authorises derogation from protected rights<sup>8</sup>, then the grant or variation of the licence has effect, as between the Agency and the person entitled to those rights, as a breach on the part of the Agency of a statutory duty not to authorise derogation from those rights<sup>9</sup> and that duty is enforceable<sup>10</sup> as described above<sup>11</sup>.

In any claim brought against the Agency in pursuance of these provisions, it is a defence for the Agency to show that the fact, as the case may be:

- 524 (1) that the abstraction of water authorised by the licence, as granted or varied by the Agency, derogated from the claimant's protected right<sup>12</sup>; or
- 525 (2) that the obstruction or impeding of the flow of the inland waters authorised by the licence, as so granted or varied, derogated from the claimant's protected right<sup>13</sup>,

was wholly or mainly attributable to exceptional shortage of rain or to an accident or other unforeseen act or event not caused by, and outside the control of, the Agency<sup>14</sup>.

Where the claimant in any claim brought against the Agency in pursuance of these provisions is entitled to a protected right by reason only that he is the holder of, or has applied for, a licence of right<sup>15</sup>, it is a defence for the Agency to prove: (a) that the claimant could have carried out permissible alterations<sup>16</sup> in the means whereby he abstracted water from the source of supply in question; and (b) that, if he had carried out such alterations, the abstraction or, as the case may be, the obstruction or impeding of the flow of the inland waters authorised by the licence to which the claim relates would not have derogated from his protected right<sup>17</sup>.

Where the Agency is liable under these provisions to pay damages to any person in consequence of the grant or variation of a licence in compliance with a direction given by the Secretary of State or the Welsh Ministers<sup>18</sup>, and the Agency pays any sum to that person in satisfaction of that liability<sup>19</sup>, then, whether a claim for recovery of those damages has been brought or not, the Secretary of State or, in relation to Wales, the Welsh Ministers may, if they think fit, pay to the Agency the whole or such part as they consider appropriate of the relevant amount<sup>20</sup>.

1    le the duty imposed by the Water Resources Act 1991 s 39(1) (see PARA 240), including that duty as applied by s 51(3) (see PARA 257) or s 53(5) (see PARA 259). As to the meaning of 'derogate' see PARA 240 note 9. As to the meaning of 'protected right' see PARA 241.

2    As to the meaning of 'person' see PARA 13 note 29.

3 Water Resources Act 1991 s 60(1) (ss 60(1)-(5), 63, Sch 7 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The Water Resources Act 1991 s 60 has effect, with modifications, in relation to the grant to the Agency of an abstraction licence or an impounding licence, or any grant which is deemed to have been made on the Agency's approval of an Agency application, or the variation of any such licence: see the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 23. As to the Environment Agency see PARA 17. As to the meaning of 'abstraction licence' see PARA 231 note 1. As to the meaning of 'impounding licence' see PARA 231 note 2.

4 Water Resources Act 1991 s 60(2) (as amended: see note 3). As to applications for revocation or variation of a licence by the owner of fishing rights who has sustained loss or damage not attributable to breach of statutory duty as mentioned in s 60(2) or (3) (see the text to notes 5-11), or in addition to loss or damage attributable to such breach, see s 55(3); and PARA 261. As to breach of statutory duty see **TORT** vol 97 (2010) PARA 495 et seq.

5 Ie under any provision of the Water Resources Act 1991 Pt II Ch II (ss 24-72).

6 As to the Secretary of State see PARA 15 note 1.

7 The functions of the Secretary of State under the Water Resources Act 1991 ss 60, 63, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

8 For these purposes, any reference to authorising a derogation from protected rights is a reference to authorising the abstraction of water, or authorising the flow of any inland waters to be obstructed or impeded by means of impounding works, so as to derogate from rights which, at the time of the authorisation, are protected rights for the purposes of the Water Resources Act 1991 Pt II Ch II (ss 24-72): s 60(7). As to the meaning of 'abstraction' see PARA 192 note 2. As to the meaning of 'flow' see PARA 215 note 4. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'impounding works' see PARA 215 note 4.

9 Water Resources Act 1991 s 60(3)(a) (as amended: see note 3).

10 Ie the Water Resources Act 1991 s 60(2) (see the text to note 4) applies in relation to that statutory duty as it applies in relation to the duty imposed by s 39(1) (see PARA 240): s 60(3)(b).

11 See the Water Resources Act 1991 s 60(3)(b). Section 60(3) is without prejudice to the duty of the Agency to comply with the direction in question, but that duty does not afford any defence in a claim brought by virtue of the application of s 60(2): s 60(4) (as so amended).

12 Water Resources Act 1991 s 60(5)(a) (as amended: see note 3).

13 Water Resources Act 1991 s 60(5)(b).

14 Water Resources Act 1991 s 60(5) (as amended: see note 3).

15 As to licences of right see PARA 238.

16 'Permissible alterations' means: (1) in relation to a person who is the holder of a licence of right, any alteration of works, or modification of machinery or apparatus, which would fulfil the requirements of the licence as to the means whereby water is authorised to be abstracted; (2) in relation to a person who is not the holder of a licence of right, but to whose application for such a licence the Water Resources Act 1991 Sch 7 para 1 (see PARA 238) applies, any alteration of works, or modification of machinery or apparatus, by means of which he abstracted water from the source of supply in question during the period of five years ending with 1 September 1989, being an alteration or modification which would be within the scope of the licence if granted in accordance with the application: s 60(6), Sch 7 para 4(2). As to the meaning of 'source of supply' see PARA 187.

17 Water Resources Act 1991 Sch 7 para 4(1) (as amended: see note 3). Section 60(3) (see the text to notes 5-11) does not apply to a direction given in consequence of an appeal against the decision of the Agency on an application for the grant of a Water Act 1989 licence of right: Sch 7 para 4(2) (as so amended).

18 Water Resources Act 1991 s 63(1)(a) (as amended: see note 3).

19 Water Resources Act 1991 s 63(1)(b) (as amended: see note 3).

20 Water Resources Act 1991 s 63(1) (as amended: see note 3). 'Relevant amount' means the amount of the sum paid by the Agency and, if a claim has been brought against the Agency in respect of the liability mentioned in s 63(1), the amount of any costs reasonably incurred by the Agency in connection with the claim (including any costs of the claimant which the Agency was required to pay): s 63(4)(a) (as so amended).

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## ***I. REGISTER OF APPLICATIONS AND LICENCES***

### **268. Register of abstraction and impounding licences.**

The Environment Agency<sup>1</sup> must keep, in such manner as may be prescribed<sup>2</sup>, registers containing such information as may be prescribed with respect to<sup>3</sup>: (1) applications made for the grant, revocation or variation of abstraction and impounding licences<sup>4</sup>, including information as to the way in which such applications have been dealt with<sup>5</sup>; and (2) persons<sup>6</sup> becoming the holders<sup>7</sup> of such licences<sup>8</sup>. Every such register kept by the Agency must also contain such information as may be prescribed with respect to applications made in accordance with regulations relating to applications made by the Agency<sup>9</sup>, and licences granted or deemed to be granted, and licences revoked or varied, in accordance with those regulations<sup>10</sup>. Subject to any regulations made under these provisions, the information which the Agency is required to keep in such registers continues to include the information which immediately before 1 September 1989 was contained in a register kept<sup>11</sup> by a water authority<sup>12</sup>.

The contents of every register kept under these provisions must be available, at such place as may be prescribed, for inspection by the public at all reasonable hours<sup>13</sup>. The Agency may keep the register, or any part of it, electronically<sup>14</sup>.

Except in relation to any information required to be excluded from the register<sup>15</sup>, the register must contain:

- 526 (a) in the case of every application made to the Agency for an abstraction licence or an impounding licence<sup>16</sup>, or the revocation or variation of such a licence, and every Agency application<sup>17</sup>:
- 55 63. (i) the name and address of the applicant, the date of the application and brief particulars of its proposals<sup>18</sup>;
- 64. (ii) particulars of the decision, if any, of the Agency, the Secretary of State or the Welsh Ministers<sup>19</sup> on the application (including the decision on any appeal), and the date of that decision<sup>20</sup>;
- 65. (iii) any notice of appeal served in relation to the application<sup>21</sup>; and
- 66. (iv) particulars of any licence granted or deemed to be granted, or revocation or variation effected, by virtue of a decision on the application and any appeal, including the date (if any) on which a licence expires<sup>22</sup>;
- 56 527 (b) in the case of a transferred licence<sup>23</sup>: the name and address of the transferee<sup>24</sup>, the date on which the Agency received (or, in the case of the transfer of a licence held by the Agency, served) the transfer notice<sup>25</sup>, particulars of the transfer notice<sup>26</sup>, and the date on which the transfer took effect<sup>27</sup>;
- 528 (c) in the case of a licence vesting on the death or bankruptcy of the holder<sup>28</sup> in relation to which notice has been given to the Agency<sup>29</sup>: the name and address of the person in whom the licence has vested<sup>30</sup> and the date of the vesting<sup>31</sup>; and
- 529 (d) in the case of a licence granted on the apportionment of a licence to abstract<sup>32</sup>: the name and address of the holder<sup>33</sup>, particulars of the licence granted<sup>34</sup>, the date on which it was granted<sup>35</sup>, the date from which it has effect<sup>36</sup>, and the date on which it expires<sup>37</sup>.

The Agency must also keep in the register: (A) any determination under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003<sup>38</sup>; (B) any environmental statement or further information<sup>39</sup> furnished in relation to it<sup>40</sup>; (C) any documents, other than the environmental statement<sup>41</sup>, which have been provided to the Agency and are relevant to the determination<sup>42</sup> relating to a variation of a licence<sup>43</sup>; and (D) any further information which is relevant to such a determination and which becomes available to the Agency after the time that the public was given notice<sup>44</sup> of the proposals<sup>45</sup>.

1 As to the Environment Agency see PARA 17.

2 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 221(1). As to the making of regulations see PARA 21. As to the provision made see the text to notes 14-45. The functions of the Secretary of State under the Water Resources Act 1991 s 189, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the Secretary of State see PARA 15 note 1.

3 Water Resources Act 1991 s 189(1) (s 189(1)-(3) amended by the Environment Act 1995 s 120, Sch 22 para 128).

4 I.e. licences under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

5 Water Resources Act 1991 s 189(1)(a).

6 As to the meaning of 'person' see PARA 13 note 29.

7 I.e. by virtue of the Water Resources Act 1991 s 59A (see PARA 252), s 59B (see PARA 253) or s 59C (see PARA 254).

8 Water Resources Act 1991 s 189(1)(b) (amended by the Water Act 2003 s 23(3)).

9 I.e. in accordance with regulations under the Water Resources Act 1991 s 64: see PARA 237.

10 Water Resources Act 1991 s 189(2) (as amended: see note 3). As to the provision made see the text to notes 14-37.

11 I.e. under the Water Resources Act 1963 s 53 (repealed).

12 Water Resources Act 1991 s 189(3) (as amended: see note 3).

13 Water Resources Act 1991 s 189(4).

14 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(6) (added by SI 2008/165).

15 The Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1) and (2) do not apply to any information required to be excluded from the register by or under the Water Resources Act 1991 s 191A (exclusion from registers of information affecting national security: see PARA 269) or s 191B (exclusion from registers of certain confidential information: see PARA 270): Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(3). In a case where a matter in relation to a valid application falls to be determined under the Water Resources Act 1991 s 191A, information which the Secretary of State or the Welsh Ministers determine should be included on the register must be entered on to the register by the date 14 days after the day on which the Agency receives notice of that determination: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(4) (reg 34(4), (5) added by SI 2008/165). In a case where a matter in relation to a valid application falls to be determined under the Water Resources Act 1991 s 191B, information which is not determined to be commercially confidential must be entered onto the register by the date 14 days after the end of the period within which notice of appeal against that determination may be served, or if notice of appeal is so served, by the date 14 days after the day on which the Agency receives notice of the determination or withdrawal of the appeal: Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(5) (as so added).



16 As to the meaning of 'abstraction licence' see PARA 231 note 1. As to the meaning of 'impounding licence' see PARA 231 note 2.

17 'Agency application' means an application by the Agency for an abstraction licence or an impounding licence, or for the variation of such a licence, prepared in accordance with the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, Sch 2 para 1: reg 2(1). As to abstraction or impounding by the Agency see PARA 237.

18 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(a)(i). The Agency must: (1) within 14 days beginning on (a) in relation to the information in reg 34(1)(a)(i), the relevant date; or (b) in relation to any other information mentioned in reg 34(1), the date on which the particulars in question become available to the Agency, enter the appropriate particulars referred to in reg 34(1) on the register; and (2) keep records on the register showing the date on which those entries are made: reg 34(2) (substituted by SI 2008/165).

19 Functions under the Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

20 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(a)(ii). See also note 18.

21 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(a)(iii). See also note 18.

22 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(a)(iv). See also note 18.

23 Ie a licence transferred in accordance with the Water Resources Act 1991 s 59A: see PARA 252.

24 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(b)(i).

25 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(b)(ii).

26 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(b)(iii).

27 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(b)(iv).

28 Ie a licence vesting in accordance with the Water Resources Act 1991 s 59B: see PARA 253.

29 Ie under the Water Resources Act 1991 s 59B(4): see PARA 253.

30 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(c)(i).

31 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(c)(ii).

32 Ie a licence granted in accordance with the Water Resources Act 1991 s 59C(5): see PARA 254.

33 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(d)(i).

34 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(d)(ii).

35 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(d)(iii).

36 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(d)(iv).

37 Water Resources (Abstraction and Impounding) Regulations 2006, SI 2006/641, reg 34(1)(d)(v).

38 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 16(a) (reg 16(a), (b) substituted, (c), (d) added, by SI 2006/3124). The determinations referred to in the text are those under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4 (see PARA 272) or reg 14 (see PARA 258).

39 Ie under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6: see PARA 272.

40 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 16(b) (as substituted: see note 38).

41     le the statement prepared in accordance with the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, regs 5 and 6: see PARA 272.

42     le under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 14: see PARA 258.

43     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 16(c) (as added: see note 38).

44     le in accordance with the Water Resources Act 1991 s 52(4): see PARA 258.

45     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 16(d) (as added: see note 38).

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## **269. Exclusion from registers of information affecting national security.**

No information<sup>1</sup> must be included in a register kept or maintained by the Environment Agency<sup>2</sup> under any provision of the Water Resources Act 1991<sup>3</sup> if and so long as, in the opinion of the Secretary of State<sup>4</sup> or, in relation to Wales, the Welsh Ministers<sup>5</sup> the inclusion in such a register of that information, or information of that description, would be contrary to the interests of national security<sup>6</sup>. The Secretary of State or the Welsh Ministers may, for the purpose of securing the exclusion from registers of such information, give to the Agency directions: (1) specifying information, or descriptions of information, to be excluded from the registers<sup>7</sup>; or (2) specifying descriptions of information to be referred to the Secretary of State or, as the case may be, the Welsh Ministers for determination<sup>8</sup>. The Agency must notify the Secretary of State or, where appropriate, the Welsh Ministers of any information it excludes from a register in pursuance of such directions<sup>9</sup>.

A person<sup>10</sup> may, as respects any information which appears to him to be information to which these provisions may apply, give a notice<sup>11</sup> to the Secretary of State or, as appropriate, the Welsh Ministers specifying the information and indicating its apparent nature<sup>12</sup>; and, if he does so he must notify the Agency that he has done so<sup>13</sup>, and no information so notified to the Secretary of State or the Welsh Ministers must be included in any such register until the Secretary of State or the Welsh Ministers has determined that it should be so included<sup>14</sup>.

1 As to the meaning of 'information' see PARA 117 note 13.

2 As to the Environment Agency see PARA 17.

3 As to registers of abstraction and impounding licences see PARA 268.

4 As to the Secretary of State see PARA 15 note 1.

5 The functions of the Secretary of State under the Water Resources Act 1991 s 191A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales to be exercisable concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 Water Resources Act 1991 s 191A(1) (s 191A added by the Environment Act 1995 s 120, Sch 22 para 170).

7 Water Resources Act 1991 s 191A(2)(a) (as added: see note 6).

8 Water Resources Act 1991 s 191A(2)(b) (as added: see note 6). No information referred to the Secretary of State or the Welsh Ministers in pursuance of s 191A(2)(b) must be included in any such register until the Secretary of State or, as the case may be, the Welsh Ministers determine that it should be so included: s 191A(2) (as so added).

9 Water Resources Act 1991 s 191A(3) (as added: see note 6).

10 As to the meaning of 'person' see PARA 13 note 29.

11 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

- 12 Water Resources Act 1991 s 191A(4) (as added: see note 6).
- 13 Water Resources Act 1991 s 191A(4)(a) (as added: see note 6).
- 14 Water Resources Act 1991 s 191A(4)(b) (as added: see note 6).

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## **270. Exclusion from registers of certain confidential information.**

No information<sup>1</sup> relating to the affairs of any individual or business must, without the consent of that individual or the person<sup>2</sup> for the time being carrying on that business, be included in a register kept or maintained by the Environment Agency<sup>3</sup> under any provision of the Water Resources Act 1991<sup>4</sup>, if and so long as the information is, in relation to him, commercially confidential<sup>5</sup> and is not required to be included in the register in pursuance of directions given<sup>6</sup> by the Secretary of State or the Welsh Ministers<sup>7</sup>.

Where it appears to the Agency that any information which has been obtained by it under or by virtue of any provision of any enactment<sup>8</sup> might be commercially confidential, the Agency must: (1) give to the person to whom or whose business it relates notice<sup>9</sup> that that information is required to be included in a register kept or maintained by the Agency<sup>10</sup>, unless excluded under these provisions<sup>11</sup>; and (2) give him a reasonable opportunity of objecting to the inclusion of the information on the ground that it is commercially confidential<sup>12</sup> and of making representations to the Agency for the purpose of justifying any such objection<sup>13</sup>. If any representations are made, the Agency must, having taken the representations into account, determine whether the information is or is not commercially confidential<sup>14</sup>. Where the Agency determines that information is not commercially confidential the information must not be entered on the register until the end of the period of 21 days beginning with the date on which the determination is notified to the person concerned<sup>15</sup>, and that person may appeal to the Secretary of State or, where appropriate, the Welsh Ministers against the decision<sup>16</sup>.

The Secretary of State or the Welsh Ministers may give to the Agency directions as to specified information, or descriptions of information, which the public interest requires to be included in registers kept or maintained by the Agency notwithstanding that the information may be commercially confidential<sup>17</sup>.

Information excluded from a register must be treated as ceasing to be commercially confidential for the purposes of these provisions at the expiry of the period of four years beginning with the date of the determination by virtue of which it was excluded; but the person who furnished it may apply to the Agency for the information to remain excluded from the register on the ground that it is still commercially confidential and the Agency must determine whether or not that is the case<sup>18</sup>.

1 As to the meaning of 'information' see PARA 117 note 13.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the Environment Agency see PARA 17.

4 As to registers of abstraction and impounding licences see PARA 268.

5 Water Resources Act 1991 s 191B(1)(a) (s 191B added by the Environment Act 1995 s 120, Sch 22 para 170). Information is not commercially confidential for these purposes unless it is determined under the Water Resources Act 1991 s 191B to be so by the Agency or, on appeal, by the Secretary of State or the Welsh Ministers: s 191B(1) (as so added). Information is, for the purposes of any such determination, commercially confidential, in relation to any individual or person, if its being contained in the register would prejudice to an unreasonable degree the commercial interests of that individual or person: s 191B(11) (as so added).

The functions of the Secretary of State under the Water Resources Act 1991 s 191B, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 le under the Water Resources Act 1991 s 191B(7): see the text to note 17.

7 Water Resources Act 1991 s 191B(1)(b) (as added: see note 5).

8 As to the meaning of 'enactment' see PARA 14 note 31.

9 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

10 le under any provision of the Water Resources Act 1991.

11 Water Resources Act 1991 s 191B(4)(a) (as added: see note 5).

12 Water Resources Act 1991 s 191B(4)(b)(i) (as added: see note 5).

13 Water Resources Act 1991 s 191B(4)(b)(ii) (as added: see note 5).

14 Water Resources Act 1991 s 191B(4) (as added: see note 5).

15 Water Resources Act 1991 s 191B(5)(a) (as added: see note 5).

16 Water Resources Act 1991 s 191B(5)(b) (as added: see note 5). Where an appeal is brought in respect of any information, the information must not be entered on the register until the end of the period of seven days following the day on which the appeal is finally determined or withdrawn: s 191B(5) (as so added). Section 91(2A), (2C) and (2K) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 312) apply in relation to such appeals but s 91(2C) has effect for these purposes with the substitution for the words from '(which may' onwards of the words '(which must be held in private)': s 191B(6)(a) (as so added). Section 191B(5) is subject to the Environment Act 1995 s 114 (delegation or reference of appeals etc: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 65): Water Resources Act 1991 s 191B(6)(b) (as so added).

17 Water Resources Act 1991 s 191B(7) (as added: see note 5).

18 Water Resources Act 1991 s 191B(8) (as added: see note 5). Section 191B(5) and (6) (see the text to notes 15-16) apply in relation to a determination under s 191B(8) as they apply in relation to a determination under s 191B(4): s 191B(9) (as so added).

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## ***J. CONSENTS FOR CERTAIN WATER MANAGEMENT PROJECTS FOR AGRICULTURE***

### **271. Relevant projects which require consent under the Environmental Impact Assessment Regulations.**

For the purposes of the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003<sup>1</sup>, a project<sup>2</sup> is a 'relevant project' if:

- 530 (1) it is a water management project for agriculture, including an irrigation project<sup>3</sup>;
- 531 (2) in the case of a project involving water abstraction, the abstraction is one which does not fall within the exception regarding the abstraction of small quantities<sup>4</sup> in relation to the restriction on abstraction<sup>5</sup>; and
- 532 (3) it would be likely to have significant effects on the environment by virtue inter alia of its nature, size or location<sup>6</sup>;

but is not a relevant project if it involves certain development<sup>7</sup> or improvement works<sup>8</sup>.

No person<sup>9</sup> must begin a relevant project except in pursuance of a consent granted<sup>10</sup> by the Environment Agency<sup>11</sup>, or carry it out except in accordance with the provisions of that consent<sup>12</sup>. However, such consent is not needed in relation to a project if an abstraction or impounding licence is required<sup>13</sup>; and a person may rely on a consent even though he is not the person to whom the consent was granted<sup>14</sup>. A person who contravenes this prohibition is guilty of an offence<sup>15</sup>.

On an application made in writing<sup>16</sup> to the Agency for a consent for these purposes, the Agency may, subject to the requirements for an environmental impact assessment<sup>17</sup>, either grant a consent containing such provisions as it considers appropriate<sup>18</sup> or refuse consent<sup>19</sup>, taking into account any significant effects the relevant project is likely to have on the environment<sup>20</sup>. Where an application has been made to the Agency for such a consent, the applicant may by notice in writing<sup>21</sup> appeal to the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'appropriate minister')<sup>22</sup> if: (a) the applicant is dissatisfied with the decision of the Agency on the application<sup>23</sup>; or (b) the Agency fails to give notice to the applicant of the Agency's decision within a period of three months<sup>24</sup> from the date of receipt of the application or within such extended period as may be agreed in writing between the applicant and the Agency<sup>25</sup>.

The appropriate minister may allow or dismiss the appeal or reverse or vary any part of the decision of the Agency, whether the appeal relates to that part of the decision or not<sup>26</sup>; and may deal with the application as if it had been made to the appropriate minister in the first instance<sup>27</sup>. Before determining the appeal, the appropriate minister may, and must do so if so requested by the applicant or the Agency, cause a local inquiry to be held<sup>28</sup>, or afford to the applicant and the Agency an opportunity of appearing before, and being heard by, a person appointed by the appropriate minister for the purpose<sup>29</sup>. The appropriate minister, in determining the appeal, must take into account: (i) any further representations in writing received by the appropriate minister from the specified persons and within the period allowed<sup>30</sup>; (ii) the requirements of the applicant, in so far as they appear to the appropriate minister to be

reasonable requirements<sup>31</sup>. Where the decision on the appeal is that a consent is to be granted, the decision must include a direction to the Agency to grant a consent containing such provisions as may be specified in the direction<sup>32</sup>.

Except as provided below, the validity of a decision of the appropriate minister on any such appeal may not be questioned in any legal proceedings whatsoever<sup>33</sup>. If the Agency or the applicant desires to question the validity of the decision of the appropriate minister on the grounds that the decision is not within the statutory powers<sup>34</sup>, or that any of the prescribed requirements which are applicable to the appeal have not been complied with<sup>35</sup>, the Agency or, as the case may be, the applicant may, at any time within the period of six weeks beginning with the date on which the decision is made, make an application to the High Court<sup>36</sup>. On any such application, the High Court may by interim order suspend the operation of the decision to which the application relates until the final determination of the proceedings<sup>37</sup>. If the High Court is satisfied, on such an application, that the decision to which the application relates is not within the statutory powers<sup>38</sup>, or that the interests of the person making the application have been substantially prejudiced by a failure to comply with any of the prescribed requirements<sup>39</sup>, the High Court may quash the decision<sup>40</sup>.

1     Ie for the purposes of the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164. These regulations were made under the European Communities Act 1972 s 2(2) and implement certain provisions of EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) (amended by EC Council Directive 97/11 (OJ L73, 14.03.97, p 05); European Parliament and Council Directive 2003/35 (OJ L156, 25.06.2003, p 17)) on the assessment of the effects of certain public and private projects on the environment. As to this Directive, known as the 'EIA Directive', see PARA 10; and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 10.

2     'Project' means the execution of construction works or of other installations or schemes, and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources: EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) art 1(2); definition applied by the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 2. See also Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, interveniënt)* [2005] All ER (EC) 353, [2004] All ER (D) 50 (Sep), ECJ; *R (on the application of Boggis) v Natural England* [2008] EWHC 2954 (Admin), (2009) Times, 25 February, [2009] All ER (D) 26 (Jan); both cited in PARA 11 note 9.

3     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3(2)(a).

4     Ie the exception provided in the Water Resources Act 1991 s 27(1): see PARA 221.

5     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3(2)(b) (amended by SI 2006/3124). As to the meaning of 'restriction on abstraction' see PARA 214 note 9: definition applied by the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 2 (amended by SI 2006/3124).

6     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3(2)(c).

7     Ie development within the meaning of the Town and Country Planning Act 1990 s 55: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 217.

8     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3(3). The improvement works referred to in the text are improvement works within the meaning of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783: see PARA 649 note 3.

9     As to the meaning of 'person' see PARA 13 note 29.

10    Ie granted under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 10: see the text to notes 16-20.

11    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 9(1)(a). As to the Environment Agency see PARA 17. The Agency has published guidance in



relation to consents under the regulations: see *Environmental Impact Assessment in relation to Water Resources Authorisations: Guidance on the requirements and procedures* which is available on the Agency's website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

12 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 9(1)(b).

13 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 9(2). As to the meaning of 'abstraction or impounding licence' see PARA 258 note 20.

14 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 9(3).

15 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 9(4). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum or, on conviction on indictment, a fine: reg 9(4)(a), (b). As to the statutory maximum see PARA 169 note 20.

<sup>16</sup> As to the meaning of 'writing' see PARA 22 note 1.

17 le subject to the requirements of the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, Pt II (regs 3-8): see PARA 272.

18 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 10(a).

19 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 10(b).

20 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 10.

21 A notice of appeal must be served within a period of 28 days from the date on which the decision to which it relates was notified to the applicant, or the end of the period referred to in the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(1)(b) (see the text to notes 24-25), whichever is the later: reg 11(2). The applicant must serve a copy of the notice of appeal on the Agency before the expiry of the period of 28 days referred to above: reg 11(3). Where any representations in writing with respect to the application were made within the period specified in accordance with reg 7(1)(e) (see PARA 272), the Agency must serve a copy of the notice of appeal on each of the persons who made those representations; and any person so served with a copy of the notice of appeal may make further representations to the appropriate minister in writing within a period of 21 days from the date on which the copy of the notice is served on him: reg 11(4) (amended by SI 2006/3124).

22 'Appropriate minister' means: (1) in relation to a project in Wales where the Secretary of State has not exercised functions under the Government of Wales Act 1998 Sch 6 para 3 (repealed) (see now the Government of Wales Act 2006 s 152; and PARA 16), the Welsh Ministers; (2) in any other case, the Secretary of State: Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 2. As to the Secretary of State see PARA 15 note 1. Functions under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

23 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(1)(a).

24 As to the meaning of 'month' see PARA 23 note 10.

25 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(1)(b). No appeal may be brought by virtue of reg 11(1)(b) before the expiry of a period of four months commencing with: (1) the date on which an environmental statement is furnished in accordance with reg 6(1) (see PARA 272); or (2) the date on which any further information requested by the Agency is provided in accordance with reg 6(7) (see PARA 272), whichever is the later: reg 11(5).

26 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(6)(a).

27 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(6)(b).

28 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(7)(a). The Local Government Act 1972 s 250(2)-(5) (local inquiries, evidence and costs: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) applies in relation to inquiries or other hearings under this provision as it applies to inquiries under s 250, but as if (1) the references to the minister were references to the appropriate minister; and (2) the reference in s 250(4) to a local authority were a reference to the Agency: Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(8).

29 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(7)(b).

30 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(9)(a). The specified persons and period allowed are those referred to in reg 11(4): see note 21.

31 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(9)(b).

32 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 11(10).

33 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(1).

34 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(2)(a). The statutory powers referred to in the text are those of the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164.

35 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(2)(b). The prescribed requirements referred to in the text are the requirements of the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164.

36 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(2). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

37 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(3).

38 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(4)(a).

39 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(4)(b).

40 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 12(4).

## UPDATE

### **271 Relevant projects which require consent under the Environmental Impact Assessment Regulations**

NOTE 2--*Boggis*, cited, reversed in part: *Boggis v Natural England* [2009] EWCA Civ 1061, [2009] All ER (D) 229 (Oct).

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## **272. Assessment of relevant projects.**

An environmental impact assessment must be carried out<sup>1</sup> in relation to a relevant project<sup>2</sup>. Any person<sup>3</sup> (the 'applicant') who proposes to apply for, or for the variation of, an authorisation<sup>4</sup> in relation to a project<sup>5</sup> which may be a relevant project, may in writing<sup>6</sup> request the Environment Agency<sup>7</sup> to make a determination whether the project is a relevant project<sup>8</sup>. Where the Agency considers that it has insufficient information to determine the request, it must by notice in writing inform the applicant and specify what further information it requires<sup>9</sup>. In determining whether a project is a relevant project the Agency must take into account such of the prescribed selection criteria as are relevant<sup>10</sup>. The Agency must give the applicant written notice of its determination before the expiry of the prescribed period<sup>11</sup>.

Where either the Agency fails to make a determination before the expiry of that period<sup>12</sup>, or the applicant is dissatisfied with the Agency's determination that the proposed abstraction or impounding would amount to or form part of a relevant project<sup>13</sup>, the applicant may apply to the appropriate minister<sup>14</sup> for a determination on the matter<sup>15</sup>. The appropriate minister must, by notice in writing given to the applicant and the Agency, either uphold the determination of the Agency<sup>16</sup>, or substitute his own determination<sup>17</sup>. The Agency or, as the case may be, the appropriate minister must take such steps as are considered appropriate to make a determination under these provisions available to the public<sup>18</sup>. The applicant must include a copy of any such determination when he subsequently applies for, or for a variation of, an authorisation in relation to the project in question<sup>19</sup>.

An environmental statement which complies with the prescribed requirements<sup>20</sup> must be provided in relation to an application for, or for the variation of, an authorisation in connection with a relevant project<sup>21</sup>. If a person so requests before making an application for, or for the variation of, an authorisation, the Agency must, having consulted the person making the request and the consultation bodies<sup>22</sup>, give an opinion on the information which should be contained in an environmental statement accompanying such an application<sup>23</sup>; but the fact that the Agency has given such an opinion does not preclude it from subsequently requiring the person making the request to provide further information<sup>24</sup>. The Agency and the consultation bodies must, if requested by a person proposing to make an application for which an environmental statement is required, enter into consultation with him to determine whether they have in their possession any information which may be relevant to the preparation of an environmental statement and, if they have, they must make it available to him<sup>25</sup>.

Where an environmental statement, including where any further information is provided, is provided under the above provisions, the Agency must publish a notice on its website and in at least one newspaper circulating in the locality of the relevant project<sup>26</sup>. The Agency must make available to the public<sup>27</sup> the application and the environmental statement<sup>28</sup>, and any information provided to the Agency<sup>29</sup> which was in the possession of the Agency on the date on which the notice was published<sup>30</sup>. Not later than the date on which the notice is published, the Agency must send a copy of it and the environmental statement and any further information<sup>31</sup>, to the consultation bodies, the appropriate minister, and such other persons as the appropriate minister may direct, under cover of a letter stating that any representations in relation to the application should be made in writing to the Agency within a period of 28 days beginning on the date of the letter<sup>32</sup>.

The Agency must not determine an application for, or for the variation of, an authorisation relating to a relevant project before the latest date allowed<sup>33</sup> for making representations or concluding any consultation<sup>34</sup>. In determining the application the Agency must take into consideration the environmental statement, any further information provided, and any representations relating to the environmental effects of the project made<sup>35</sup> to the Agency<sup>36</sup>. Within 28 days of the decision on the application, the Agency must publish on its website and in the newspaper or newspapers in which the notice of the application was published<sup>37</sup> a notice stating that the Agency has granted or refused the application<sup>38</sup>.

No appeal may be brought<sup>39</sup> on the grounds that the Agency has failed to give the requisite notice<sup>40</sup> before the expiry of a period of four months<sup>41</sup> commencing with the date on which an environmental statement is furnished<sup>42</sup>, or the date on which any further information requested by the Agency is provided<sup>43</sup>, whichever is the later<sup>44</sup>.

1 le in accordance with Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164.

2 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 3(1). As to the meaning of 'relevant project' see PARA 271.

3 As to the meaning of 'person' see PARA 13 note 29.

4 'Authorisation' means: (1) an abstraction or impounding licence; or (2) a consent under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, Pt III (regs 9-12) (see PARA 271): reg 2. As to the meaning of 'abstraction or impounding licence' see PARA 258 note 20.

5 As to the meaning of 'project' see PARA 271 note 2.

6 As to the meaning of 'writing' see PARA 22 note 1.

7 As to the Environment Agency see PARA 17.

8 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(1). The request must be accompanied by: (1) a plan sufficient to identify the place where the project is to be carried out; (2) a brief description of the project and its possible effects on the environment; and (3) any other information or representations which the applicant wishes the Agency to take into account: reg 4(2)(a)-(c).

9 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(3).

10 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(4). The selection criteria are:

- 35 (1) Characteristics of Projects: the characteristics of projects must be considered having regard, in particular, to (a) the size of the project; (b) the cumulation with other projects; (c) the use of natural resources; (d) the production of waste; (e) pollution and nuisances; (f) the risk of accidents, having regard in particular to substances or technologies used (Sch 1 para 1);
- 36 (2) Location of Projects: the environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to (a) the existing land use; (b) the relative abundance, quality and regenerative capacity of natural resources in the area; (c) the absorption capacity of the natural environment, paying particular attention to the following areas (i) wetlands; (ii) coastal zones; (iii) mountain and forest areas; (iv) nature reserves and parks; (v) areas classified or protected under EEA states' legislation; special protection areas designated by EEA states pursuant to EC Council Directive 79/409 (OJ L103, 25.04.79, p 01) on the conservation of wild birds and EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) on the conservation of natural habitats and of wild fauna and flora; (vi) areas in which the environmental quality standards laid down in Community legislation have already been exceeded; (vii) densely populated areas; (viii) landscapes of historical, cultural or archaeological significance (Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, Sch 1 para 2);

- 37 (3) Characteristics of the Potential Impact: the potential significant effects of projects must be considered in relation to criteria set out under heads (1) and (2) above, and having regard in particular to (a) the extent of the impact (geographical area and size of the affected population); (b) the transfrontier nature of the impact; (c) the magnitude and complexity of the impact; (d) the probability of the impact; (e) the duration, frequency and reversibility of the impact (Sch 1 para 3).

11 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(5). The prescribed period is: (1) a period of three weeks beginning with (a) the date on which the request is received; or (b) where the Agency has served a notice under reg 4(3) (see the text to note 9), the date on which the further information specified is given to the Agency (reg 4(5)(a)); or (2) such longer period as may be agreed in writing with the applicant (reg 4(5)(b)). The determination must be accompanied by a written statement of the reasons for that determination: reg 4(9).

12 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(6)(a).

13 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(6)(b).

14 As to the meaning of 'appropriate minister' see PARA 271 note 22.

15 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(6). The application must be made by notice in writing not later than 28 days after the expiry of the period within which the Agency must make its determination or, as the case may be, after the date of the determination of the Agency: reg 4(6). The appropriate minister must send a copy of the application to the Agency: see reg 4(7).

16 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(8)(a).

17 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(8)(b). Such determination must be accompanied by a written statement of the reasons for that determination: reg 4(9).

18 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(10).

19 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 4(11).

20 An environmental statement must include such of the information set out in the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(1), Sch 2 as is relevant to the relevant project and at least the following: (1) a description of the project comprising information on the site, design and size of the project; (2) a description of the aspects of the environment likely to be significantly affected by the project; (3) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; (4) an outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice, taking into account the environmental effects; and (5) a non-technical summary of the information provided under heads (1)-(4): reg 6(1). The information set out in Sch 2 is as follows:

- 38 (a) a description of the project, including in particular: (i) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases; (ii) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used; (iii) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed project (Sch 2 para 1);
- 39 (b) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects (Sch 2 para 2);
- 40 (c) a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors (Sch 2 para 3);
- 41 (d) a description of the likely significant effects of the proposed project on the environment resulting from: (i) the existence of the project; (ii) the use of natural resources; (iii) the emission

of pollutants, the creation of nuisances and the elimination of waste, and the description by the developer of the forecasting methods used to assess the effects on the environment (Sch 2 para 4);

- 42 (e) a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment (Sch 2 para 5);
- 43 (f) a non-technical summary of the information provided under the above headings (Sch 2 para 6);
- 44 (g) an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information (Sch 2 para 7).

If the Agency considers that an environmental statement does not contain all the information so required, it must by notice in writing inform the applicant, and specify what further information the Agency requires, and the applicant must provide that information to the Agency: reg 6(7). The provisions of reg 6(7) and of reg 8 (see the text to notes 33-44) apply in relation to any called-in application within the meaning of the Water Resources Act 1991 s 42 (consideration of called-in applications: see PARA 243) as if any reference in those provisions to the Agency were a reference to the appropriate minister: Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 13.

21 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 5.

22 'Consultation bodies' means: (1) the local planning authority within the meaning of the Town and Country Planning Act 1990 Pt I (ss 1-9) (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 28) within whose area the project is to be carried out; (2) in relation to a project to be carried out in England, the Countryside Agency, English Nature and English Heritage; (3) in relation to a project to be carried out in Wales, the Countryside Council for Wales and the Welsh Ministers in their exercise of functions in the field of ancient monuments and historic buildings; and (4) other bodies designated by statutory provision as having specific environmental responsibilities which the Agency or the appropriate minister, as the case may be, considers likely to have an interest in the application: Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 2 (definition amended by SI 2006/3124); Government of Wales Act 2006 Sch 11 para 32. The functions of the Countryside Agency and English Nature are now vested in Natural England: see the Natural Environment and Rural Communities Act 2006 s 1. As to English Heritage **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 803. As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

23 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(2).

24 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(3).

25 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(4). This provision does not, however, require the disclosure of information which is capable of being treated as confidential or must be so treated under the Environmental Information Regulations 2004, SI 2004/3391, reg 12(1) or 13(1) (see PARA 681): Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(5) (amended by SI 2006/3124). Any body which provides information to a person under these provisions may require him to pay a charge which reflects the cost of making that information available: Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(6).

26 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 7(1) (reg 7 substituted by SI 2006/3124). The notice must: (1) state the applicant's name, that he has made an application to which the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, apply, and that he has provided the Agency with an environmental statement in accordance with reg 5 (see the text to notes 20-21) and, where it is the case, that he has provided further information in accordance with reg 6(7) (see note 20) (reg 7(1)(a) (as so substituted)); (2) state a place and times where, during a period of 28 days beginning on the date on which the notice is published, copies of the application, the environmental statement, any information provided to the Agency in response to its consultation under reg 6(2) (see the text to note 23), and any further information provided in accordance with reg 6(7) may be inspected, and that such inspection is free of charge (reg 7(1)(b) (as so substituted)); (3) specify an address from which copies of the application, the environmental statement, any information provided to the Agency in response to its consultation under reg 6(2), and any further information provided in accordance with reg 6(7) may be obtained from the Agency and, if a charge is to be made for a copy, the amount (not exceeding a reasonable charge for copying) of the charge (reg 7(1)(c) (as so substituted)); (4) specify the other arrangements, if any, that have been made by the Agency for informing the public of the application and for consulting them in relation to it (reg 7(1)(d) (as so substituted)); and (5) state that any

person wishing to make representations in relation to the application should make them in writing addressed to the Agency at an address specified in the notice within a period of 28 days beginning on the date on which the notice is published (reg 7(1)(e) (as so substituted)). A notice of an environmental statement under reg 7(1) may be combined with any notice required under any other enactment for the purpose of publicising the application in question: reg 7(5) (as so substituted). As to the meaning of 'enactment' see PARA 14 note 31. The Agency's website can be found at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

27    Ie as indicated in the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 7(1)(b) and (c): see note 26. 'Public' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups: EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) art 1(2) (amended by European Parliament and Council Directive 2003/35 (OJ L156, 25.06.2003, p 17)); definition applied by the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 2.

28    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 7(2)(a) (as substituted: see note 26).

29    Ie in response to its consultation under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(2) (see the text to note 23), or any further information provided in accordance with reg 6(7) (see note 20).

30    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 7(2)(b) (as substituted: see note 26). In relation to information which is relevant to the determination under reg 8 (see the text to notes 33-44) and which becomes available to the Agency, whether as a result of a request by the Agency or otherwise, after the date on which the notice was published, the Agency must, on its website: (1) state a place and times where, during a period of 28 days beginning on the day 14 days after which the information becomes available to the Agency, a copy of the information may be inspected, and that inspection is free of charge (reg 7(3)(a) (as so substituted)); and (2) specify an address from which a copy of the information may be obtained from the Agency and, if a charge is to be made for a copy, the amount (not exceeding a reasonable charge for copying) of the charge (reg 7(3)(b) (as so substituted)).

31    Ie provided in accordance with the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(7): see note 20.

32    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 7(4) (as substituted: see note 26).

33    Ie under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164.

34    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 8(1).

35    Ie in accordance with the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164.

36    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 8(2).

37    Ie under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 7: see the text to notes 26-32.

38    Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 8(3) (substituted by SI 2006/3124). The notice must also state a place and times where any person may inspect: (1) any relevant authorisation or variation; (2) a document containing the relevant decision and the main reasons and considerations on which it is based, and information about the public participation process that has taken place; (3) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the project; and (4) information regarding any right to challenge the validity of the decision and the procedures for doing so: Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 8(3)(a)-(d) (as so substituted).

39    Ie under the Water Resources Act 1991 s 43: see PARA 244.

40    Ie notice as required by the Water Resources Act 1991 s 43(1)(b): see PARA 244.

41    As to the meaning of 'month' see PARA 23 note 10.

42     le under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(1) (see note 20): reg 8(4)(a).

43     le under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 6(7) (see note 20): reg 8(4)(b).

44     Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164, reg 8(4).



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#### **(4) WATER RESOURCES CHARGES ETC**

##### **273. Power of Environment Agency to impose charges for licences.**

In the case of any particular licence relating to the abstraction and impounding of water<sup>1</sup>, the Environment Agency<sup>2</sup> may require the payment to it of such charges as may from time to time be prescribed<sup>3</sup>. These powers, and the Agency's powers to charge for, and make charging schemes in relation to, other environmental licences, are discussed elsewhere in this work<sup>4</sup>. The Agency also has a general power to fix and recover charges for services and facilities provided in the course of carrying out its functions<sup>5</sup>.

Where there is an interruption or diminution of the supply of water during a drought, nothing in any drought order or drought permit affects the Agency's right to recover any fixed or minimum charge which might have been recovered from any person if there had been no such interruption or diminution<sup>6</sup>.

1    le any licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

2    As to the Environment Agency see PARA 17.

3    Environment Act 1995 s 41(1)(a). 'Prescribed' means specified in, or determined under a charging scheme made by the Agency: s 41(1).

4    See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 97-98.

5    See the Environment Act 1995 s 43; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 82.

6    See the Water Resources Act 1991 s 79(3), s 79A(9); and PARA 314.

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## **274. Exemptions from water resources charges.**

No charges, other than those for the purpose of recovering administrative expenses attributable to the exercise by the Environment Agency<sup>1</sup> of its functions in relation to the application for the licence, may be levied in respect of water authorised by a licence to be abstracted<sup>2</sup> for use in the production of electricity or any other form of power by any generating station or apparatus of a capacity of not more than five megawatts<sup>3</sup>.

On the application of any person<sup>4</sup> who is liable to pay charges to the Agency for the abstraction of water under a licence<sup>5</sup>, the Agency may make an agreement with him either exempting him from the payment of charges or providing for charges to be levied on him at reduced rates specified in the agreement<sup>6</sup>. In the exercise of these powers in relation to any person, the Agency must have regard to:

- 533 (1) the extent to which any works constructed at any time by that person, or any works to be constructed by him, have made (or will make) a beneficial contribution towards the fulfilment of the purposes of the Agency's functions under any enactment<sup>7</sup>;
- 534 (2) any financial assistance which that person has rendered, or has agreed to render, towards the carrying out of works by the Agency in the performance of those functions<sup>8</sup>; and
- 535 (3) any other material considerations<sup>9</sup>.

The Secretary of State<sup>10</sup> or, in relation to Wales, the Welsh Ministers<sup>11</sup> may give directions as to the exercise by the Agency of these powers<sup>12</sup>.

Without prejudice to the exercise of such power to give directions, if on any application for such an agreement, the Agency refuses to make such an agreement with the applicant<sup>13</sup>, or the applicant objects to the terms of such an agreement as proposed by the Agency and that objection is not withdrawn<sup>14</sup>, either the applicant or the Agency may refer the question in dispute to the Secretary of State or, where appropriate, the Welsh Ministers<sup>15</sup>. On such a reference the Secretary of State or, as the case may be, the Welsh Ministers must determine the question in dispute, having regard to the matters to which the Agency was required to have regard in relation to the applicant in accordance with heads (1) to (3) above<sup>16</sup>, and may give directions to the Agency requiring it to make an agreement with the applicant in accordance with the decision<sup>17</sup>. Any decision of the Secretary of State or the Welsh Ministers on such a reference is final<sup>18</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'abstract' see PARA 192 note 2. As to the meaning of 'licence to abstract water' see PARA 227.

3 Water Resources Act 1991 s 125(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

4 As to the meaning of 'person' see PARA 13 note 29.

5 I.e. a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq.

6 Water Resources Act 1991 s 126(1) (s 126(1)-(5) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 Water Resources Act 1991 s 126(2)(a) (as amended: see note 6). As to the meaning of 'enactment' see PARA 14 note 31. As to the Agency's functions generally see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

8 Water Resources Act 1991 s 126(2)(b) (as amended: see note 6).

9 Water Resources Act 1991 s 126(2)(c).

10 As to the Secretary of State see PARA 15 note 1.

11 The functions of the Secretary of State under the Water Resources Act 1991 s 126, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

12 Water Resources Act 1991 s 126(3) (as amended: see note 6).

13 Water Resources Act 1991 s 126(4)(a) (as amended: see note 6).

14 Water Resources Act 1991 s 126(4)(b) (as amended: see note 6).

15 Water Resources Act 1991 s 126(4) (as amended: see note 6).

16 Water Resources Act 1991 s 126(5)(a) (as amended: see note 6).

17 Water Resources Act 1991 s 126(5)(b) (as amended: see note 6).

18 Water Resources Act 1991 s 126(7). Section 69 (validity of decisions: see PARA 247) applies in relation to a decision on such a reference as it applies in relation to a decision on a reference such as is mentioned in s 69(1) (b), but as if references to the other party were references to the applicant: s 126(7).

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## **275. Special charges in respect of spray irrigation.**

Where a person<sup>1</sup> (the 'applicant') is for the time being the holder of a licence to abstract water<sup>2</sup> (the 'applicant's licence') and in accordance with the provisions of that licence: (1) the water is to be used on land<sup>3</sup> of which the applicant is the occupier<sup>4</sup>; and (2) the purposes for which water abstracted in pursuance of the licence is to be used consist of or include spray irrigation<sup>5</sup>, the applicant may apply to the Environment Agency<sup>6</sup> to make an agreement with him under the following provisions, and the Agency may make such an agreement accordingly<sup>7</sup>. During any period for which such an agreement is in force, the following charges are payable by the applicant to the Agency in respect of the applicant's licence, in so far as it relates to water authorised to be abstracted and used on the relevant land<sup>8</sup>:

- 536 (a) basic charges calculated, in accordance with the agreement, by reference to the quantity of water authorised to be so abstracted and used from time to time in pursuance of the licence<sup>9</sup>; and
- 537 (b) supplementary charges calculated, in accordance with the agreement, by reference to the quantity of water which is measured or assessed as being abstracted from time to time by or on behalf of the applicant from the source of supply<sup>10</sup> to which the applicant's licence relates for use on the relevant land<sup>11</sup>.

In determining whether to make such an agreement, and the charges to be leviable under it, the Agency must have regard to the extent to which, in any year<sup>12</sup> within the period proposed to be specified in the agreement as the period for which it is made<sup>13</sup>, the quantity of water referred to in head (a) above is likely to exceed the quantity referred to in head (b) above<sup>14</sup>. Where the applicant's licence authorises water abstracted in pursuance of the licence to be used on the relevant land for purposes which include spray irrigation and other purposes, any such agreement must provide for apportioning, as between those purposes respectively, the quantities of water mentioned above<sup>15</sup>.

An application for such an agreement may also be made by a person who has applied for, but is not yet the holder of, a licence to abstract water<sup>16</sup>.

An agreement made under these provisions remains in force until the occurrence of whichever of the following events first occurs:

- 538 (i) the period specified in the agreement comes to an end<sup>17</sup>;
- 539 (ii) the applicant's licence expires or is revoked<sup>18</sup>;
- 540 (iii) the applicant ceases to be the occupier of the relevant land or, if he has previously ceased to be the occupier of a part or parts of that land, ceases to be the occupier of the remainder of it<sup>19</sup>;
- 541 (iv) the agreement is terminated by the Agency on an application made to it by the other party to do so<sup>20</sup>.

The Secretary of State<sup>21</sup> or, in relation to Wales, the Welsh Ministers<sup>22</sup> may give directions as to the exercise by the Agency of its powers under the above provisions<sup>23</sup>. Without prejudice to the exercise of this power to give directions, if on any application to make or terminate an agreement the Agency refuses to make or terminate it<sup>24</sup>, or the applicant objects to the Agency's proposals as to the terms of such an agreement or as to the conditions subject to

which such an agreement is to be terminated, and that objection is not withdrawn<sup>25</sup>, either the applicant or the Agency may refer the question in dispute to the Secretary of State or, where appropriate, the Welsh Ministers<sup>26</sup>. On such a reference, the Secretary of State or, as the case may be, the Welsh Ministers must determine the question in dispute, having regard to the matters to which the Agency would be required to have regard<sup>27</sup> in relation to the application<sup>28</sup>, and may give directions to the Agency requiring it to make an agreement with the applicant in accordance with the decision<sup>29</sup>. Any decision of the Secretary of State or the Welsh Ministers on such a reference is final<sup>30</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstract' see PARA 192 note 2. As to who is the holder of a licence see the Water Resources Act 1991 s 47; and PARA 250.

3 As to the meaning of 'land' see PARA 14 note 21.

4 Water Resources Act 1991 s 127(1)(a).

5 Water Resources Act 1991 s 127(1)(b). As to the meaning of 'spray irrigation' see PARA 262.

6 As to the Environment Agency see PARA 17.

7 Water Resources Act 1991 s 127(1) (ss 127-129 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Such an agreement is commonly referred to as a 'two part tariff agreement'.

8 Water Resources Act 1991 s 127(2) (as amended: see note 7). 'Relevant land' means the land on which the applicant's licence, as for the time being in force, authorises water abstracted in pursuance of the licence to be used for purposes which consist of or include spray irrigation: s 127(6).

9 Water Resources Act 1991 s 127(2)(a).

10 As to the meaning of 'source of supply' see PARA 187.

11 Water Resources Act 1991 s 127(2)(b).

12 For these purposes, 'year' means a period of 12 months beginning: (1) with the date on which an agreement under the Water Resources Act 1991 s 127 comes into force or is proposed to come into force; or (2) with an anniversary of that date: s 127(6). As to the meaning of 'month' see PARA 23 note 10.

13 The period so specified must not be less than five years: Water Resources Act 1991 s 128(1).

14 See the Water Resources Act 1991 s 127(3) (as amended: see note 7).

15 See the Water Resources Act 1991 s 127(4)(a). In such a case, s 127(2) has effect as if in each of heads (a) and (b) in the text the reference to the quantity of water mentioned were a reference to so much of that quantity as in accordance with the agreement is apportioned to the purpose of spray irrigation, and in s 127(3) (see the text to note 14) any reference to either of those heads is to be construed as a reference to that head as so modified: see s 127(4)(b), (c).

16 See the Water Resources Act 1991 s 127(5). In relation to an application so made or to an agreement made on such an application, the reference in s 127(1) (see the text to notes 1-7) to the provisions of the applicant's licence is to be construed as a reference to the proposals contained in the application for a licence (s 127(5)(a)), and any other reference in ss 127-129 to the applicant's licence is to be construed as a reference to any licence granted to the applicant in pursuance of the application for a licence or in pursuance of an appeal consequential on that application (s 127(5)(b)).

17 Water Resources Act 1991 s 128(2)(a).

18 Water Resources Act 1991 s 128(2)(b).

19 Water Resources Act 1991 s 128(2)(c).

20 Water Resources Act 1991 s 128(2)(d) (as amended: see note 7). At any time while an agreement is in force, the applicant may apply to the Agency to terminate the agreement: s 128(3) (as so amended). If on such an application the Agency is satisfied that, by reason of any change of circumstances since the agreement was

made, it ought to be terminated, it may terminate the agreement either unconditionally or subject to such conditions, whether as to any payment to be made by the applicant or otherwise, as the Agency and the applicant may agree: s 128(4) (as so amended).

21 As to the Secretary of State see PARA 15 note 1.

22 The functions of the Secretary of State under the Water Resources Act 1991 s 129, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

23 Water Resources Act 1991 s 129(1) (as amended: see note 7).

24 Water Resources Act 1991 s 129(2)(a) (as amended: see note 7).

25 Water Resources Act 1991 s 129(2)(b) (as amended: see note 7).

26 Water Resources Act 1991 s 129(2) (as amended: see note 7).

27 Ie in accordance with the Water Resources Act 1991 s 127(3): see the text to notes 12-14.

28 Water Resources Act 1991 s 129(3)(a) (as amended: see note 7).

29 Water Resources Act 1991 s 129(3)(b) (as amended: see note 7).

30 Water Resources Act 1991 s 129(5) (as amended: see note 7). Section 69 (validity of decisions: see PARA 247) applies in relation to a decision on such a reference as it applies in relation to a decision on a reference such as is mentioned in s 69(1)(b), but as if references to the other party were references to the applicant: s 129(5).

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## **276. Charges in respect of abstraction from waters of British Waterways Board.**

Where the British Waterways Board<sup>1</sup> is the holder of a licence<sup>2</sup> authorising abstraction<sup>3</sup> from any inland waters owned or managed by the board<sup>4</sup>, then the charges which would otherwise be payable in respect of that licence must either be reduced to such extent, and as so reduced be payable subject to such conditions<sup>5</sup>, or are not to be payable<sup>6</sup>, as the Board and the Environment Agency<sup>7</sup> may agree or as, in default of such agreement, the Secretary of State<sup>8</sup> or, in relation to Wales, the Welsh Ministers<sup>9</sup> may determine<sup>10</sup>. Where a person<sup>11</sup> other than the Board is the holder of a licence authorising abstraction from any such inland waters owned or managed by the Board<sup>12</sup>, and any charges are payable in respect of that licence<sup>13</sup>, the Agency must pay to the Board such proportion of those charges, subject to such conditions, as the Board and the Agency may agree or as, in default of such agreement, the Secretary of State or, where appropriate, the Welsh Ministers may determine<sup>14</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 I.e. a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 227 et seq. As to who is the holder of a licence see s 47; and PARA 250.

3 As to the meaning of 'licence to abstract water' see PARA 227. As to the meaning of 'abstraction' see PARA 192 note 2.

4 I.e. any inland waters to which the Water Resources Act 1991 s 66 applies: see PARAS 229, 233. As to the meaning of 'inland waters' see PARA 187 note 2.

5 Water Resources Act 1991 s 130(1)(a).

6 Water Resources Act 1991 s 130(1)(b).

7 As to the Environment Agency see PARA 17.

8 As to the Secretary of State see PARA 15 note 1.

9 The functions of the Secretary of State under the Water Resources Act 1991 s 130, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

10 Water Resources Act 1991 s 130(1) (s 130 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

11 As to the meaning of 'person' see PARA 13 note 29.

12 Water Resources Act 1991 s 130(2)(a).

13 Water Resources Act 1991 s 130(2)(b).

14 Water Resources Act 1991 s 130(2) (as amended: see note 10).

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## (5) RESERVOIRS

### (i) In general

#### 277. Introduction.

The construction and operation of reservoirs involve many different considerations, including planning and development control, water resources management, recreation and navigation, and safety. This section of this title deals exclusively with statutory controls relating to the safety of so-called 'large raised reservoirs'<sup>1</sup> under the Reservoirs Act 1975<sup>2</sup>. Water resources management<sup>3</sup>, recreation and amenity<sup>4</sup>, and navigation<sup>5</sup> are dealt with elsewhere in this title, and pollution controls<sup>6</sup>, planning and development control<sup>7</sup> and general issues regarding safety<sup>8</sup> are discussed elsewhere in this work.

The Reservoirs Act 1975 requires the registration of large raised reservoirs<sup>9</sup>, the appointment of construction engineers to supervise their construction, enlargement or restoration<sup>10</sup>, the periodic inspection of such reservoirs by inspecting engineers<sup>11</sup>, the monitoring and supervision of such reservoirs<sup>12</sup>, and the preparation of flood plans<sup>13</sup>. The Act also regulates the discontinuance or abandonment of reservoirs<sup>14</sup>. There are extensive powers of enforcement<sup>15</sup>. The Environment Agency is the body with the principal responsibilities under the Act<sup>16</sup>. The Act was brought into force piecemeal, the last commencement order not being made until 1986<sup>17</sup>, and transitional provision is made with regard to reservoirs wholly or partly constructed before its coming into force<sup>18</sup>.

Subject to certain exceptions, the Reservoirs Act 1975 binds the Crown<sup>19</sup>.

1 As to the meanings of 'reservoir', 'raised reservoir' and 'large raised reservoir' see PARA 278.

2 See PARA 278 et seq.

3 See PARA 187 et seq.

4 See PARA 674 et seq.

5 See PARA 688 et seq.

6 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270 et seq.

7 See **TOWN AND COUNTRY PLANNING**.

8 See generally **HEALTH AND SAFETY AT WORK; NEGLIGENCE; TORT** vol 97 (2010) PARA 401 et seq.

9 See the Reservoirs Act 1975 s 2; and PARAS 279-280.

10 See the Reservoirs Act 1975 s 4; and PARA 281. As to the construction of new reservoirs and the re-use of abandoned reservoirs see ss 6-9; and PARAS 282-285.

11 See the Reservoirs Act 1975 s 10; and PARA 286.

12 See the Reservoirs Act 1975 ss 11, 12; and PARAS 287, 289.

13 See the Reservoirs Act 1975 ss 12A, 12B; and PARA 288.



14 See the Reservoirs Act 1975 ss 13, 14; and PARAS 290-291.

15 See the Reservoirs Act 1975 ss 15-19; and PARAS 292-296.

16 See the Reservoirs Act 1975 s 2; and PARAS 279, 280. As to the Environment Agency see PARA 17.

17 See the Reservoirs Act 1975 s 29; and the Reservoirs Act 1975 (Commencement No 4) Order 1986, SI 1986/2202. All the provisions of the Act (as originally enacted) were finally brought into force in all areas of England and Wales with effect from 1 April 1987: see the Reservoirs Act 1975 (Commencement No 4) Order 1986, SI 1986/2202, art 2.

18 Where a large raised reservoir was wholly or partly constructed before the commencement of the Reservoirs Act 1975, any certificate given, report made, or other thing done in relation to the reservoir under or for the purposes of the Reservoirs (Safety Provisions) Act 1930 (repealed) has the same effect for the purposes of the Reservoirs Act 1975 as if given, made or done thereunder or for the purposes thereof: s 23(1). Other transitional provision is made in relation to notification of existing reservoirs (see s 24 (now spent in practice) (ss 24, 25, 27 amended by the Water Act 2003 s 74(1))); reservoirs which at the commencement of the Reservoirs Act 1975 were in the course of construction or alteration, or newly constructed or altered (see s 25 (as so amended)); the first inspection of reservoirs constructed before 1931 (ie before the commencement of the Reservoirs (Safety Provisions) Act 1930 (repealed) on 1 January 1931) (see the Reservoirs Act 1975 s 26 (now spent in practice)); and large raised reservoirs which did not fall within the provisions of the 1930 Act (see the Reservoirs Act 1975 s 27 (as so amended)).

19 See the Reservoirs Act 1975 s 27A; and PARA 20.

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## **278. Meaning of 'reservoir' and related terms.**

For the purposes of the Reservoirs Act 1975, 'reservoir' means a reservoir for water as such, and accordingly does not include a mine or quarry lagoon which is a tip<sup>1</sup>; nor does it include a canal or inland navigation, although the Act applies to a reservoir notwithstanding that it may form part of a watercourse or be used for navigation<sup>2</sup>.

A reservoir is a 'raised reservoir' if it is designed to hold, or is capable of holding, water above the natural level of the land<sup>3</sup> adjoining the reservoir<sup>4</sup>.

A reservoir is a 'large raised reservoir' if it is designed to hold, or is capable of holding, more than 25,000 cubic metres of water above that level<sup>5</sup>.

The provision made by the Reservoirs Act 1975 in relation to reservoirs extends, unless otherwise stated, to any place where water is artificially retained to form or enlarge a lake or loch, whether or not use is intended to be made of the water<sup>6</sup>; and the provision made in relation to large raised reservoirs extends both to those constructed under statutory powers and those not so constructed<sup>7</sup>.

1 Reservoirs Act 1975 s 1(1), (6), Sch 1. 'Tip' means a tip within the meaning of the Mines and Quarries (Tips) Act 1969 (see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 541): see the Reservoirs Act 1975 s 1(1).

2 Reservoirs Act 1975 s 1(1).

3 As to the meaning of 'land' see PARA 14 note 21.

4 Reservoirs Act 1975 s 1(1)(a), Sch 1.

5 Reservoirs Act 1975 s 1(1)(b), Sch 1.

6 Reservoirs Act 1975 s 1(2).

7 Reservoirs Act 1975 s 1(3).

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## **279. Registration of large raised reservoirs.**

It is the duty of the Environment Agency, in its capacity as the relevant authority for England and Wales<sup>1</sup>, to establish and maintain for its area<sup>2</sup> a register showing the large raised reservoirs<sup>3</sup> situated wholly or partly in the area and giving prescribed<sup>4</sup> information about each of them<sup>5</sup>. The register and copies of it or a prescribed part of it must be kept at such place or places as may be prescribed<sup>6</sup>, and must be available for inspection at all reasonable times by any person<sup>7</sup>. Where a large raised reservoir is discontinued it must be removed from the register<sup>8</sup>.

1 The relevant authority for purposes of the Reservoirs Act 1975, in England and Wales, is the Environment Agency: see the Reservoirs Act 1975 s 2(1) (amended by the Water Act 2003 s 74(1)(a), (e)). As to the Environment Agency see PARA 17. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. In Scotland, the relevant authority is those councils constituted under the Local Government etc (Scotland) Act 1994 s 2: see the Reservoirs Act 1975 s 2(1) (amended by the Local Government etc (Scotland) Act 1994 s 180(1), Sch 13 para 98).

2 The 'area' of the Environment Agency, in its capacity as a relevant authority for purposes of the Reservoirs Act 1975, is the whole of England and Wales: s 1(4A) (added by the Water Act 2003 s 74(1)(c)).

3 As to the meaning of 'large raised reservoir' see PARA 278.

4 The Secretary of State or, in relation to Wales, the Welsh Ministers, may by statutory instrument make regulations for prescribing anything which is to be prescribed under the Reservoirs Act 1975; and 'prescribed' means prescribed by regulations so made: s 5, Sch 1. As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Reservoirs Act 1975 s 5, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

The prescribed information to be given about large raised reservoirs in any register so kept by a relevant authority is the information set out in the Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 3(1), Sch 1, ie: (1) the name and situation of the reservoir; (2) its national grid reference; (3) the name and address of the undertakers; (4) the name and address of the enforcement authority, if any; (5) a summary of the contents of all certificates or reports under the Reservoirs Act 1975, or the Reservoirs (Safety Provisions) Act 1930 (repealed), including (a) the name and address of the engineer giving the certificate or making the report; (b) the section of whichever Act the certificate is given under or report made; (c) the date of the latest inspection made under the 1930 Act; (d) where no final certificate was given under that Act because the construction or alteration of the reservoir was completed before the commencement of the 1930 Act, a statement of that fact; and (6) the following information, if it is revealed by any certificate or report or is otherwise known to the authority: (a) the category of the reservoir (ie whether impounding or non-impounding); (b) the year(s) in which the dam(s) was or were completed; (c) the construction of the dam(s) ie whether constructed of earth, rockfill, gravity, buttress or by other means; (d) the maximum height of the dam(s) in metres measured from the lowest adjacent natural ground level to the top, excluding the height of the wave wall; (e) the capacity of the reservoir above the lowest natural ground level adjacent to it (in cubic metres) to top water level; (f) the water surface area of the reservoir at top water level, in square metres or square kilometres: Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, Sch 1 items 1-6. The following additional information is prescribed only in the case of a reservoir for which the relevant authority is the enforcement authority or undertaker: (i) the name and business address of the supervising engineer or, if the reservoir is under the supervision of a construction engineer, of that engineer; (ii) the date when the next inspection is due under the Reservoirs Act 1975 or any date recommended for the next inspection thereunder by the supervising or inspecting engineer; (iii) particulars of any appointment made by the enforcement authority under s 15 (see PARA 293); and (iv) particulars of any measures taken by the enforcement authority under s 16 (see PARA 292), including the date on which they were taken: Reservoirs

Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 3(1) proviso, Sch 1 items 7-10. As to the meaning of 'enforcement authority' see PARA 280 note 6.

5 Reservoirs Act 1975 s 2(2) (s 2(2) amended by the Water Act 2003 s 74(1)(b)). If it appears to the Secretary of State or, in relation to Wales, to the Welsh Ministers, that the inclusion of any information in the register maintained under the Reservoirs Act 1975 s 2(2) by the Agency would be contrary to the interests of national security, he or they may direct the Agency not to include that information in the register: s 2(2A) (added by the Water Act 2003 s 78(1)). Information as to the register is available on the Environment Agency website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

6 Reservoirs Act 1975 s 2(2)(a) (as amended: see note 5). The register must be kept at the principal office of the Agency: see the Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 3(2).

7 Reservoirs Act 1975 s 2(2)(b). As to the meaning of 'person' see PARA 13 note 29. As to the availability of environmental information see also PARAS 680-681.

8 See the Reservoirs Act 1975 s 13(3); and PARA 290.

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## **280. Enforcement.**

It is for the Environment Agency, in its capacity as the relevant authority<sup>1</sup> in whose area<sup>2</sup> a reservoir<sup>3</sup> is situated, if not itself the undertaker<sup>4</sup> to secure that the undertakers observe and comply with the requirements of the Reservoirs Act 1975<sup>5</sup>. In this context, the Environment Agency is known as the 'enforcement authority'<sup>6</sup>.

The Agency must, at such intervals as may be prescribed<sup>7</sup>, make a report to the Secretary of State or, in relation to Wales, to the Welsh Ministers<sup>8</sup>, giving the prescribed information as to the steps taken by it as enforcement authority, or as undertaker, to secure that the requirements of the Act are observed and complied with<sup>9</sup>. If it appears to the Secretary of State or, where appropriate, the Welsh Ministers that he or they should do so, he or they may cause an inquiry to be held into the question whether the Agency has failed to perform any of its statutory functions relating to reservoirs in a case where it ought to have performed them<sup>10</sup>. If the Secretary of State or, as the case may be, the Welsh Ministers are satisfied after such an inquiry, or without such an inquiry, that the Agency has failed to perform those functions in such a case, he or they may make an order declaring the Agency to be in default and directing it to perform specified functions in a specified manner and within a specified time<sup>11</sup>. The order may be varied or revoked by a further order<sup>12</sup>.

1 As to the relevant authority see PARA 279 note 1. As to the Environment Agency see PARA 17. Information as to the Agency as enforcement authority is available on its website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

2 As to the meaning of 'area' see PARA 279 note 2.

3 As to the meaning of 'reservoir' see PARA 278.

4 In relation to any reservoir, 'undertakers' means: (1) in the case of a reservoir that is or, when constructed is to be, managed and operated by the Environment Agency or a water undertaker, that Agency or undertaker; and (2) in any other case (a) if the reservoir is used or intended to be used for the purposes of any undertaking, the persons for the time being carrying on that undertaking; and (b) if it is not so used or intended to be used, the owners or lessees of the reservoir: Reservoirs Act 1975 s 1(4), (6), Sch 1 (s 1(4) amended by the Water Act 1989 s 190(1), Sch 25 para 49; SI 1996/593). In relation to an abandoned reservoir, references to the undertakers have effect as at the time of abandonment: see the Reservoirs Act 1975 ss 14(4), 16(7), 17(3); and PARAS 291, 292, 294. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'person' see PARA 13 note 29.

5 Reservoirs Act 1975 s 2(3) (ss 2, 3 amended by the Water Act 2003 s 74(1)(b)).

6 'Enforcement authority' means, in relation to a reservoir, the Environment Agency as the relevant authority charged under the Reservoirs Act 1975 s 2(3) (see the text to notes 1-5) with securing that the undertakers observe and comply with the requirements of the Act (and, where the context so requires, includes the Agency if it would be so charged if the reservoir were a large raised reservoir); and accordingly the provisions of the Act relating to the enforcement authority for a reservoir do not apply in the case of a reservoir if the Agency is the undertaker and the reservoir is situated wholly in the area of the Agency: see s 2(6) (as amended: see note 5). In relation to an abandoned reservoir, references to the enforcement authority have effect as at the time of abandonment: see ss 14(4), 16(7), 17(3). As to the meaning of 'large raised reservoir' see PARA 278.

Where a reservoir extends into the areas of more than one relevant authority, then unless one of those authorities is the undertaker, the enforcement authority is to be such one of them as is agreed between them or, in default of agreement, determined by the Secretary of State: s 2(4) (as so amended). Where one of those authorities is the undertaker, then the provisions relating to the enforcement authority apply as if the reservoir did not extend into the area of that one of the authorities: s 2(5) (as so amended). Such overlap of areas is now

only possible where the whole or part of a reservoir is in Scotland: see PARA 279 note 1. As to the Secretary of State see PARA 15 note 1.

7 As to the meaning of 'prescribed' see PARA 279 note 4. Reports must be made at intervals of two years (the first such report having to be made on 1 April 1987): see the Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 4(1).

8 The functions of the Secretary of State under the Reservoirs Act 1975 s 3, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

9 Reservoirs Act 1975 s 3(1) (as amended: see note 5). The prescribed information which must be given in such reports is: (1) information as to the steps (if any) that the Agency as an enforcement authority has taken in respect of any reservoir to secure that undertakers observe and comply with the requirements of the Reservoirs Act 1975; and (2) a statement whether as undertaker for any reservoir situated wholly in its area, it has been required by any section of that Act to take steps to observe and comply therewith and a statement as to any steps that have been taken: Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 4(2)(a), (b). The information must be accompanied by a statement of the number of reservoirs for which the Agency is enforcement authority and the number of reservoirs wholly in its area for which it is the undertaker: reg 4(2).

10 Reservoirs Act 1975 s 3(2) (as amended: see note 5).

11 See the Reservoirs Act 1975 s 3(3) (as amended: see note 5).

12 Reservoirs Act 1975 s 3(4).

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## **281. Qualification of civil engineers.**

There must be a panel of civil engineers for the purposes of the Reservoirs Act 1975, or such number of different panels for different purposes of that Act or for different classes of reservoirs<sup>1</sup> as, after consultation<sup>2</sup>, the Secretary of State or, in relation to Wales, the Welsh Ministers may from time to time determine<sup>3</sup>. Any reference in the Reservoirs Act 1975 to a 'qualified civil engineer' is a reference to a civil engineer who is a member of a panel so constituted or, if there is more than one such panel, a member of the appropriate panel<sup>4</sup>.

Any civil engineer may apply in the prescribed manner to be placed on a panel; and if the application is accompanied by the prescribed fee (if any) and the Secretary of State or, where appropriate, the Welsh Ministers are satisfied after consultation that the applicant is qualified and fit to be placed on that panel, the Secretary of State or, as the case may be, the Welsh Ministers must appoint him to be a member of the panel<sup>5</sup>. The appointment is for a term of five years but an engineer whose appointment expires may be reappointed for a further term<sup>6</sup>. Any appointment to a panel lapses on the abolition or alteration of that panel, but:

- 542 (1) before abolishing or altering any panel, the Secretary of State or, as the case may be, the Welsh Ministers must give to the engineers for the time being on the panel such notice as the Secretary of State or Welsh Ministers consider reasonable to allow them to apply for appointment to any other panel constituted or to be constituted wholly or partly for the same purposes<sup>7</sup>; and
- 543 (2) a person who is appointed to act for any purpose of the Reservoirs Act 1975 (otherwise than as a supervising engineer<sup>8</sup>) at a time when he is a qualified civil engineer for that purpose may, on so ceasing to be a member of the appropriate panel, continue to act for not more than four years by virtue of that appointment and is a qualified engineer for the purpose<sup>9</sup>.

The Secretary of State or, where appropriate, the Welsh Ministers may remove an engineer from any panel, or direct that he is no longer qualified to act by virtue of head (2) above, if the Secretary of State or the Welsh Ministers are satisfied after consultation that the engineer is not fit to remain on the panel or not fit so to act<sup>10</sup>.

1 As to the meaning of 'reservoir' see PARA 278.

2 References in the Reservoirs Act 1975 s 4 to 'consultation' by the Secretary of State or, as the case may be, the Welsh Ministers are references to consultation with the President of the Institution of Civil Engineers or, if that institution appoints a committee for the relevant purpose, with that committee: s 4(6). The Secretary of State or, as appropriate, the Welsh Ministers, may reimburse to the institution any expenses it incurs for these purposes: s 4(7). If at any time the Institution of Civil Engineers ceases to exist, references to that institution or its President are to have effect as references to the prescribed institution or head of the prescribed institution: s 4(9). As to the meaning of 'prescribed' see PARA 279 note 4. At the date at which this volume states the law no such provision had been made. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

The functions of the Secretary of State under the Reservoirs Act 1975 s 4, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any

particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Reservoirs Act 1975 s 4(1). Four panels ('existing panels') have been established as a result of a determination of the Secretary of State under s 4(1), ie the Supervising Engineers Panel, the All Reservoirs Panel, the Non-impounding Reservoirs Panel, and the Service Reservoirs Panel: see the Reservoirs (Panels of Civil Engineers) (Applications and Fees) Regulations 1992, SI 1992/1527, reg 1(2). Information as to panel engineers is available on the Environment Agency website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

4 Reservoirs Act 1975 ss 1(6), 4(1), Sch 1.

5 Reservoirs Act 1975 s 4(2). An application by a civil engineer to be appointed or reappointed to an existing panel must be made to the Secretary of State for Environment, Food and Rural Affairs or, as the case may be, the Welsh Ministers in writing, with the prescribed information, the prescribed fee, and, in the case of a first appointment, a reference from a civil engineer as to the suitability of the applicant for appointment: Reservoirs (Panels of Civil Engineers) (Applications and Fees) Regulations 1992, SI 1992/1527, reg 2(1) (reg 2 amended by SI 2005/143); National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 3, Sch 1; Government of Wales Act 2006 Sch 11 para 32. The prescribed fee is £385: Reservoirs (Panels of Civil Engineers) (Applications and Fees) Regulations 1992, SI 1992/1527, reg 2(2) (as so amended). The prescribed information is: (1) the applicant's full name, address and date of birth; (2) where the application is for reappointment, the panel to which his appointment relates and the date on which it took effect; (3) the relevant qualifications of the applicant; (4) his membership of professional institutions; (5) particulars of his present employment; and (6) particulars of all work carried out by him in relation to reservoirs, with details of the reservoirs in connection with whose design, construction, maintenance or repair the applicant has been employed, including their type, capacity and main dimensions or, where the application is for reappointment, particulars of all such work carried out since his appointment to the panel: reg 2(1), Schedule.

6 Reservoirs Act 1975 s 4(3).

7 Reservoirs Act 1975 s 4(4)(a).

8 As to the supervising engineer see PARA 287.

9 Reservoirs Act 1975 s 4(4)(b).

10 Reservoirs Act 1975 s 4(5).



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## **(ii) New, Enlarged and Restored Reservoirs**

### **282. Construction or enlargement of reservoirs.**

No large raised reservoir<sup>1</sup> may be constructed (whether as a new reservoir or by the alteration of an existing reservoir that is not a large raised reservoir), or may be altered so as to increase its capacity, unless a qualified civil engineer<sup>2</sup> (the 'construction engineer') is employed to design and supervise the construction<sup>3</sup> or alteration<sup>4</sup>.

Where a large raised reservoir is constructed as a new reservoir, it may not be used for the storage of water, or be filled wholly or partially with water, otherwise than in accordance with the certificate<sup>5</sup> of the construction engineer<sup>6</sup>. Where such a reservoir is constructed by the alteration of an existing reservoir that is not a large raised reservoir, the addition to the reservoir<sup>7</sup> may not be used for the storage of water, or be filled wholly or partially with water, otherwise than in accordance with the certificate of the construction engineer responsible for the construction of the reservoir<sup>8</sup>. Where a large raised reservoir is altered so as to increase its capacity, then from the time when the construction engineer responsible for the alteration gives any certificate for the reservoir, it may not be used for the storage of water, or be filled wholly or partially with water, otherwise than in accordance with the certificate of that construction engineer<sup>9</sup>.

Where the construction or alteration of a reservoir is so required to be supervised by a construction engineer, the reservoir must be under his supervision until he gives his final certificate for it<sup>10</sup>.

Failure to comply with these provisions is an offence<sup>11</sup>.

1 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

2 As to the meaning of 'qualified civil engineer' see PARA 281.

3 Where the use of a reservoir as a reservoir has been abandoned and the reservoir is to be brought back into use after being altered so as to increase its capacity, that is treated for the purposes of the Reservoirs Act 1975 as the construction of a new reservoir: s 6(1). As to the re-use of abandoned reservoirs see PARA 285.

4 Reservoirs Act 1975 s 6(1). As to the necessary notice to the relevant authority see s 21(1); and PARA 299. As to the enforcement see s 8; and PARA 284. The construction or alteration of a reservoir may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

5 As to certificates see PARAS 283, 298.

6 Reservoirs Act 1975 s 6(2). In the event of any alteration to the reservoir it may not be so used except in accordance with s 6(4) (see the text to note 9): see s 6(2).

7 References to an addition to a reservoir refer to that part of the reservoir which, as a result of alterations to it, provides or will provide additional capacity: Reservoirs Act 1975 s 6(6), Sch 1.

8 Reservoirs Act 1975 s 6(3). In the event of any alteration to the reservoir it may not be so used except in accordance with s 6(4) (see the text to note 9): see s 6(3).

9 Reservoirs Act 1975 s 6(4). In the event of any further alteration to the reservoir it may not be so used except in accordance with s 6(4) as it applies on that alteration: see s 6(4).

- 10 Reservoirs Act 1975 s 6(5). As to final certificates see PARA 283.
- 11 See PARA 300.

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### **283. Preliminary, interim and final certificates of construction engineers.**

As soon as the construction engineer<sup>1</sup> responsible for any reservoir<sup>2</sup> or addition to a reservoir<sup>3</sup> considers that the construction<sup>4</sup> or addition has reached a stage at which the reservoir or addition can properly be filled wholly or partially with water, he must give a certificate (the 'preliminary certificate') specifying the level up to which, and the conditions (if any) subject to which, it may be so filled<sup>5</sup>. Where the construction engineer responsible for an addition to a large raised reservoir<sup>6</sup> considers at any time during the carrying out of the alteration to the reservoir that the reservoir ought not to be filled with water up to the level, or subject to the conditions, that would otherwise be lawful, he may give a certificate (an 'interim certificate') specifying the level up to which it may be filled until the issue of a preliminary certificate and the conditions (if any) subject to which it may be so filled<sup>7</sup>.

If, at the end of three years after a preliminary certificate is first issued for a reservoir or addition to a reservoir, or at any time thereafter, the construction engineer is satisfied that the reservoir or, as the case may be, the reservoir with the addition is sound and satisfactory and may safely be used for the storage of water, he must give a certificate (the 'final certificate')<sup>8</sup> to that effect, specifying the level up to which, and the conditions (if any) subject to which, water may be so stored<sup>9</sup>. The construction engineer giving a final certificate for a reservoir must consider the matters (if any) that need to be watched by a supervising engineer<sup>10</sup> during the period before there is a statutory inspection<sup>11</sup> of the reservoir, and must include in an annex to the certificate a note of any such matters<sup>12</sup>. As soon as practicable after the completion of the works and in any event not later than the giving of the final certificate, the construction engineer for any reservoir or addition to a reservoir must also give a certificate that the works have been efficiently executed in accordance with the drawings and descriptions annexed to the certificate and must annex to the certificate detailed drawings and descriptions giving full information of the works actually constructed<sup>13</sup>.

If at the end of five years after a preliminary certificate is first issued for a reservoir or addition to a reservoir the construction engineer has not issued his final certificate, he must give the undertakers<sup>14</sup> a written<sup>15</sup> explanation of his reasons for deferring its issue<sup>16</sup>.

1 As to the construction engineer see PARA 282.

2 As to the meaning of 'reservoir' see PARA 278.

3 As to the meaning of 'addition to a reservoir' see PARA 282 note 7.

4 As to the meaning of 'construction' see PARA 282 note 3.

5 Reservoirs Act 1975 s7(1). The construction engineer may from time to time supersede a preliminary certificate by the issue of a further preliminary certificate varying the previous certificate, whether as to water level or as to conditions: s 7(1). As to certificates generally see s 20; and PARA 298. For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(a), Sch 1.

6 As to the meaning of 'large raised reservoir' see PARA 278.

7 Reservoirs Act 1975 s 7(2). The construction engineer may from time to time supersede an interim certificate by the issue of a further interim certificate varying the previous certificate, whether as to water level

or as to conditions: s 7(2). For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(b), Sch 1.

8 References to this certificate include references to any annex to it: see the Reservoirs Act 1975 s 7(7).

9 Reservoirs Act 1975 s 7(3). For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(c), Sch 1.

10 As to the supervising engineer see PARA 287.

11 Is an inspection under the Reservoirs Act 1975: see s 10; and PARA 286.

12 Reservoirs Act 1975 s 7(5).

13 Reservoirs Act 1975 s 7(6). References to this certificate include references to any annex to it: see s 7(7). The information so annexed must include dimensions and levels and details of the geological strata or deposits encountered in trial holes or excavations made in connection with the works: s 7(6). For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(d), Sch 1.

14 As to the meaning of 'undertakers' see PARA 280 note 4.

15 As to the meaning of 'written' see PARA 22 note 1.

16 Reservoirs Act 1975 s 7(4).

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**284. Powers of enforcement authority in event of non-compliance with statutory requirements.**

Where it appears to the Environment Agency, in its capacity as the enforcement authority<sup>1</sup>, either:

- 544 (1) that a large raised reservoir<sup>2</sup> is being constructed<sup>3</sup>, whether as a new reservoir or by the alteration of an existing reservoir that is not a large raised reservoir, or is being altered so as to increase its capacity<sup>4</sup>; or
- 545 (2) that a large raised reservoir has been so constructed or altered and no final certificate<sup>5</sup> has yet been given for the reservoir on the construction or alteration<sup>6</sup>,

but that no qualified civil engineer<sup>7</sup> is responsible for the reservoir or addition<sup>8</sup> as construction engineer<sup>9</sup>, the Agency may by written notice served<sup>10</sup> on the undertakers<sup>11</sup> require them, within 28 days after the date when the notice is served, to appoint a qualified civil engineer, unless an appointment has already been made, and in either case to notify the Agency of the appointment<sup>12</sup>.

An engineer appointed for these purposes must be appointed to inspect the reservoir and make a report<sup>13</sup> on the construction or alteration, and to supervise the reservoir until he gives a final certificate for it<sup>14</sup>. Where it appears to the Agency that the report of an engineer so acting includes a recommendation as to measures to be taken in the interests of safety that has not been carried into effect as required by these provisions, the Agency may by written notice served on the undertakers require them to carry the recommendation into effect within a time specified<sup>15</sup> in the notice<sup>16</sup>.

An engineer appointed for these purposes has the same powers and duties in relation to the giving of preliminary certificates, interim certificates<sup>17</sup> and final certificates as if he were the construction engineer responsible for the reservoir or the addition to it<sup>18</sup>; but a final certificate so given:

- 546 (a) may be given less than three years after the first issue of a preliminary certificate, or without the previous issue of a preliminary certificate, if the engineer is satisfied that the reservoir or addition has for a period of three years or more been filled with water up to the level that is specified in the preliminary certificate or, if no preliminary certificate has been issued, up to the level that is specified in the final certificate, and that the reservoir or, as the case may be, the reservoir with the addition is sound and satisfactory and may safely be used for the storage of water<sup>19</sup>;
- 547 (b) is not required, unless it is given by virtue of head (a) above, to state that the engineer is satisfied that the reservoir or the reservoir with the addition is sound and satisfactory; but if it does not do so and the engineer's report includes any recommendations as to measures to be taken in the interests of safety, the certificate must instead state that those recommendations have been carried into effect<sup>20</sup>.

An engineer acting under these provisions must, as soon as practicable after the completion of the works and in any event not later than the giving of the final certificate, give an additional certificate that, so far as he has been able to ascertain, the works have been efficiently executed in accordance with the drawings and descriptions annexed to that additional certificate, and must annex to that additional certificate detailed drawings and descriptions giving such information as he can of the works actually constructed<sup>21</sup>.

Failure to comply with these provisions is an offence<sup>22</sup>.

1 As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

2 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

3 As to the meaning of 'construction' see PARA 282 note 3.

4 Reservoirs Act 1975 s 8(1)(a).

5 As to the meaning of 'final certificate' see PARA 283.

6 Reservoirs Act 1975 s 8(1)(b).

7 As to the meaning of 'qualified civil engineer' see PARA 281.

8 As to the meaning of 'addition to a reservoir' see PARA 282 note 7.

9 As to the construction engineer see PARA 282.

10 As to the service of documents see PARA 22. As to the meaning of 'written' see PARA 22 note 1.

11 As to the meaning of 'undertakers' see PARA 280 note 4.

12 Reservoirs Act 1975 s 8(1). The engineer must be afforded all reasonable facilities by the undertakers for the effective performance of his functions: see s 21; and PARA 299.

13 The engineer must include in his report any recommendations he sees fit to make as to measures to be taken in the interests of safety; and subject to any reference of the matter to a referee (see PARA 296), the undertakers must carry any such recommendation into effect: Reservoirs Act 1975 s 8(3). As to reports generally see s 20; and PARA 298. For the prescribed form of report see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 4(1), (2)(a), Sch 2.

14 Reservoirs Act 1975 s 8(2). References in this provision to the final certificate include the annex to the certificate, where there is one: s 8(8). As to certificates generally see s 20; and PARA 298.

15 Where the Agency proposes to serve such a notice, it must consult as to the time to be specified in the notice a civil engineer, being a qualified civil engineer for the purpose of inspecting and supervising the reservoir under the Reservoirs Act 1975 s 8: see s 8(3B) (s 8(3A), (3B) added by the Water Act 2003 s 75(1), (2)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

16 Reservoirs Act 1975 s 8(3A) (as added: see note 15).

17 As to the meanings of 'preliminary certificate' and 'interim certificate' see PARA 283.

18 Reservoirs Act 1975 s 8(4). Certificates so given have effect for the purposes of the Reservoirs Act 1975 as if they were certificates of a construction engineer: s 8(4).

19 Reservoirs Act 1975 s 8(5).

20 Reservoirs Act 1975 s 8(6).

21 See the Reservoirs Act 1975 s 8(7). References to this certificate include the annex to the certificate, where there is one: s 8(8). The information so annexed must include dimensions and levels and details of the geological strata or deposits encountered in trial holes or excavations made in connection with the works: s 8(7). For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(d), Sch 1.

22 See PARA 300.

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## **285. Re-use of abandoned reservoirs.**

Where the use of a large raised reservoir<sup>1</sup> as a reservoir has been abandoned<sup>2</sup>, the reservoir may not again be used as a reservoir unless a qualified civil engineer<sup>3</sup> has been employed to inspect the reservoir and make a report<sup>4</sup> on it, and to supervise it until he gives a final certificate<sup>5</sup> for it<sup>6</sup>. Where a large raised reservoir is brought back into use as a reservoir after that use has been abandoned, it may not be used for the storage of water, or be filled wholly or partially with water, otherwise than in accordance with the engineer's certificate<sup>7</sup>.

An engineer acting under these provisions has the same powers and duties in relation to the giving of preliminary certificates<sup>8</sup> and final certificates as if he were the construction engineer<sup>9</sup> responsible on the construction<sup>10</sup> of the reservoir<sup>11</sup>. A final certificate so given is not, however, required to state that the engineer is satisfied that the reservoir is sound and satisfactory; but if it does not do so and the engineer's report includes any recommendations as to measures to be taken in the interests of safety, the certificate must instead state that those recommendations have been carried into effect<sup>12</sup>.

Nothing in these provisions applies to a reservoir if, before it is brought back into use, either it is altered in such a manner as is to be treated for the purposes of the Reservoirs Act 1975 as the construction of a new reservoir<sup>13</sup>, or is altered under the supervision of a qualified civil engineer so as not to be a large raised reservoir when brought back into use<sup>14</sup>.

Where it appears to the Environment Agency in its capacity as the enforcement authority<sup>15</sup>:

548 (1) that a large raised reservoir has been brought back into use as a reservoir after that use had been abandoned but that the required report has not been obtained<sup>16</sup>; or

549 (2) that such a report includes a recommendation as to measures to be taken in the interests of safety that has not been carried into effect as required<sup>17</sup>,

the Agency may by written notice served<sup>18</sup> on the undertakers<sup>19</sup> require them, within 28 days after the date when the notice is served, to appoint a qualified civil engineer for these purposes, unless an appointment has already been made, and in either case to notify the Agency of the appointment; or, as the case may be, require them to carry the recommendation into effect within a specified time<sup>20</sup>.

Failure to comply with these provisions is an offence<sup>21</sup>.

1 As to the meanings of 'large raised reservoir' and 'reservoir' see PARA 278.

2 Ie whether before or after the commencement of the Reservoirs Act 1975: s 9(1). As to the commencement of the Act see PARA 277.

3 As to the meaning of 'qualified civil engineer' see PARA 281.

4 In his report the engineer must include any recommendations he sees fit to make as to measures to be taken in the interests of safety, and, subject to any reference of the matter to a referee (see PARA 296), the reservoir must not be used as such if any such recommendation has not been carried out: Reservoirs Act 1975 s 9(3). As to reports generally see PARA 298. For the prescribed form of the report see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 4(1), (2)(b), Sch 2.



5 As to the meaning of 'final certificate' see PARA 283.

6 Reservoirs Act 1975 s 9(1). As to the requisite notice to the relevant authority see s 21; and PARA 299. The engineer must be afforded all reasonable facilities by the undertakers for the effective performance of his functions: see s 21; and PARA 299.

7 Reservoirs Act 1975 s 9(2). This does not, however, apply where s 6(4) (see PARA 282) applies on a subsequent alteration: s 9(2).

8 As to the meaning of 'preliminary certificate' see PARA 283.

9 As to the construction engineer see PARA 282.

10 As to the meaning of 'construction' see PARA 282 note 3.

11 Reservoirs Act 1975 s 9(4). As to the powers and duties concerned see s 7; and PARA 283. Certificates under s 9(4) have effect for the purposes of the Reservoirs Act 1975 as if they were certificates of a construction engineer: s 9(4).

12 Reservoirs Act 1975 s 9(5).

13 Reservoirs Act 1975 s 9(6)(a). As to such alterations see s 6(1); and PARA 282.

14 Reservoirs Act 1975 s 9(6)(b).

15 As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

16 Reservoirs Act 1975 s 9(7)(a).

17 Reservoirs Act 1975 s 9(7)(b).

18 As to the service of documents see PARA 22. As to the meaning of 'written' see PARA 22 note 1.

19 As to the meaning of 'undertakers' see PARA 280 note 4.

20 Reservoirs Act 1975 s 9(7). Where the Agency proposes to serve such a notice requiring undertakers to carry a recommendation into effect, the authority must consult as to the time to be specified in the notice a civil engineer who is a qualified civil engineer for the purpose of inspecting and supervising the reservoir: see s 9(8). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

21 See PARA 300.

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### (iii) Inspection, Monitoring and Supervision

#### 286. Periodical inspection of large raised reservoirs.

The undertakers<sup>1</sup> must have any large raised reservoir<sup>2</sup> inspected from time to time by an independent<sup>3</sup> qualified civil engineer<sup>4</sup> (the 'inspecting engineer'), and obtain from him a report of the result of his inspection<sup>5</sup>. Unless it is at the time under the supervision of a construction engineer<sup>6</sup> or of an engineer acting as such<sup>7</sup>, a large raised reservoir must be so inspected:

- 550 (1) within two years at most from the date of any final certificate<sup>8</sup> for the reservoir given by the construction engineer responsible for the construction<sup>9</sup> of the reservoir or for any alteration to it<sup>10</sup>;
- 551 (2) as soon as practicable after the carrying out of any alterations to the reservoir which do not increase its capacity but are such as might affect its safety and which have not been designed and supervised by a qualified civil engineer<sup>11</sup>;
- 552 (3) at any time when the supervising engineer so recommends<sup>12</sup>;
- 553 (4) within ten years at most from the last inspection or within any lesser interval that may have been recommended in the report of the inspecting engineer on the last inspection<sup>13</sup>.

As soon as practicable after such an inspection, the inspecting engineer must make a report of the result of the inspection, including in it any recommendations he sees fit to make as to the time of the next inspection, or as to measures that should be taken in the interests of safety<sup>14</sup>. He must consider the matters, if any, that need to be watched by the supervising engineer during the period before the next inspection of the reservoir and must include in his report a note of any such matters<sup>15</sup>. He must also give a certificate stating that the report does, or does not, include recommendations as to measures to be taken in the interests of safety and, if it includes a recommendation as to the time of the next inspection, stating also the period within which he recommends the inspection should be made<sup>16</sup>.

Where an inspecting engineer includes in his report any recommendation as to measures to be taken in the interests of safety, then subject to any reference of the matter to a referee<sup>17</sup>, the undertakers must as soon as practicable carry the recommendation into effect under the supervision of a qualified civil engineer<sup>18</sup>; and that engineer must give a certificate, as soon as he is satisfied that it is so, that the recommendation has been carried into effect<sup>19</sup>.

Where it appears to the Environment Agency in its capacity as the enforcement authority<sup>20</sup>, in the case of any large raised reservoir:

- 554 (a) that an inspection and a report on it have not been made as so required<sup>21</sup>; or
- 555 (b) that the latest report of the inspecting engineer includes a recommendation as to measures to be taken in the interests of safety that has not been carried into effect as so required<sup>22</sup>,

the Agency may by written notice served<sup>23</sup> on the undertakers require them, within 28 days after the date when the notice is served, to appoint a qualified civil engineer to carry out an inspection, unless an appointment has already been made, and in either case to notify the

Agency of the appointment; or, as the case may be, require them to carry the recommendation into effect within a specified time<sup>24</sup>.

Failure to comply with these provisions is an offence<sup>25</sup>.

1 As to the meaning of 'undertakers' see PARA 280 note 4.

2 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

3 'Independent', when used of a civil engineer in relation to a reservoir, means: (1) that he is not in the employment of the undertakers otherwise than in a consultant capacity (Reservoirs Act 1975 s 10(9)(a)); and (2) that he was not the engineer responsible for the reservoir or any addition to it as construction engineer, nor is he connected with any such engineer as his partner, employer, employee or fellow employee in a civil engineering business (s 10(9)(b)). This reference to a construction engineer includes an engineer acting under s 8 (see PARA 284) or s 9 (see PARA 285): s 10(9). As to the construction engineer see PARA 282.

4 As to the meaning of 'qualified civil engineer' see PARA 281.

5 Reservoirs Act 1975 s 10(1). As to reports generally see PARA 298. For the prescribed form of report see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 4(1), (2)(c), Sch 2. Notice of any appointment must be given to the enforcement authority and the engineer must be afforded all reasonable facilities by the undertakers for the effective performance of his functions: see s 21; and PARA 299.

6 As to the requirement for such supervision see PARA 282.

7 ie under the Reservoirs Act 1975 s 8 (see PARA 284) or s 9 (see PARA 285).

8 As to the meaning of 'final certificate' see PARA 283.

9 As to the meaning of 'construction' see PARA 282 note 3.

10 Reservoirs Act 1975 s 10(2)(a).

11 Reservoirs Act 1975 s 10(2)(b).

12 Reservoirs Act 1975 s 10(2)(c). As to the supervising engineer see PARA 287.

13 Reservoirs Act 1975 s 10(2)(d).

14 Reservoirs Act 1975 s 10(3).

15 Reservoirs Act 1975 s 10(4).

16 Reservoirs Act 1975 s 10(5). As to certificates generally see PARA 298. For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(e), Sch 1.

17 As to such references see the Reservoirs Act 1975 s 19; and PARA 296.

18 Reservoirs Act 1975 s 10(6).

19 Reservoirs Act 1975 s 10(6). For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(f), Sch 1.

20 As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

21 Reservoirs Act 1975 s 10(7)(a).

22 Reservoirs Act 1975 s 10(7)(b).

23 As to the service of documents see PARA 22. As to the meaning of 'written' see PARA 22 note 1.

24 Reservoirs Act 1975 s 10(7). Where the Agency proposes to serve a notice requiring the undertakers to carry a recommendation into effect, it must consult, as to the time to be specified in the notice, a civil engineer who is a qualified civil engineer for the purpose of supervising the carrying into effect of the recommendation: s

10(8). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. In default the authority may itself cause the recommendation to be carried into effect: see PARA 293.

25 See PARA 300.

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## **287. Supervision of large raised reservoirs.**

At all times when a large raised reservoir<sup>1</sup> is not under the supervision of a construction engineer<sup>2</sup>, a qualified civil engineer<sup>3</sup> (the 'supervising engineer') must be employed to supervise the reservoir and keep the undertakers<sup>4</sup> advised of its behaviour in any respect that might affect safety, to watch the observance of and compliance with certain statutory provisions<sup>5</sup> and to draw the undertakers' attention to any breach of those provisions<sup>6</sup>. It is the supervising engineer's duty, so long as any matters are noted as matters that need to be watched by him in any annex to the final certificate<sup>7</sup> for the reservoir or in the latest report of an inspecting engineer<sup>8</sup>, to pay attention in particular to those matters and to give the undertakers, at least once a year, a written<sup>9</sup> statement of the action he has taken to do so<sup>10</sup>. He must also recommend to the undertakers that the reservoir be inspected<sup>11</sup> if at any time he thinks that such an inspection is called for<sup>12</sup>.

Where it appears to the Environment Agency, in its capacity as the enforcement authority<sup>13</sup>, that a large raised reservoir is not for the time being under the supervision either of a construction engineer or of a supervising engineer, the Agency may by written notice served<sup>14</sup> on the undertakers require them, within 28 days after the date the notice is served, to appoint a supervising engineer and to notify the Agency of the appointment or, if the reservoir is at that date under the supervision of a construction engineer or of a supervising engineer, to notify the Agency of that fact<sup>15</sup>.

Failure to comply with these provisions is an offence<sup>16</sup>.

1 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

2 As to the construction engineer see PARA 282. References in the Reservoirs Act 1975 s 12 to a construction engineer include references to an engineer acting under s 8 (see PARA 284) or s 9 (see PARA 285): s 12(5).

3 As to the meaning of 'qualified civil engineer' see PARA 281.

4 As to the meaning of 'undertakers' see PARA 280 note 4.

5 I.e the Reservoirs Act 1975 s 6(2)-(4) (see PARA 282), s 9(2) (see PARA 285) and s 11 (see PARA 289): s 12(1).

6 See the Reservoirs Act 1975 s 12(1). Notice of any appointment or the termination of such appointment must be given to the enforcement authority see s 21; and PARA 299.

7 As to the meaning of 'final certificate', and as to the annex thereto, see PARA 283.

8 As to the inspecting engineer and as to such reports see PARA 286.

9 As to the meaning of 'written' see PARA 22 note 1.

10 Reservoirs Act 1975 s 12(2).

11 I.e under the Reservoirs Act 1975 s 10: see PARA 286.

12 Reservoirs Act 1975 s 12(3).

13 As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

14 As to the service of documents see PARA 22.

15 Reservoirs Act 1975 s 12(4). If the undertakers do not comply with such a notice, the Agency may make the appointment: see PARA 293.

16 See PARA 300.

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## **288. Flood plans in relation to reservoirs.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may, by written notice served<sup>3</sup> on the undertakers<sup>4</sup> in relation to a large raised reservoir<sup>5</sup>, direct them to prepare a plan (a 'flood plan') setting out the action they would take in order to control or mitigate the effects of flooding likely to result from any escape of water from the reservoir<sup>6</sup>. Such a direction may in particular:

- 556 (1) specify the matters to be included in the flood plan<sup>7</sup>;
- 557 (2) require the flood plan to be prepared in accordance with such methods of technical or other analysis as may be specified by the Environment Agency<sup>8</sup>;
- 558 (3) require the flood plan, or any information about the matters contained in it, to be given to the Environment Agency at such time or times as may be directed by that Agency or by the Secretary of State or, as the case may be, the Welsh Ministers<sup>9</sup>;
- 559 (4) require a copy of the flood plan to be sent to such persons<sup>10</sup> as may be specified in the direction<sup>11</sup>;
- 560 (5) require publication of the flood plan, in such manner as may be specified in the direction, for the purpose of bringing the matters contained in the flood plan to the attention of persons likely to be interested<sup>12</sup>.

Before giving such a direction the Secretary of State or the Welsh Ministers must consult<sup>13</sup>: (a) the undertakers concerned<sup>14</sup>; (b) the Environment Agency<sup>15</sup>; (c) if the reservoir concerned is in England, the county council, metropolitan district council or London borough council in whose area the reservoir is situated<sup>16</sup>; (d) if the reservoir concerned is in Wales, the county council or county borough council in whose area the reservoir is situated<sup>17</sup>; (e) such persons appearing to the Secretary of State or the Welsh Ministers to represent the emergency services in the area where the reservoir is situated<sup>18</sup>; and (f) such other persons (if any) as the Secretary of State or, as the case may be, the Welsh Ministers consider appropriate<sup>19</sup>.

In relation to any reservoir (whether a large raised reservoir or not, as the case may be) the Secretary of State or, where appropriate, the Welsh Ministers may, by written notice served on the undertakers, require them not to publish, or not to publish except as specified in the notice a flood plan prepared by them pursuant to a notice given under the above provisions<sup>20</sup>, or any corresponding plan prepared by them other than pursuant to such a notice<sup>21</sup>. Such a notice may also require the undertakers to withhold access to any such plan from any person except as specified in the notice<sup>22</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Reservoirs Act 1975 s 12A (except s 12A(4): see note 6) and s 12B, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(1)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meaning of 'England' see PARA 19 note 8.

- 3 As to the service of documents see PARA 22. As to the meaning of 'written' see PARA 22 note 1.
- 4 As to the meaning of 'undertakers' see PARA 280 note 4.
- 5 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.
- 6 Reservoirs Act 1975 s 12A(1) (s 12A added by the Water Act 2003 s 77). The Reservoirs Act 1975 s 12A is subject to s 12B (see note 13 and the text to notes 20-22): s 12A(5) (as so added). If no direction has been given by the Welsh Ministers under s 12A(1) in relation to a reservoir in Wales and it appears to the Secretary of State that it is necessary or expedient in the interests of public safety in England that such a direction be given, he may give such a direction in relation to that reservoir: s 12A(4) (as so added). A flood plan may require strategic environmental assessment (see PARA 9) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11). Information as to reservoir flood plans is available on the Environment Agency website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).
- 7 Reservoirs Act 1975 s 12A(2)(a) (as added: see note 6).
- 8 Reservoirs Act 1975 s 12A(2)(b) (as added: see note 6). As to the Environment Agency see PARA 17.
- 9 Reservoirs Act 1975 s 12A(2)(c) (as added: see note 6).
- 10 As to the meaning of 'person' see PARA 13 note 29.
- 11 Reservoirs Act 1975 s 12A(2)(d) (as added: see note 6).
- 12 Reservoirs Act 1975 s 12A(2)(e) (as added: see note 6).
- 13 If it appears to the Secretary of State or the Welsh Ministers that in the interests of national security any person or class of persons referred to in any one or more of heads (a) to (e) in the text should not be consulted about a proposed direction, he or they may treat the Reservoirs Act 1975 s 12A(3) as not referring to that person or to that class of person: s 12B(1) (s 12B added by the Water Act 2003 s 78(2)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 14 Reservoirs Act 1975 s 12A(3)(a) (as added: see note 6).
- 15 Reservoirs Act 1975 s 12A(3)(b) (as added: see note 6).
- 16 Reservoirs Act 1975 s 12A(3)(c) (as added: see note 6). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq.
- 17 Reservoirs Act 1975 s 12A(3)(d) (as added: see note 6).
- 18 Reservoirs Act 1975 s 12A(3)(e) (as added: see note 6).
- 19 Reservoirs Act 1975 s 12A(3)(f) (as added: see note 6).
- 20 Reservoirs Act 1975 s 12B(2)(a) (as added: see note 13).
- 21 Reservoirs Act 1975 s 12B(2)(b) (as added: see note 13).
- 22 Reservoirs Act 1975 s 12B(2) (as added: see note 13).



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## 289. Monitoring of reservoirs.

For every large raised reservoir<sup>1</sup> the undertakers<sup>2</sup> must keep a record in the prescribed form<sup>3</sup> of:

- 561 (1) water levels and depth of water, including the flow of water over the waste weir or overflow<sup>4</sup>;
- 562 (2) leakages, settlements of walls or other works, and repairs<sup>5</sup>; and
- 563 (3) such other matters as may be prescribed<sup>6</sup>,

and must install and maintain the instruments needed to provide the information to be recorded<sup>7</sup>. The record to be kept for a reservoir under these provisions must give such information as may be prescribed of any of the matters to be included in the record<sup>8</sup> and must give it at such intervals and in such manner as may from time to time be required by any directions of the construction engineer<sup>9</sup> or inspecting engineer<sup>10</sup>.

Failure to comply with these provisions is an offence<sup>11</sup>.

1 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

2 As to the meaning of 'undertakers' see PARA 280 note 4.

3 As to the meaning of 'prescribed' see PARA 279 note 4. For the prescribed form of the record see the Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 5(1), Sch 2 (amended by SI 1985/548).

4 Reservoirs Act 1975 s 11(1)(a).

5 Reservoirs Act 1975 s 11(1)(b).

6 Reservoirs Act 1975 s 11(1)(c). The prescribed matters are: (1) persons having, in relation to the reservoir, a function provided for by the Reservoirs Act 1975; (2) certificates given thereunder or under the predecessor legislation; (3) reports made thereunder; (4) appointment of referees thereunder; (5) re-use, abandonment and discontinuance; (6) physical characteristics of direct and indirect catchment areas of the reservoir and method of filling from indirect catchment area; (7) standard average annual rainfall on direct and indirect catchment areas of the reservoir; (8) means of access to the reservoir; (9) category of the reservoir, its use, the certified level up to which it may store water, its surface water area, capacity and fetch; (10) structural character of the dam, reservoir wall or embankment, its date of completion, height, level of the top of the dam and reservoir wall or embankment and of the wave wall above Ordnance Datum; details of draw off works, bottom outlets, or any other means of lowering the water level together with their maximum rates of discharge; (11) spillway works; their type, location and level and the safety provisions made in connection with their operation; (12) measures taken in the interests of safety on the recommendation of a qualified civil engineer; and (13) unusual events which could affect the safety of the reservoir: Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, reg 5(2), Sch 3. As to the meaning of 'qualified civil engineer' see PARA 281.

7 Reservoirs Act 1975 s 11(1).

8 The information which is to be given about those matters which are specified in the Reservoirs Act 1975 s 11(1)(a), (b) is that set out in the Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985, SI 1985/177, Sch 2 Pts 1, 2; and the information which is to be given about the additional matters specified in Sch 3 is that set out in Sch 2 Pts 3-11 (amended by SI 1985/548): reg 5(3).

9 As to the construction engineer see PARA 282.

10 Reservoirs Act 1975 s 11(2). As to the inspecting engineer see PARA 286. As to access to environmental information see further PARAS 680-681.

11 See PARA 300.

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#### **(iv) Discontinuance or Abandonment**

##### **290. Discontinuance of large raised reservoirs.**

A large raised reservoir<sup>1</sup> may not be altered in order to render it incapable of holding more than 25,000 cubic metres of water above the natural level of adjoining land<sup>2</sup> unless a qualified civil engineer<sup>3</sup> is employed to design or approve and to supervise the alteration<sup>4</sup>. An engineer so employed must give a certificate<sup>5</sup>, as soon as he is satisfied that it is so, that the alteration has been completed and efficiently executed<sup>6</sup>. Where such a certificate is given, the Environment Agency in its capacity as the relevant authority<sup>7</sup> must, on receipt of the certificate or a copy of it, remove the reservoir from its register of large raised reservoirs<sup>8</sup>; but unless the alteration is made and a certificate given in accordance with these provisions, a reservoir that has been a large raised reservoir but is altered so as no longer to be capable of holding more than 25,000 cubic metres of water above the natural level of adjoining land nevertheless continues for the purposes of the Reservoirs Act 1975 to be a large raised reservoir<sup>9</sup>.

Failure to comply with these provisions is an offence<sup>10</sup>.

1 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

2 As to the meaning of 'land' see PARA 14 note 21.

3 As to the meaning of 'qualified civil engineer' see PARA 281.

4 Reservoirs Act 1975 s 13(1).

5 For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(g), Sch 1. As to certificates generally see PARA 298.

6 Reservoirs Act 1975 s 13(2).

7 As to the relevant authority see PARA 279 note 1. As to the Environment Agency see PARA 17.

8 As to the register see PARA 279.

9 Reservoirs Act 1975 s 13(3) (amended by the Water Act 2003 s 74(1)(b)).

10 See PARA 300.

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## **291. Abandonment of large raised reservoirs.**

Where the use of a large raised reservoir as a reservoir<sup>1</sup> is to be abandoned<sup>2</sup>, the undertakers<sup>3</sup> must obtain from a qualified civil engineer<sup>4</sup> a report<sup>5</sup> as to the measures, if any, that ought to be taken in the interests of safety to secure that the reservoir is incapable of filling accidentally or naturally with water above the natural level of adjoining land<sup>6</sup> or is only capable of doing so to an extent that does not constitute a risk<sup>7</sup>. The engineer must give with the report a certificate<sup>8</sup> stating that the report does, or does not, make recommendations for measures to be taken in the interests of safety<sup>9</sup>. Where the report of an engineer under these provisions makes any recommendation as to measures to be taken in the interests of safety then, subject to any reference of the matter to a referee<sup>10</sup>, the undertakers obtaining the report must, before the use of the reservoir as a reservoir is abandoned or as soon as practicable afterwards, carry the recommendation into effect<sup>11</sup>.

Where it appears to the Environment Agency in its capacity as the enforcement authority<sup>12</sup>, in the case of any large raised reservoir:

- 564 (1) that the use of the reservoir as a reservoir has been abandoned but that no such report has been obtained as required under these provisions<sup>13</sup>; or
- 565 (2) that such a report so obtained includes a recommendation as to measures to be taken in the interests of safety that has not been carried into effect as so required<sup>14</sup>,

the Agency may by written notice served<sup>15</sup> on the undertakers<sup>16</sup> require them, within 28 days after the date when the notice is served, to appoint an engineer to make such a report, unless an appointment has already been made, and in either case to notify the Agency of the appointment or, as the case may be, require them to carry the recommendation into effect within a specified time<sup>17</sup>.

Failure to comply with these provisions is an offence<sup>18</sup>.

1 As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

2 As to unsafe abandoned reservoirs see PARA 292. As to the re-use of abandoned reservoirs see PARA 285.

3 As to the meaning of 'undertakers' see PARA 280 note 4.

4 As to the meaning of 'qualified civil engineer' see PARA 281.

5 For the prescribed form of report see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 4(1), (2)(d), Sch 2. As to reports generally see PARA 298.

6 As to the meaning of 'land' see PARA 14 note 21.

7 Reservoirs Act 1975 s 14(1). As to notice to be given to the enforcement authority see s 21; and PARA 299. The engineer must be afforded all reasonable facilities by the undertakers for the effective performance of his functions: see s 21; and PARA 299.

8 For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(h), Sch 1. As to certificates generally see PARA 298.

9 Reservoirs Act 1975 s 14(3).

10 le under the Reservoirs Act 1975 s 19: see PARA 296.

11 Reservoirs Act 1975 s 14(2). If the recommendation involves any alteration of the reservoir, s 13 (see PARA 290) applies accordingly: s 14(2).

12 For these purposes, references to the enforcement authority have effect as at the time when the use of the reservoir as such is abandoned: Reservoirs Act 1975 s 14(4). As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

13 Reservoirs Act 1975 s 14(4)(a).

14 Reservoirs Act 1975 s 14(4)(b).

15 As to the service of documents see PARA 22. As to the meaning of 'written' see PARA 22 note 1.

16 For these purposes references to the undertakers have effect as at the time when the use of the reservoir as such is abandoned: Reservoirs Act 1975 s 14(4).

17 Reservoirs Act 1975 s 14(4). Where the Agency proposes to serve a notice requiring undertakers to carry a recommendation into effect, it must consult, as to the time to be specified in the notice, a civil engineer who must, if the recommendation involves any alteration of the reservoir, be a qualified civil engineer for the purpose of supervising the alteration under s 13 (see PARA 290): s 14(5). If the undertakers fail to comply with the notice, the Agency may itself make the appointment or cause the recommendation to be carried into effect: see PARA 293. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

18 See PARA 300.

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## **(v) Additional Enforcement Powers**

### **292. Emergency measures.**

Where it appears to the Environment Agency in its capacity as the enforcement authority<sup>1</sup>, in the case of any large raised reservoir<sup>2</sup>, that the reservoir is unsafe and that immediate action is needed to protect persons<sup>3</sup> or property against an escape of water from the reservoir, it may take at the reservoir such measures as it considers proper to remove or reduce the risk or to mitigate the effects of an escape<sup>4</sup>. Similarly, where it appears to Agency, in the case of any large raised reservoir, that the use of the reservoir as a reservoir has been abandoned<sup>5</sup>, but that there may from time to time be an undue accumulation of water there and immediate action is needed to protect persons or property against an escape of water, it may take there such measures as it considers proper to remove or reduce the risk or to mitigate the effects of an escape<sup>6</sup>. The Agency, in proposing to exercise these powers, must appoint a qualified civil engineer<sup>7</sup> to make recommendations as to the measures to be taken in the exercise of those powers, and any measures so taken must be carried into effect under the supervision of such an engineer appointed by the Agency<sup>8</sup>.

The Agency, in exercising or proposing to exercise these powers at a reservoir, must, as early as practicable, serve a notice<sup>9</sup> on the undertakers giving full information of the measures that are being or are to be taken in the exercise of those powers<sup>10</sup>. If, however, the authority is unable after reasonable inquiry to ascertain the name or address of the undertakers, it is not required to serve any notice on them after work is begun at the reservoir<sup>11</sup>.

Where the Agency exercises these powers, the undertakers must pay to the Agency the amount of the expenses reasonably incurred by it in the exercise of those powers<sup>12</sup>.

<sup>1</sup> As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

<sup>2</sup> As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

<sup>3</sup> As to the meaning of 'person' see PARA 13 note 29.

<sup>4</sup> Reservoirs Act 1975 s 16(1). As to liability for escapes of water see PARAS 301, 662 et seq.

<sup>5</sup> As to the abandonment of reservoirs see PARA 291.

<sup>6</sup> Reservoirs Act 1975 s 16(2). For purposes of s 16(2) references in s 16, and in any other provision of the Reservoirs Act 1975 as it operates in relation thereto, to the enforcement authority or to the undertakers have effect as at the time when the use of the reservoir as such is abandoned: s 16(7). As to the meaning of 'undertakers' see PARA 280 note 4.

<sup>7</sup> As to the meaning of 'qualified civil engineer' see PARA 281.

<sup>8</sup> Reservoirs Act 1975 s 16(3). The engineer must be afforded all reasonable facilities by the undertakers for the effective performance of his functions: see s 21; and PARA 299.

<sup>9</sup> If the notice cannot be given before the work is begun, the Agency must notify the undertakers as early as practicable of the beginning of the work: Reservoirs Act 1975 s 16(4). As to the service of documents see PARA 22.

<sup>10</sup> Reservoirs Act 1975 s 16(4).

11 Reservoirs Act 1975 s 16(5). In relation to notices served before work is begun, s 15(4) (see PARA 293) applies for the purposes of s 16 as it applies for the purposes of s 15: s 16(5).

12 Reservoirs Act 1975 s 16(6). Compensation for damage to or disturbance in the enjoyment of land on the exercise of a right of entry is treated as an expense for this purpose: see s 18(3); and PARA 295.

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### 293. Default powers of Environment Agency.

Where undertakers<sup>1</sup> are required by a notice from the Environment Agency in its capacity as the enforcement authority<sup>2</sup> to appoint an engineer for any purpose of the Reservoirs Act 1975, and the undertakers fail to make the appointment, the Agency may appoint an engineer for that purpose who must be a person eligible for appointment by the undertakers<sup>3</sup>. An appointment so made is of no effect if before it is made the undertakers have appointed an eligible engineer; and any such appointment of a supervising engineer<sup>4</sup> terminates when an appointment of a supervising engineer duly made by the undertakers takes effect<sup>5</sup>.

Where undertakers are required by a notice from the Agency<sup>6</sup> to carry into effect any recommendation as to measures to be taken in the interests of safety, and the undertakers fail to comply with that requirement, the Agency may cause the recommendation to be carried into effect under the supervision of a qualified civil engineer<sup>7</sup> appointed by the Agency, who must give a certificate<sup>8</sup>, as soon as he is satisfied that it is so, that the recommendation has been carried into effect<sup>9</sup>.

Where the Agency makes any such appointment<sup>10</sup> or exercises any powers so conferred<sup>11</sup>, the undertakers must pay to the Agency the amount of the expenses reasonably incurred by reason of the appointment or, as the case may be, in the exercise of those powers<sup>12</sup>.

1 As to the meaning of 'undertakers' see PARA 280 note 4.

2 I.e. notice under the Reservoirs Act 1975 s 8 (see PARA 284), s 9 (see PARA 285), s 10 (see PARA 286), s 12 (see PARA 287) or s 14 (see PARA 291). Without prejudice to the Environment Act 1995 s 123 as it is applied by the Reservoirs Act 1975 s 22A (see PARA 22), where the Agency is unable after reasonable inquiry to ascertain the name or address of the undertakers for any large raised reservoir, then for the purposes of s 15 a notice relating to the reservoir is deemed to have been duly served on the undertakers if it has been left in the hands of a person who is or appears to be resident or employed at the reservoir or if it has been left conspicuously affixed to some building or object at the reservoir: s 15(4) (amended by the Water Act 2003 s 76(1)). As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278. As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

3 Reservoirs Act 1975 s 15(1). As to eligibility for appointment see PARA 281. Except as otherwise provided, the provisions of the Reservoirs Act 1975 apply in relation to any person so appointed and to anything done by him as if he had been duly appointed by the undertakers: s 15(1).

4 As to the supervising engineer see PARA 287.

5 Reservoirs Act 1975 s 15(3).

6 I.e. notice under the Reservoirs Act 1975 s 8 (see PARA 284), s 9 (see PARA 285), s 10 (see PARA 286) or s 14 (see PARA 291). As to when the notice is deemed to be served see note 2.

7 As to the meaning of 'qualified civil engineer' see PARA 281.

8 For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(i), Sch 1. As to certificates generally see PARA 298.

9 Reservoirs Act 1975 s 15(2) (amended by the Water Act 2003 s 75(1), (3)). The engineer must be afforded all reasonable facilities by the undertakers for the effective performance of his functions: see the Reservoirs Act 1975 s 21; and PARA 299.

10 I.e. under the Reservoirs Act 1975 s 15(1): see the text to notes 1-3.



- 11 le by the Reservoirs Act 1975 s 15(2): see the text to notes 6-9.
- 12 Reservoirs Act 1975 s 15(5).

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## **294. Powers of entry.**

A person duly authorised in writing<sup>1</sup> by the Environment Agency in its capacity as the enforcement authority<sup>2</sup>, may at any reasonable time enter upon the land on which a reservoir<sup>3</sup> is situated for the purpose of carrying out<sup>4</sup>:

- 566 (1) any survey or other operation needed to determine whether the reservoir is a large raised reservoir or is being constructed or altered so as to be one, whether, being a large raised reservoir, it is being altered so as to increase its capacity, or whether it is or is not in use as a reservoir<sup>5</sup>;
- 567 (2) any survey or other operation needed to determine whether any recommendation as to measures to be taken in the interests of safety has been carried into effect<sup>6</sup> or what period should be specified in a notice<sup>7</sup> requiring the undertakers<sup>8</sup> to carry such a recommendation into effect<sup>9</sup>;
- 568 (3) any inspection of the reservoir that he has been appointed<sup>10</sup> to carry out, or any survey or other operation needed for the purpose of a report<sup>11</sup> that he has been appointed to make<sup>12</sup>;
- 569 (4) any survey or other operation needed to determine whether any or what emergency measures<sup>13</sup> should be taken, or for any purpose connected with the carrying into effect of any such measures<sup>14</sup>,

and also for any purpose connected with the carrying into effect under reserve powers<sup>15</sup> of a recommendation as to measures to be taken in the interests of safety<sup>16</sup>. He must, if so required, produce evidence of his authority before so entering and may take with him on to the land such other persons and such equipment as may be necessary<sup>17</sup>. Except for a purpose within head (4) above, a person may not demand admission as of right to occupied land unless at least seven days' written notice of the intended entry<sup>18</sup> has been given to the occupier or the entry is authorised by warrant<sup>19</sup>.

Any person who wilfully obstructs a person entitled to enter on land by virtue of these provisions commits an offence<sup>20</sup>.

1 As to the meaning of 'writing' see PARA 22 note 1.

2 As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

3 Where the use of a large raised reservoir is abandoned, the Reservoirs Act 1975 s 17(1), so far as material, continues to apply in relation to the site of the reservoir as land on which a reservoir is situated; and for this purpose references in s 17(1), and in any other provision of the Act as it operates in relation thereto, to the enforcement authority or to the undertakers have effect as at the time when the use of the reservoir as such is abandoned: s 17(3). As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278. As to the meaning of 'land' see PARA 14 note 21.

4 As to the exercise of these powers of entry in relation to land in which there is a Crown or Duchy interest see PARA 20. As to compensation for damage or disturbance see PARA 295. As to powers of entry on land exercisable by water undertakers and the Environment Agency see generally PARA 476 et seq.

5 Reservoirs Act 1975 s 17(1)(a).

6 le as required by the Reservoirs Act 1975 s 8 (see PARA 284), s 9 (see PARA 285), s 10 (see PARA 286) or s 14 (see PARA 291).

7 le under the Reservoirs Act 1975 s 8 (see PARA 284), s 9 (see PARA 285), s 10 (see PARA 286) or s 14 (see PARA 291).

8 As to the meaning of 'undertakers' see PARA 280 note 4.

9 Reservoirs Act 1975 s 17(1)(b) (amended by the Water Act 2003 s 75(1), (4)).

10 le under the Reservoirs Act 1975 s 15(1): see PARA 293.

11 le a report under the Reservoirs Act 1975 s 15(1): see PARA 293.

12 Reservoirs Act 1975 s 17(1)(c).

13 le measures under the Reservoirs Act 1975 s 16: see PARA 292.

14 Reservoirs Act 1975 s 17(1)(e). In this case the power to enter upon the land on which a reservoir is situated extends also to any neighbouring land: s 17(2). See also *Dwr Cymon Cyfyngedig v Williams* (1991) Times, 9 October, DC.

15 le under the Reservoirs Act 1975 s 15(2): see PARA 293.

16 Reservoirs Act 1975 s 17(1)(d).

17 Reservoirs Act 1975 s 17(7).

18 The notice must specify the purpose for which entry is required and must indicate so far as practicable the nature of any works to be executed on the land: Reservoirs Act 1975 s 17(4).

19 Reservoirs Act 1975 s 17(4). If it is shown to the satisfaction of a justice of the peace on sworn information in writing that: (1) admission to any land on which any person is entitled to enter under s 17 has been refused, or that a refusal is apprehended, or that the occupier is temporarily absent (s 17(5)(a)); and (2) there is reasonable ground for entry on to the land for the purpose for which entry is required (s 17(5)(b)), the justice may by warrant under his hand authorise that person to enter on the land, if need be by force; but such a warrant may not be issued on the ground that entry has been refused or that a refusal of entry is apprehended unless the justice is satisfied that notice in writing of the intention to apply for a warrant has been given to the occupier (s 17(5)). The warrant continues in force until the purpose of the entry has been satisfied: see s 17(6). As to justices of the peace see **MAGISTRATES** vol 29(2) (Reissue) PARA 501 et seq.

20 See the Reservoirs Act 1975 s 17(8). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 17(8) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 141 note 18.

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## **295. Compensation to third parties for damage and disturbance.**

Where, in the exercise in relation to any reservoir<sup>1</sup> of powers of entry upon land<sup>2</sup>, any land on which entry is made and which is not in the occupation of the undertakers<sup>3</sup> is damaged<sup>4</sup>, or any person<sup>5</sup> is disturbed in his enjoyment of any such land<sup>6</sup>, any person interested in the land which is damaged or whose enjoyment of the land is disturbed is entitled to compensation from the Environment Agency in its capacity as the enforcement authority<sup>7</sup> in respect of the damage or disturbance<sup>8</sup>. Any dispute as to a right to such compensation, or as to its amount, must be determined by the Lands Tribunal<sup>9</sup>.

1 As to the meaning of 'reservoir' see PARA 278.

2 The powers conferred by the Reservoirs Act 1975 s 17: see PARA 294. As to the meaning of 'land' see PARA 14 note 21.

3 As to the meaning of 'undertakers' see PARA 280 note 4.

4 Reservoirs Act 1975 s 18(1)(a).

5 As to the meaning of 'person' see PARA 13 note 29.

6 Reservoirs Act 1975 s 18(1)(b).

7 As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

8 Reservoirs Act 1975 s 18(1). Compensation payable by an enforcement authority is treated as an expense incurred in the exercise of the authority's powers under s 16 (see PARA 292): s 18(3). Interest is payable on the compensation payable, in the case of a claim under s 18(1)(a) (see the text to notes 3-4) from the date of entry, and in the case of a claim under s 18(1)(b) (see the text to notes 5-6) from the date of the claim for disturbance: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I. Payments on account of compensation or interest may be made: see s 80(2), (3).

9 Reservoirs Act 1975 s 18(2). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

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## **(vi) Reference of Disputed Recommendations**

### **296. Reference of disputed recommendations to referee.**

Where:

- 570 (1) an inspecting engineer<sup>1</sup> includes in his report<sup>2</sup> recommendations to be taken in the interests of safety or as to the time of the next inspection<sup>3</sup>; or
- 571 (2) an engineer acting under certain powers<sup>4</sup> includes in his report recommendations to be taken in the interests of safety<sup>5</sup>,

the undertakers<sup>6</sup> may, if aggrieved by any recommendation, refer their complaint to a referee<sup>7</sup>. The referee must be an independent qualified civil engineer<sup>8</sup> appointed by agreement between the undertakers and the engineer making the recommendation complained of or, in default of their agreement, must be a person appointed by the Secretary of State<sup>9</sup> or, in relation to Wales, by the Welsh Ministers<sup>10</sup>.

The Secretary of State or in relation to Wales, the Welsh Ministers may make rules by statutory instrument as to the time within which a referee may be appointed by agreement, as to the time within which and the manner in which a request for the appointment of a referee may be made to the Secretary of State or the Welsh Ministers, as to the procedure before the referee, and as to the costs of the proceedings before and investigation by the referee, including his remuneration<sup>11</sup>. Those costs and that remuneration must, however, be paid by the undertakers<sup>12</sup>.

A referee may be appointed by agreement between the undertakers and the engineer making the recommendation complained of within 40 days after the day on which the undertakers receive the report containing the recommendation or a copy of it<sup>13</sup>. In default of agreement, a request may be made to the Secretary of State or, where appropriate, the Welsh Ministers to appoint a referee within 50 days after the day on which the undertakers receive that report or copy<sup>14</sup>.

1 As to the inspecting engineer see PARA 286.

2 As to such reports see the Reservoirs Act 1975 s 10: see PARA 286.

3 Reservoirs Act 1975 s 19(1)(a).

4 ie acting under the Reservoirs Act 1975 s 8 (see PARA 284), s 9 (see PARA 285) or s 14 (see PARA 291).

5 Reservoirs Act 1975 s 19(1)(b).

6 As to the meaning of 'undertakers' see PARA 280 note 4.

7 Reservoirs Act 1975 s 19(1).

8 As to the meaning of 'qualified civil engineer' see PARA 281. As to the meaning of 'independent', in relation to such an engineer, see PARA 286 note 3.

9 As to the Secretary of State see PARA 15 note 1.

10 Reservoirs Act 1975 s 19(2). The functions of the Secretary of State under the Reservoirs Act 1975 s 19 and the Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 3, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

11 Reservoirs Act 1975 s 19(5). The Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, have been made: see the text to notes 12-14 and PARA 297.

12 See the Reservoirs Act 1975 s 19(5); and the Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 4.

13 Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 2(1).

14 Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 2(2). Such a request must be made in writing and must be sent, together with a copy of the report and a statement indicating the recommendation in respect of which the appointment is requested, to the Secretary of State for the Environment, Transport and the Regions if the reservoir, or the greater part of it, is in England, or to the Welsh Ministers if the reservoir, or the greater part of it, is in Wales: see r 2(3) (amended by SI 1997/2971). As to the meaning of 'writing' see PARA 22 note 1. As to the meaning of 'reservoir' see PARA 278.

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## 297. Referee's investigation and decision.

Upon his appointment<sup>1</sup>, a referee must invite the undertakers<sup>2</sup> to send him, within 28 days after the date of his appointment, a written<sup>3</sup> statement of the grounds of their complaint, a copy of which he must send to the engineer who made the recommendation<sup>4</sup> with a request for his written observations within 28 days after the date of that request<sup>5</sup>. The referee must refer the written observations of the engineer to the undertakers for comment and may, if he wishes, arrange to meet them or their representatives to hear any observations either party may wish to make orally<sup>6</sup>. At any time during his investigation of the complaint, the referee may make an inspection of the reservoir<sup>7</sup> with or without the undertakers and the engineer or their representatives<sup>8</sup>. Subject to these provisions, the referee may exercise his own discretion as to the manner in which he conducts his investigation<sup>9</sup>.

After concluding his investigation of the complaint, the referee must communicate his decision on the report, and the reasons for it, to the undertakers and the engineer as soon as practicable<sup>10</sup>. After investigating the complaint he has power to make such modifications as he thinks fit in the report containing the recommendation complained of, and the report has effect<sup>11</sup> accordingly<sup>12</sup>. When he gives his decision on a report, he must also give a certificate<sup>13</sup> stating that the decision does or does not modify the report and, if necessary in consequence of any modification, revising accordingly any certificate given with reference to the report by the engineer who made it<sup>14</sup>.

1 As to the appointment of a referee see PARA 296.

2 As to the meaning of 'undertakers' see PARA 280 note 4.

3 As to the meaning of 'written' see PARA 22 note 1.

4 As to the recommendations in respect of which a complaint may be made see PARA 296.

5 Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 3(1).

6 Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 3(2).

7 As to the meaning of 'reservoir' see PARA 278.

8 Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 3(3).

9 See the Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 3(4).

10 Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, SI 1986/467, r 3(5).

11 Ie for the purposes of the Reservoirs Act 1975.

12 Reservoirs Act 1975 s 19(3).

13 For the prescribed form of certificate see the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 3(1), (2)(j), Sch 1. As to certificates generally see PARA 298.

14 Reservoirs Act 1975 s 19(4).

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## **(vii) Documents and Information; in general**

### **298. Engineers' reports, certificates and other documents.**

Any engineer's report or certificate<sup>1</sup> must be in the prescribed<sup>2</sup> form<sup>3</sup> and, unless the engineer in question is appointed to act by the Environment Agency in its capacity as the enforcement authority<sup>4</sup>, must be delivered to and kept by the undertakers<sup>5</sup>. Where the engineer is appointed to act by the Agency, the report or certificate must be delivered to the Agency but a copy of it must be sent by the engineer at the same time to the undertakers and must be kept by them<sup>6</sup>.

Where any of the specified documents is delivered by the engineer in question to the undertakers, he must within 28 days after he delivers it to the undertakers send a copy of it to the Agency in its capacity as the enforcement authority<sup>7</sup>. The specified documents are:

- 572 (1) any certificate of an engineer acting for any purpose of the Reservoirs Act 1975<sup>8</sup>;
- 573 (2) any report made by an inspecting engineer<sup>9</sup> or an engineer acting for the purposes of the provisions relating to abandoned reservoirs<sup>10</sup> and stated in his certificate to include a recommendation as to measures to be taken in the interests of safety, and any report made by an engineer acting for the purposes of the Agency's powers on the undertakers' non-compliance with construction or enlargement requirements<sup>11</sup> or for purposes connected with the re-use<sup>12</sup> of abandoned reservoirs<sup>13</sup>;
- 574 (3) any decision of a referee modifying any such report as is mentioned in head (2) above<sup>14</sup>;
- 575 (4) any written explanation given by a construction engineer<sup>15</sup> to the undertakers of his reasons for deferring the issue of his final certificate<sup>16</sup>;
- 576 (5) any advice given by a supervising engineer<sup>17</sup> to the undertakers which either recommends them to have the reservoir inspected<sup>18</sup> or to take any other action or which draws their attention to a breach of any specified<sup>19</sup> statutory provision<sup>20</sup>.

Where the Agency receives a certificate or copy certificate of an engineer acting for the purposes of the provisions as to the discontinuance of reservoirs<sup>21</sup> and the reservoir is situated partly in the area of another relevant authority<sup>22</sup> which is not the undertaker, the Agency must send a copy of the certificate to that other relevant authority<sup>23</sup>.

1    ie including a certificate of a referee under the Reservoirs Act 1975 s 19: see PARAS 296-297.

2    As to the meaning of 'prescribed' see PARA 279 note 4.

3    Reservoirs Act 1975 s 20(1). The prescribed forms of reports and certificates are those set out in the Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, to which reference is made in the appropriate paragraphs of this work.

4    As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

5    Reservoirs Act 1975 s 20(2). As to the meaning of 'undertakers' see PARA 280 note 4.



- 6 See the Reservoirs Act 1975 s 20(3).
- 7 Reservoirs Act 1975 s 20(4).
- 8 Reservoirs Act 1975 s 20(4)(a).
- 9 As to the inspecting engineer see PARA 286.
- 10 He acting for the purposes of the Reservoirs Act 1975 s 14: see PARA 291.
- 11 He acting for the purposes of the Reservoirs Act 1975 s 8: see PARA 284.
- 12 He acting for the purposes of the Reservoirs Act 1975 s 9: see PARA 285.
- 13 Reservoirs Act 1975 s 20(4)(b).
- 14 Reservoirs Act 1975 s 20(4)(c). As to decisions by referees see PARA 297.
- 15 As to the construction engineer see PARA 282.
- 16 Reservoirs Act 1975 s 20(4)(d). As to such an explanation see s 7(4); and PARA 283. As to the meaning of 'final certificate' see PARA 283.
- 17 As to the supervising engineer see PARA 287.
- 18 He under the Reservoirs Act 1975 s 10: see PARA 286.
- 19 He a breach of any of the Reservoirs Act 1975 s 6(2)-(4) (see PARA 282), s 9(2) (see PARA 285) or s 11 (see PARA 289).
- 20 Reservoirs Act 1975 s 20(4)(e).
- 21 He acting for the purposes of the Reservoirs Act 1975 s 13: see PARA 290.
- 22 As to the relevant authority see PARA 279 note 1.
- 23 Reservoirs Act 1975 s 20(5) (amended by the Water Act 2003 s 74(1)(b)).

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## **299. Information to be furnished by undertakers.**

Where undertakers<sup>1</sup> intend: (1) to construct a large raised reservoir<sup>2</sup>, or to alter it so as to increase its capacity<sup>3</sup>; or (2) to bring such a reservoir back into use as a reservoir after that use has been abandoned<sup>4</sup>, they must, if they are not the relevant authority<sup>5</sup>, serve notice of their intention<sup>6</sup>, giving the prescribed information<sup>7</sup>, on the Environment Agency<sup>8</sup> in its capacity as the relevant authority in whose area the reservoir will be or, if it will extend into the areas of more than one relevant authority, on each of those authorities<sup>9</sup>.

Undertakers must notify the Agency in its capacity as the enforcement authority<sup>10</sup> in writing<sup>11</sup> within 28 days:

- 577 (a) where the use of a large raised reservoir as a reservoir is abandoned<sup>12</sup>;
- 578 (b) whenever a person is appointed to be, or ceases to be, supervising engineer<sup>13</sup> for a large raised reservoir<sup>14</sup>;
- 579 (c) of the appointment of an inspecting engineer<sup>15</sup> for such a reservoir<sup>16</sup>.

The supervising engineer, every inspecting engineer for a large raised reservoir, and any civil engineer employed by the undertakers or appointed by the Agency in its capacity as the enforcement authority for certain statutory purposes<sup>17</sup> must be afforded all reasonable facilities by the undertakers for the effective performance of his functions<sup>18</sup>. The undertakers must furnish him with:

- 580 (i) the statutory record<sup>19</sup> required to be kept for the reservoir<sup>20</sup>;
- 581 (ii) copies of any statutory certificates relating to it, with any annexes<sup>21</sup>;
- 582 (iii) copies of the reports made by inspecting engineers on any statutory inspection of the reservoir<sup>22</sup>; and
- 583 (iv) such further information and particulars as he may require<sup>23</sup>.

Failure to comply with these provisions is an offence<sup>24</sup>.

1 As to the meaning of 'undertakers' see PARA 280 note 4.

2 Ie whether as a new reservoir or by altering an existing reservoir that is not a large raised reservoir: Reservoirs Act 1975 s 21(1)(a). As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

3 Reservoirs Act 1975 s 21(1)(a). As to construction generally see PARA 282.

4 Reservoirs Act 1975 s 21(1)(b). As to the re-use of abandoned reservoirs generally see PARA 285.

5 As to the relevant authority see PARA 279 note 1.

6 The notice must be served not less than 28 days before any work on the construction or alteration of the reservoir is begun or, if the case is within head (2) in the text and the reservoir is to be brought back into use without alteration, not less than 28 days before it is brought back into use: Reservoirs Act 1975 s 21(1). As to the service of documents see PARA 22.

7 As to the meaning of 'prescribed' see PARA 279 note 4. The prescribed information is: (1) the name and address of the undertakers serving the notice; (2) the name and situation of the reservoir; (3) the national grid

reference of the approximate centre of the reservoir; (4) if the reservoir extends into the area of more than one local authority, the name of each of those authorities; (5) whether the undertakers intend to construct a new large raised reservoir, to alter an existing reservoir which is not such a reservoir so that it becomes one, to alter such a reservoir so as to increase its capacity or to bring such a reservoir back into use after that use has been abandoned; (6) the date when it is intended that construction or alteration will commence or the date when it is intended the reservoir will be brought back into use, as the case may be; (7) the name and address of the construction engineer or, in the case of re-use, the engineer appointed for the purposes of the Reservoirs Act 1975 s 9 (see PARA 285); and (8) the following information about the reservoir as it will be when constructed, altered or brought back into use as proposed, ie (a) category, whether impounding or non-impounding; (b) date(s) or approximate date(s) of completion of the dam(s); (c) construction of the dam(s) whether of earth, rockfill, gravity, buttress or by other means; (d) maximum height of the dam(s) in metres measured from the lowest natural ground level adjacent to it, to the top of the dam, excluding the height of the wave wall; (e) the height of the dam(s) in metres measured from the lowest natural ground level adjacent to it to top water level; (f) capacity in cubic metres measured from the lowest natural ground level adjacent to it to top water level; (g) the water surface area at top water level in square metres or square kilometres: Reservoirs Act 1975 (Certificates, Reports and Prescribed Information) Regulations 1986, SI 1986/468, reg 5, Sch 3. For these purposes, 'lowest natural ground level' means, where there is a watercourse below the dam, the lowest bed level of that watercourse; and 'top water level' means, in relation to a reservoir with a fixed overflow sill, the lowest crest level of that sill, and for a reservoir the overflow from which is controlled wholly or partly by movable gates, syphons or otherwise, the maximum level to which water may be stored exclusive of any provision for flood storage: Sch 3.

8 As to the Environment Agency see PARA 17.

9 Reservoirs Act 1975 s 21(1) (amended by the Water Act 2003 s 74(1)(b)). If the undertaker is a relevant authority and the reservoir or any part of it will be in the area of another relevant authority or authorities, notice must be served on that other or others: s 21(1).

10 As to the meaning of 'enforcement authority' see PARA 280 note 6.

11 As to the meaning of 'writing' see PARA 22 note 1.

12 See the Reservoirs Act 1975 s 21(2). As to abandonment of reservoirs see PARA 291.

13 As to the supervising engineer see PARA 287.

14 See the Reservoirs Act 1975 s 21(3). The notice of an appointment must include the date on which the appointment will take effect, if it has not done so: s 21(3).

15 As to the inspecting engineer see PARA 286.

16 See the Reservoirs Act 1975 s 21(4).

17 Ie employed by the undertakers for the purposes of the Reservoirs Act 1975 s 8 (see PARA 284), s 9 (see PARA 285), s 10(6) (see PARA 286) or s 14 (see PARA 291) or appointed by an enforcement authority under s 15(2) (see PARA 293) or s 16(3) (see PARA 292).

18 Reservoirs Act 1975 s 21(5).

19 For the purposes of heads (i)-(iv) in the text, 'statutory' refers to matters provided for by the Reservoirs Act 1975 or previously provided for by the Reservoirs (Safety Provisions) Act 1930 (repealed): Reservoirs Act 1975 s 21(6).

20 Reservoirs Act 1975 s 21(5)(a). As to this record see s 11(1); and PARA 289. The equivalent provision under the Reservoirs (Safety Provisions) Act 1930 was s 3 (repealed).

21 Reservoirs Act 1975 s 21(5)(b). As to these certificates see the Reservoirs Act 1975 ss 6-10, 13, 14; and PARAS 282-286, 290, 291. See also the Reservoirs (Safety Provisions) Act 1930 s 1 (repealed).

22 Reservoirs Act 1975 s 21(5)(c). As to these reports see the Reservoirs Act 1975 s 10; and PARA 286. See also the Reservoirs (Safety Provisions) Act 1930 s 2 (repealed).

23 Reservoirs Act 1975 s 21(5)(d).

24 See PARA 300.

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## **(viii) Criminal and Civil Liability**

### **300. Criminal liability of undertakers and their employees.**

If:

- 584 (1) by the wilful default of the undertakers<sup>1</sup> any specified provision<sup>2</sup> is not observed or complied with in relation to a large raised reservoir<sup>3</sup>; or
- 585 (2) the undertakers fail to comply with any of certain notices<sup>4</sup> from the Environment Agency in its capacity as the enforcement authority<sup>5</sup>; or
- 586 (3) the undertakers fail to comply with a direction<sup>6</sup> to prepare a flood plan<sup>7</sup>;

then unless there is reasonable excuse for the default or failure, the undertakers are guilty of an offence<sup>8</sup>.

If the undertakers fail to comply with a notice restricting publication of, or access to, a flood plan in the interests of national security<sup>9</sup>, they are guilty of an offence<sup>10</sup>.

If, in the case of any large raised reservoir:

- 587 (a) the undertakers fail without reasonable excuse to give the Agency in its capacity as the enforcement authority in due time any notice which they are required to give<sup>11</sup>; or
- 588 (b) the undertakers or persons<sup>12</sup> employed by them without reasonable excuse refuse, or knowingly fail, to afford to any person the required facilities<sup>13</sup> or the required information and particulars<sup>14</sup>,

the undertakers are guilty of an offence<sup>15</sup>.

If a person makes use of any document for certain statutory purposes<sup>16</sup> or furnishes any information or particulars for those purposes which he knows to be false in a material respect, or recklessly makes use of any document or furnishes any information or particulars which is or are false in a material respect, he is guilty of an offence<sup>17</sup>.

Proceedings for any of these offences may be instituted only by the Agency, or the Secretary of State<sup>18</sup> or, in relation to Wales, the Welsh Ministers<sup>19</sup>, or by or with the consent of the Director of Public Prosecutions<sup>20</sup>. Where any such offence committed by a body corporate is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and is liable to be proceeded against and punished accordingly<sup>21</sup>.

It is also an offence to obstruct a person exercising a statutory power of entry on land<sup>22</sup>.

1 As to the meaning of 'undertakers' see PARA 280 note 4.

2 Ie any provision of the Reservoirs Act 1975 s 6 (construction or enlargement: see PARA 282), s 8(3) (non-compliance with construction or enlargement requirements: see PARA 284), s 9(1), (2) or (3) (re-use of

abandoned reservoir: see PARA 285), s 10(1) or (6) (inspection: see PARA 286), s 11 (monitoring: see PARA 289), s 12(1) (supervision: see PARA 287), s 13 (discontinuance: see PARA 290), or s 14(1) or (2) (abandonment: see PARA 291).

3 Reservoirs Act 1975 s 22(1)(a). As to the meanings of 'reservoir' and 'large raised reservoir' see PARA 278.

4 Ie a notice under any of the Reservoirs Act 1975 ss 8-10 (see PARAS 284-286), s 12 (see PARA 287) or s 14 (see PARA 291).

5 Reservoirs Act 1975 s 22(1)(b). As to the meaning of 'enforcement authority' see PARA 280 note 6. As to the Environment Agency see PARA 17.

6 Ie a direction under the Reservoirs Act 1975 s 12A: see PARA 288.

7 Reservoirs Act 1975 s 22(1)(c) (added by the Water Act 2003 s 79(1), (2)).

8 Reservoirs Act 1975 s 22(1). The penalty for such an offence is, on conviction on indictment, a fine; or on summary conviction a fine not exceeding the prescribed sum: s 22(1) (amended by virtue of the Magistrates' Courts 1980 s 32(2)). As to the 'prescribed sum' see PARA 169 note 20.

9 Ie a notice under the Reservoirs Act 1975 s 12B: see PARA 288.

10 Reservoirs Act 1975 s 22(1A) (added by the Water Act 2003 s 79(1), (3)). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum; or on conviction on indictment, imprisonment for a term not exceeding two years or a fine, or both: Reservoirs Act 1975 s 22(1A) (as so added). As to the statutory maximum see PARA 169 note 20.

11 Reservoirs Act 1975 s 22(2).

12 As to the meaning of 'person' see PARA 13 note 29.

13 Ie the facilities required by the Reservoirs Act 1975 s 21(5): see PARA 299.

14 Reservoirs Act 1975 s 22(3). The information and particulars referred to in the text are those required by the Reservoirs Act 1975 s 21(5): see PARA 299.

15 See the Reservoirs Act 1975 s 22(2), (3). The penalty for such an offence is, in each case, on summary conviction a fine not exceeding level 4 on the standard scale: see s 22(2), (3) (both amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 141 note 18.

16 Ie for the purposes of the Reservoirs Act 1975 s 21(5): see PARA 299.

17 Reservoirs Act 1975 s 22(4). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: s 22(4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46).

18 As to the Secretary of State see PARA 15 note 1.

19 The functions of the Secretary of State under the Reservoirs Act 1975 s 22, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

20 Reservoirs Act 1975 s 22(6) (amended by the Water Act 2003 s 74(1)(d)). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

21 Reservoirs Act 1975 s 22(5). Where the affairs of a body corporate are managed by its members, this provision applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 22(5).

22 See the Reservoirs Act 1975 s 17(8); and PARA 294.

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### **301. Civil liability of undertakers.**

The Reservoirs Act 1975 is not to be taken as conferring on any person<sup>1</sup> a claim to damages in respect of a breach by undertakers<sup>2</sup> of their obligations under it<sup>3</sup>. Nevertheless, where damage or injury is caused by the escape of water from a reservoir<sup>4</sup> constructed<sup>5</sup> after the year 1930<sup>6</sup> under statutory powers granted after July 1930<sup>7</sup>, the fact that the reservoir was so constructed does not exonerate the persons for the time being having its management or control from any indictment, claim or other proceedings to which they would otherwise have been liable<sup>8</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'undertakers' see PARA 280 note 4.

3 Reservoirs Act 1975 s 1(5). This provision thus removes any right to sue for breach of statutory duty. As to breach of statutory duty see **TORT** vol 97 (2010) PARA 495 et seq.

4 The Reservoirs Act 1975 s 1(2) (see PARA 278) does not apply for the interpretation of 'reservoir' in this context: s 28(2).

5 The Reservoirs Act 1975 s 6(1) (see PARA 282 note 3) does not apply for the interpretation of 'constructed' in this context: see s 28(2).

6 The Reservoirs (Safety Provisions) Act 1930 (repealed) commenced on 1 January 1931: see s 12(2) (repealed).

7 The Reservoirs (Safety Provisions) Act 1930 (repealed) was passed on 1 August 1930.

8 See the Reservoirs Act 1975 s 28(2), Sch 2, which preserves in an amended form the Reservoirs (Safety Provisions) Act 1930 s 7 (repealed). The effect is to preserve rights of action against undertakers for damage caused by the escape of water from a reservoir constructed after 1930, ie claims in respect of the absolute liability under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 (see PARA 667). The defence of statutory authority (see **NUISANCE** vol 78 (2010) PARA 192) may still be available in respect of escapes from reservoirs constructed before 1931 under statutory powers, subject to any applicable local enactments to the contrary. As to the common law in respect of liability for damage by water see PARA 662 et seq.

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## **(6) WATER SHORTAGES**

### **(i) In general**

#### **302. Introduction.**

The water legislation contains provisions allowing both water undertakers<sup>1</sup> and the Environment Agency<sup>2</sup> to take special steps to cope with water shortages<sup>3</sup>. Some of these provisions relate only to water undertakers, others relate only to the Agency, and some are common to both. In summary: the Water Resources Act 1991 provides four mechanisms for dealing with drought situations: ordinary drought orders and emergency drought orders (both granted by the Secretary of State or, in relation to Wales, by the Welsh Ministers<sup>4</sup>), drought permits (granted by the Agency)<sup>5</sup>, and specific provision for water undertakers to obtain drought orders restricting the use of water for certain purposes (so-called 'non-essential use bans')<sup>6</sup>. The Act also gives the Agency power to place temporary restrictions on spray irrigation licences<sup>7</sup>. The Water Industry Act 1991 gives water undertakers free-standing powers to impose hosepipe bans<sup>8</sup>, and requires water undertakers to prepare and review drought plans<sup>9</sup> in respect of which licensed water suppliers<sup>10</sup> are required to provide water undertakers with information<sup>11</sup>.

The prerequisite for both drought orders and drought permits is an exceptional shortage of rain meaning that a serious deficiency of water supplies exists or is threatened<sup>12</sup>. Both can authorise abstraction from specified sources, and can modify or suspend restrictions or obligations relating to the (existing) abstraction of water from any source<sup>13</sup>, but drought orders may go further<sup>14</sup>. Ordinary drought orders can also be granted for environmental reasons, that is where the lack of rain poses a serious threat to flora or fauna dependent on affected inland waters. These may be referred to as 'environmental drought orders'<sup>15</sup>. Emergency drought orders may be granted where the deficiency of water supplies is likely to impair the economic or social well-being of persons in the affected area. In practice these are granted to water undertakers and can enable them, for example, to impose rota cuts<sup>16</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17.

3 See PARA 303 et seq. See also the provisions relating to areas of water scarcity and water stress in relation to charging for water by reference to volume; and PARA 427 note 16.

4 See PARA 306. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

5 See PARA 305.

6 See PARA 309.

7 See PARA 262.

8 See PARA 316.

9 See PARA 323.

10 As to the meaning of 'licensed water supplier' see PARA 152.

11 See PARA 323.

12 See PARAS 305, 307.

13 See PARA 310.

14 See PARA 303.

15 See PARA 307.

16 See PARA 308.



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## **(ii) Drought Permits and Drought Orders**

### **A. IN GENERAL**

#### **303. Drought orders and drought permits distinguished.**

Drought orders are granted by the Secretary of State or, in relation to Wales, by the Welsh Ministers<sup>1</sup>, while drought permits are granted by the Environment Agency<sup>2</sup>.

Ordinary and emergency drought orders may go further than drought permits. Drought orders can deal with discharges of water<sup>3</sup>, abstractions and discharges by people other than the undertaker affected<sup>4</sup>, supply, filtration, and treatment obligations<sup>5</sup>. They can allow water undertakers<sup>6</sup> to prohibit or limit particular uses of water<sup>7</sup> and can authorise the carrying out of associated works<sup>8</sup>. Emergency drought orders can go further still: the water undertaker has complete discretion on the uses of water that may be prohibited or limited<sup>9</sup>, and such orders can authorise supply by stand-pipes or water tanks<sup>10</sup>.

By contrast drought permits can only authorise a water undertaker to take water from specified sources, and modify or suspend restrictions or obligations to which that undertaker is subject relating to the (existing) taking of water from any source<sup>11</sup>.

1 See the Water Resources Act 1991 s 73(1); and PARA 307. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

2 See the Water Resources Act 1991 s 79A(1); and PARA 305. As to the Environment Agency see PARA 17.

3 See the Water Resources Act 1991 s 74(1)(b), (2)(c); and PARA 307.

4 See the Water Resources Act 1991 s 74(1)(c), (2)(d); and PARA 307.

5 See the Water Resources Act 1991 s 74(1)(d), (2)(f); and PARA 307.

6 As to the meaning of 'water undertaker' see PARA 137 note 4.

7 See the Water Resources Act 1991 s 74(2)(b); and PARA 307.

8 See the Water Resources Act 1991 s 78; and PARA 311.

9 See the Water Resources Act 1991 s 75(2)(b); and PARA 308.

10 See the Water Resources Act 1991 s 75(2)(c); and PARA 308.

11 See the Water Resources Act 1991 s 79A(2); and PARA 305.

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### **304. Procedure on applications for drought orders and drought permits.**

The applicant for a drought order<sup>1</sup> or drought permit<sup>2</sup> must cause notice of the application<sup>3</sup> to be served<sup>4</sup> on the specified persons<sup>5</sup> and published in one or more local newspapers circulating within the area affected by the order or permit<sup>6</sup> and in the London Gazette<sup>7</sup>.

If any objection is duly made with respect to the application and is not withdrawn, then the Secretary of State or, in relation to Wales, the Welsh Ministers if the application is for a drought order, or the Environment Agency if the application is for a drought permit, must afford an opportunity to the objector and, if he avails himself of the opportunity, to the applicant and any other persons to whom it appears to the Secretary of State or the Welsh Ministers or, as the case may be, the Agency expedient to afford the opportunity, of appearing before and being heard by a person appointed by the Secretary of State or the Welsh Ministers or, as the case may be, by the Agency for the purpose<sup>8</sup>. In the case of an application for a drought order, the Secretary of State or the Welsh Ministers may alternatively cause a local inquiry to be held<sup>9</sup>. Where, however, it appears to the Secretary of State or the Welsh Ministers or to the Agency, as the case may be, that the order or permit is required to be made urgently if it is to enable the deficiency of supplies of water to be effectively met, they may direct that these requirements<sup>10</sup> may be dispensed with<sup>11</sup>, but this does not authorise any of them to fail to consider any objection which has been duly made and not withdrawn<sup>12</sup>.

Notwithstanding the above provisions relating to the hearing of objections<sup>13</sup>, the Secretary of State or the Welsh Ministers in relation to an application for a drought order, or the Agency in relation to an application for a drought permit, may:

589 (1) require any person who has made an objection to the proposed order or permit to state in writing<sup>14</sup> the grounds of his objection<sup>15</sup>; and

590 (2) disregard the objection if satisfied:

57

67. (a) that it relates exclusively to matters which can be dealt with on a reference in relation to compensation<sup>16</sup> or by any person by whom compensation is to be assessed<sup>17</sup>; or

68. (b) in a case where the order or permit is one confined to the extension of a period specified in a previous order or permit, that the objection is one that has in substance been made with respect to the previous application<sup>18</sup>.

58

Upon being satisfied that the proper notices have been published and served, the Secretary of State or the Welsh Ministers if he or they think fit may make the drought order, or the Agency if it thinks fit may make the drought permit, in respect of which the application is made, with or without modifications<sup>19</sup>. After a drought order or permit has been made, the person on whose application it was made must cause a notice to be published<sup>20</sup> stating that the order or permit has been made and naming a place where a copy of it may be inspected<sup>21</sup>.

1 'Drought order' means an ordinary drought order under the Water Resources Act 1991 s 73(1) (see PARA 307) or an emergency drought order under s 73(2) (see PARA 308): s 221(1).

2 As to drought permits see PARA 305. The Water Resources Act 1991 Sch 8 has effect with respect to the procedure on an application for a drought permit as it has effect with respect to the procedure on an application for a drought order, but with modifications: see s 79A(7) (added by the Environment Act 1995 s 120, Sch 22 para 140).

3 The notice must: (1) state the general effect of the application; (2) specify a place within the area affected by the order where a copy of any relevant map or plan may be inspected by any person free of charge at all reasonable times within a period of seven days from the date on which it is served or, as the case may be, published; (3) state that objections to the application may be made to the Secretary of State or, in relation to Wales, the Welsh Ministers, in the case of an application for a drought order, and to the Environment Agency at a specified address in the case of an application for a drought permit, within seven days from the date on which it is served or, as the case may be, published; and (4) in the case of an application for an order authorising the occupation and use of land, specify the land to which the application relates: Water Resources Act 1991 Sch 8 para 1(3). As to the meaning of 'person' see PARA 13 note 29. As to the Environment Agency see PARA 17.

The functions of the Secretary of State under the Water Resources Act 1991 Sch 8, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the service of documents see PARA 22. A notice sent in a letter in pursuance of the Water Resources Act 1991 s 220 (general provisions about service: see PARA 22) to an address to which it may be sent in pursuance of s 220 is not treated as having been properly served for these purposes unless the sender takes such steps as are for the time being required to secure that the letter is transmitted in priority to letters of other descriptions: Sch 8 para 1(4).

5 Water Resources Act 1991 Sch 8 para 1(1)(a). The specified persons are, in the case of applications for: (1) all drought permits: every local authority, not being an English county council, and water undertaker, not being the applicant, whose area would be affected by the order; (2) all drought orders: the persons specified in head (1) above and the Environment Agency where it is not the applicant; (3) drought orders or permits which suspend or modify any enactment or any order or scheme made or confirmed under any enactment: such persons, if any, as are specified by name in the enactment, order or scheme as being persons for whose protection it was enacted or made; (4) drought orders or permits concerning the taking of water from a source or the discharge of water or effluent to a place: (a) every local authority, not being an English county council, in whose area the source, or the place at which water or effluent is to be discharged, is situated; (b) every drainage board for an internal district in which the source, or the place at which water or effluent is to be discharged, is situated; (c) every navigation authority exercising functions over any watercourse affected by the order; (d) if the order concerns any consent relating to the discharge of sewage effluent or trade effluent, the person to whom the consent was given; (5) drought orders which authorise the carrying out of any works: every local authority, not being an English county council, within whose area the works are situated and, if the order authorises the carrying out of works in, under or over a watercourse, every drainage board for an internal drainage district within which the works, or any part of the works, are situated; (6) drought orders which authorise the occupation and use of land: every owner, lessee and occupier of the land; and (7) drought orders which prohibit or limit the taking of water: every named person to whom the prohibition or limitation applies: Sch 8 para 1(2), Table (amended by the Environment Act 1995 Sch 22 para 128; the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(7); and modified in its application to drought permits by the Water Resources Act 1991 s 79A(7)(a), (c) (as added: see note 2)).

As to the meaning of 'local authority' see PARA 187 note 2. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'effluent' see PARA 262 note 31. As to the meaning of 'owner' see PARA 22 note 9. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'watercourse' see PARA 187 note 2. As to internal drainage boards see PARA 569 et seq. As to the meaning of 'land' see PARA 14 note 21. 'Sewage effluent' includes any effluent from the sewage disposal or sewerage works of a sewerage undertaker but does not include surface water: Water Resources Act 1991 s 221(1). 'Trade effluent' includes any effluent which is discharged from premises used for carrying on any trade or industry, other than surface water and domestic sewage, and for the purposes of this definition any premises wholly or mainly used (whether for profit or not) for agricultural purposes or for the purposes of fish farming or for scientific research or experiment are deemed to be premises used for carrying on a trade: s 221(1). As to the meaning of 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'agricultural' see PARA 209 note 20. In Pt II Ch III (ss 73-81) references to the 'taking of water' include references to the collection, impounding, diversion or appropriation of water: s 81(a).

6 Water Resources Act 1991 Sch 8 para 1(1)(b).

7 Water Resources Act 1991 Sch 8 para 1(1)(c).

8 Water Resources Act 1991 Sch 8 para 2(1)(b).

9 See the Water Resources Act 1991 Sch 8 para 2(1)(a), (6). For the purposes of the Environment Act 1995 s 53(2) (which applies the Local Government Act 1972 s 250(2)-(5) to inquiries in connection with functions of or in relation to the Agency: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 89), a local inquiry held under the Water Resources Act 1991 Sch 8 para 2 with respect to an application by a water undertaker for a drought order, if it would not otherwise fall within the Environment Act 1995 s 53(2)(a) or (b), is to be treated as one which falls within s 53(2)(b): Water Resources Act 1991 Sch 8 para 2(7) (added by the Water Act 2003 s 65). For the procedure to be followed before any such inquiry see the Drought Orders (Inquiries Procedure) Rules 1984, SI 1984/999, r 4; as to appearances at the inquiry see rr 5, 6; for the procedure at the inquiry see r 7; as to site inspections see r 8; and as to the procedure after the inquiry see rr 9, 10. In relation to any such inquiry, references in those rules to 'government policy' have effect as if they included reference to policy adopted or formulated by the Welsh Ministers: National Assembly for Wales (Transfer of Functions) Order 2000, SI 2000/253, art 6(1), (2), Sch 4; Government of Wales Act 2006 Sch 11 para 32. In relation to any such inquiry which is held or caused to be held other than by the Welsh Ministers, references to a government department have effect as if they included reference to the Welsh Ministers (National Assembly for Wales (Transfer of Functions) Order 2000, SI 2000/253, art 6(3); Government of Wales Act 2006 Sch 11 para 32); but this does not include an inquiry held by an inspector where jurisdiction to determine the appeal to which that inquiry relates has been transferred to the inspector by the Welsh Ministers (National Assembly for Wales (Transfer of Functions) Order 2000, SI 2000/253, art 6(4); Government of Wales Act 2006 Sch 11 para 32).

10 Ie the requirements of the Water Resources Act 1991 Sch 8 para 2(1): see the text to notes 8-9.

11 Water Resources Act 1991 Sch 8 para 2(2).

12 Water Resources Act 1991 Sch 8 para 2(3).

13 Ie notwithstanding the Water Resources Act 1991 Sch 8 para 2(1): see the text to notes 8-9.

14 As to the meaning of 'writing' see PARA 22 note 1.

15 Water Resources Act 1991 Sch 8 para 2(4)(a).

16 Ie a reference under the Water Resources Act 1991 Sch 9: see PARAS 312-313.

17 Water Resources Act 1991 Sch 8 para 2(4)(b)(i).

18 Water Resources Act 1991 Sch 8 para 2(4)(b)(ii).

19 Water Resources Act 1991 Sch 8 para 2(5). As to the meaning of 'modifications' see PARA 141 note 20.

20 Ie in the manner in which notice of the application was required under the Water Resources Act 1991 Sch 8 para 1(1) to be published: see the text to notes 6, 7.

21 Water Resources Act 1991 Sch 8 para 3.

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## **B. DROUGHT PERMITS**

### **305. Powers to issue drought permits.**

If the Environment Agency<sup>1</sup> is satisfied that, by reason of an exceptional shortage of rain, a serious deficiency of supplies of water in any area exists or is threatened, it may, upon the application of a water undertaker<sup>2</sup> which supplies water to premises in that area, issue to that undertaker a drought permit making such authorised provision<sup>3</sup> as appears to the Agency to be expedient with a view to meeting the deficiency<sup>4</sup>.

A drought permit may contain any of the following provisions:

- 591 (1) provision authorising the water undertaker to which it is issued to take water<sup>5</sup> from any source specified in the permit subject to any conditions or restrictions so specified<sup>6</sup>;
- 592 (2) provision suspending or modifying<sup>7</sup>, subject to any conditions specified in the permit, any restriction or obligation<sup>8</sup> to which that undertaker is subject as respects the taking of water from any source<sup>9</sup>;

and may make different provision for different cases, including different provision in relation to different persons<sup>10</sup>, circumstances or localities, and may contain such supplemental, consequential and transitional provisions as the Agency considers appropriate<sup>11</sup>.

A drought permit must specify the day on which it comes into force<sup>12</sup> and the period for which any authorisation given or suspension or modification effected by the permit is to have effect<sup>13</sup>. The period for which an authorisation given by a drought permit<sup>14</sup>, or a suspension or modification effected by such a permit<sup>15</sup>, has effect expires before the end of the period of six months<sup>16</sup> beginning with the day on which the permit comes into force<sup>17</sup>; but at any time before the expiration of that period the Agency may, by notice<sup>18</sup> given to the water undertaker to which the permit in question was issued, extend that period<sup>19</sup>.

A drought permit which:

- 593 (a) authorises the taking of water from a source from which water is supplied to an inland navigation<sup>20</sup>; or
- 594 (b) suspends or modifies (i) a restriction as respects the taking of water from a source from which water is supplied to an inland navigation<sup>21</sup>; or (ii) an obligation to discharge compensation water<sup>22</sup> into a canal or into any river or stream which forms part of, or from which water is supplied to, an inland navigation<sup>23</sup>,

must not be issued without the consent of every navigation authority<sup>24</sup> exercising functions over any or all of the parts of the canal or inland navigation in question which are affected by the permit<sup>25</sup>.

Where a water undertaker makes an application for a drought permit, the Agency may recover from the water undertaker any expenses it incurs, whether of a revenue or capital nature, in the exercise of its functions so far as their exercise is attributable to the application<sup>26</sup> and (if the

permit is issued) the permit<sup>27</sup>, in so far as those expenses have not been recovered, whether from the water undertaker or not, under or by virtue of any other enactment<sup>28</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 The provision authorised by the Water Resources Act 1991 s 79A. As to the provision that may be made see the text to notes 5-11.

4 Water Resources Act 1991 s 79A(1) (s 79A added by the Environment Act 1995 s 120, Sch 22, para 140). As to compensation payable in respect of the entry upon or occupation or use of land pursuant to a drought permit see PARAS 312-314. The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of the granting of a permit under the Water Resources Act 1991 s 79A: see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

5 As to the meaning of 'taking of water' see PARA 304 note 5.

6 Water Resources Act 1991 s 79A(2)(a) (as added: see note 4).

7 As to the meaning of 'modify' see PARA 141 note 20.

8 In the Water Resources Act 1991 Pt II Ch III (ss 73-81), references to an obligation or to a restriction include references to an obligation or, as the case may be, to a restriction which is imposed by or under any enactment or agreement: s 81(b). As to the meaning of 'enactment' see PARA 14 note 31.

9 Water Resources Act 1991 s 79A(2)(b) (as added: see note 4).

10 As to the meaning of 'person' see PARA 13 note 29.

11 Water Resources Act 1991 s 79A(10) (as added: see note 4). As to the procedure for making a drought permit see PARA 304.

12 Water Resources Act 1991 s 79A(3)(a) (as added: see note 4).

13 Water Resources Act 1991 s 79A(3)(b) (as added: see note 4).

14 Water Resources Act 1991 s 79A(4)(a) (as added: see note 4).

15 Water Resources Act 1991 s 79A(4)(b) (as added: see note 4).

16 As to the meaning of 'month' see PARA 23 note 10.

17 Water Resources Act 1991 s 79A(4) (as added: see note 4).

18 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

19 Water Resources Act 1991 s 79A(5) (as added: see note 4). Such extension may not, however, extend it beyond the end of the period of one year beginning with the day on which the permit came into force: see s 79A(5) (as so added).

20 Water Resources Act 1991 s 79A(6)(a) (as added: see note 4). 'Inland navigation' includes any canal or navigable river: s 77(6); definition applied by s 79A(11) (as so added).

21 Water Resources Act 1991 s 79A(6)(b)(i) (as added: see note 4).

22 'Compensation water' means water which a water undertaker is under an obligation to discharge in accordance with the provisions of a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72) (see PARA 227 et seq) or under any local statutory provision, into any river, stream, brook or other running water or into a canal: s 77(6)(a), (b) (amended by virtue of the Environment Act 1995 Sch 22 para 128); definition applied by the Water Resources Act 1991 s 79A(11) (as amended: see note 4). As to the meaning of 'local statutory provision' see PARA 14 note 24.

23 Water Resources Act 1991 s 79A(6)(b)(ii) (as added: see note 4).

- 24 As to the meaning of 'navigation authority' see PARA 189 note 1.
- 25 Water Resources Act 1991 s 79A(6) (as added: see note 4).
- 26 Water Resources Act 1991 s 79A(8A)(a) (s 79A as added (see note 4); s 79A(8A), (8B) subsequently added by the Water Act 2003 s 64(3)(b)).
- 27 Water Resources Act 1991 s 79A(8A)(b) (as added: see note 26).
- 28 Water Resources Act 1991 s 79A(8A) (as added: see note 26). Sections 125-129 (see PARAS 274-275) do not apply in respect of any charges which may be made under s 79A(8A): s 79A(8B) (as so added).

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### ***C. DROUGHT ORDERS***

#### **306. Powers to make drought orders; in general.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may make both ordinary<sup>3</sup> and emergency drought orders<sup>4</sup> on application by the Environment Agency<sup>5</sup> or a water undertaker<sup>6</sup>. Third parties are not entitled to apply for drought orders, but the Agency may in practice use its powers to apply for them for the benefit of such persons<sup>7</sup>.

Where a water undertaker makes an application for a drought order, the Environment Agency may recover from the water undertaker any expenses it incurs (whether of a revenue or capital nature):

- 595 (1) in connection with any local inquiry held in respect of the application<sup>8</sup>;
- 596 (2) in the exercise of the Agency's functions so far as their exercise is attributable to the application and (if the order is made) to the order<sup>9</sup>,

in so far as those expenses have not been recovered (whether from the water undertaker or not) under or by virtue of any other enactment<sup>10</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the Welsh Ministers see PARA 16 note 5.

3 An ordinary drought order is an order made under the Water Resources Act 1991 s 73(1); see PARA 307.

4 An emergency drought order is an order made under the Water Resources Act 1991 s 73(2); see PARA 308.

5 As to the Environment Agency see PARA 17.

6 See PARAS 307, 308. As to the meaning of 'water undertaker' see PARA 137 note 4.

7 See PARA 307.

8 Water Resources Act 1991 s 79(4)(a) (s 79(4), (5) added by the Water Act 2003 s 64(2)).

9 Water Resources Act 1991 s 79(4)(b) (as added: see note 8).

10 Water Resources Act 1991 s 79(4) (as added: see note 8). As to the meaning of 'enactment' see PARA 14 note 31. The Water Resources Act 1991 ss 125-129 (see PARAS 274-275) do not apply in respect of any charges which may be made under s 79(4); s 79(5) (as so added).



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### **307. Ordinary drought orders.**

If the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> is satisfied that, by reason of an exceptional shortage of rain, there exists or is threatened:

- 597 (1) a serious deficiency of supplies of water in any area<sup>3</sup>; or
- 598 (2) such a deficiency in the flow or level of water in any inland waters<sup>4</sup> as to pose a serious threat to any of the flora or fauna which are dependent on those waters<sup>5</sup>,

then he or they may by order (an 'ordinary drought order')<sup>6</sup> make such authorised provision<sup>7</sup> as appears to him or them to be expedient with a view to meeting the deficiency<sup>8</sup>. The power to make such an order in relation to any area is not exercisable unless an application is made<sup>9</sup> to the Secretary of State or, where appropriate, the Welsh Ministers by the Environment Agency<sup>10</sup> or, except in the case of an ordinary drought order by virtue of head (2) above, by a water undertaker<sup>11</sup> which supplies water to premises in that area<sup>12</sup>.

An ordinary drought order made on the application of the Agency may contain any of the following provisions:

- 599 (a) provision authorising the Agency (or persons<sup>13</sup> authorised to do so by the Agency) to take water from any source specified in the order subject to any conditions or restrictions so specified<sup>14</sup>;
- 600 (b) provision authorising the Agency (or persons authorised to do so by the Agency) to discharge water to any place specified in the order subject to any conditions or restrictions so specified<sup>15</sup>;
- 601 (c) provision authorising the Agency to prohibit or limit the taking by any person (including a water undertaker) of water<sup>16</sup> from a source specified in the order if the Agency is satisfied that the taking of water from that source seriously affects the supplies available to the Agency, any water undertaker or any other person<sup>17</sup>;
- 602 (d) provision suspending or modifying<sup>18</sup>, subject to any conditions specified in the order, any restriction or obligation<sup>19</sup> to which the Agency, any water undertaker or sewerage undertaker<sup>20</sup> or any other person is subject as respects the taking of water from any source<sup>21</sup>, the discharge of water<sup>22</sup>, the supply of water (whether in point of quantity, pressure, quality, means of supply or otherwise)<sup>23</sup>, or the filtration or other treatment of water<sup>24</sup>;
- 603 (e) provision authorising the Agency to suspend or vary, or attach conditions to, any consent specified in the order for the discharge of any effluent<sup>25</sup> by any person, including any sewerage undertaker or water undertaker<sup>26</sup>.

An ordinary drought order made on the application of a water undertaker may contain any of the following provisions;

- 604 (i) provision authorising the water undertaker to take water from any source specified in the order subject to any conditions or restrictions so specified<sup>27</sup>;
- 605 (ii) provision authorising the water undertaker to prohibit or limit the use of water for any purpose specified in the order, being a purpose for the time being set

- out in a direction given by the Secretary of State or, as the case may be, the Welsh Ministers to water undertakers generally as a purpose which may be specified by virtue of this provision in any ordinary drought order<sup>28</sup>;
- 606 (iii) provision authorising the water undertaker to discharge water to any place specified in the order subject to any conditions or restrictions so specified<sup>29</sup>;
- 607 (iv) provision authorising the Agency to prohibit or limit the taking by any person of water from a source specified in the order if the Agency is satisfied that the taking of water from that source seriously affects the supplies available to the water undertaker<sup>30</sup>;
- 608 (v) provision prohibiting or limiting the taking by the Agency of water from a source specified in the order if the taking of water from that source is determined, in accordance with provision made by the order, seriously to affect the supplies available to the water undertaker<sup>31</sup>;
- 609 (vi) provision suspending or modifying, subject to any conditions specified in the order, any restriction or obligation to which the water undertaker or any sewerage undertaker or other person is subject as respects the taking of water from any source<sup>32</sup>, the discharge of water<sup>33</sup>, the supply of water (whether in point of quantity, pressure, quality, means of supply or otherwise)<sup>34</sup>, or the filtration or other treatment of water<sup>35</sup>;
- 610 (vii) provision authorising the Agency to suspend or vary, or attach conditions to, any consent specified in the order for the discharge of any effluent by any person, including the company which applied for the order (whether in the capacity in which it made the application, in its capacity as a sewerage undertaker or in any other capacity)<sup>36</sup>.

An ordinary drought order may<sup>37</sup> make different provision for different cases (including different provision in relation to different persons, circumstances or localities)<sup>38</sup>, and contain such supplemental, consequential and transitional provision as the Secretary of State or the Welsh Ministers consider appropriate<sup>39</sup>.

The period for which an authorisation given by or under an ordinary drought order<sup>40</sup>, a prohibition or limitation imposed by or under any such order<sup>41</sup>, or a suspension or modification effected by or under any such order<sup>42</sup>, has effect must expire before the end of the period of six months<sup>43</sup> beginning with the day on which the order comes into force, unless that period of six months is extended, in relation to that order, by virtue of the exercise by the Secretary of State or, as the case may be, the Welsh Ministers of the power to amend the order<sup>44</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 ss 73, 74, 76 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Water Resources Act 1991 s 73(1)(a) (s 73(1) amended by the Environment Act 1995 s 120, Sch 22, para 139(2)).

4 As to the meaning of 'inland waters' see PARA 187 note 2.

5 Water Resources Act 1991 s 73(1)(b) (as amended: see note 3).

6 The power to make an ordinary drought order is exercisable by statutory instrument: see the Water Resources Act 1991 s 73(4). The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply

in relation to the granting of an authorisation by virtue of the making of an order under the Water Resources Act 1991 s 73 which has the effect of authorising (1) an abstraction or additional abstraction; or (2) a discharge or additional discharge: see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

7 The provision authorised by the Water Resources Act 1991 Pt II Ch III (ss 73-81).

8 Water Resources Act 1991 s 73(1). Such orders, being local in nature, are not recorded in this work. However, for examples of such orders see the Sutton and East Surrey Water plc (Non-Essential Use) Drought Order 2006, SI 2006/1333; the Southern Water Services (Sussex North and Sussex Coast) (Non-Essential Use) Drought Order 2006, SI 2006/1422.

9 As to the procedure on such applications see PARA 304.

10 As to the Environment Agency see PARA 17.

11 As to the meaning of 'water undertaker' see PARA 137 note 4.

12 Water Resources Act 1991 s 73(3) (amended by the Environment Act 1995 Sch 22 paras 128, 139(1), (3)). This provision is expressed to be subject to the Water Resources Act 1991 s 76(3): see note 28.

13 As to the meaning of 'person' see PARA 13 note 29.

14 Water Resources Act 1991 s 74(1)(a) (s 74(1), (2) amended by the Environment Act 1995 Sch 22 para 128).

15 Water Resources Act 1991 s 74(1)(b) (as amended: see note 14).

16 As to the meaning of 'taking of water' see PARA 304 note 5.

17 Water Resources Act 1991 s 74(1)(c) (as amended: see note 14).

18 As to the meaning of 'modify' see PARA 141 note 20.

19 As to the meanings of 'restriction' and 'obligation' see PARA 305 note 8.

20 As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

21 Water Resources Act 1991 s 74(1)(d)(i) (as amended: see note 14).

22 Water Resources Act 1991 s 74(1)(d)(ii) (as amended: see note 14).

23 Water Resources Act 1991 s 74(1)(d)(iii) (as amended: see note 14).

24 Water Resources Act 1991 s 74(1)(d)(iv) (as amended: see note 14).

25 As to the meaning of 'effluent' see PARA 262 note 31.

26 Water Resources Act 1991 s 74(1)(e) (as amended: see note 14).

27 Water Resources Act 1991 s 74(2)(a).

28 Water Resources Act 1991 s 74(2)(b). The Secretary of State or, as the case may be, the Welsh Ministers may revoke or vary any direction given by him or them for the purposes of s 74(2)(b) by a further direction for those purposes: s 76(2). Where any purpose set out in a direction given for the purposes of s 74(2)(b) will cease, by virtue of the variation or revocation of the direction, to be one which may be specified in an ordinary drought order, the Secretary of State or, where appropriate, the Welsh Ministers must (without an application having been made to him or them) exercise the power to vary or revoke ordinary drought orders, in so far as any orders in force will be affected by the variation or revocation of the direction, so as to make those orders conform to the variation or reflect the revocation: s 76(3). The revocation or variation of a direction under s 76(3) does not affect either: (1) the validity of anything done in pursuance of an order before the giving of the further direction (s 76(4)(a)); or (2) any obligation or liability accrued or incurred before the giving of the further direction (s 76(4)(b)). See also s 76(1); and PARA 309.

29 Water Resources Act 1991 s 74(2)(c).

30 Water Resources Act 1991 s 74(2)(d) (as amended: see note 14).

31 Water Resources Act 1991 s 74(2)(e) (as amended: see note 14).

32 Water Resources Act 1991 s 74(2)(f)(i).

33 Water Resources Act 1991 s 74(2)(f)(ii).

34 Water Resources Act 1991 s 74(2)(f)(iii).

35 Water Resources Act 1991 s 74(2)(f)(iv).

36 Water Resources Act 1991 s 74(2)(g) (as amended: see note 14).

37 ie without prejudice to the provisions of the Water Resources Act 1991 ss 75-81: see PARAS 308-316.

38 Water Resources Act 1991 s 74(5)(a).

39 Water Resources Act 1991 s 74(5)(b). As to provisions of drought orders with respect to abstractions and discharges see PARA 310. As to works under drought orders see PARA 311. As to compensation and charges where a drought order is made see PARAS 312-314. As to offences in relation to drought orders see PARA 315.

40 Water Resources Act 1991 s 74(3)(a).

41 Water Resources Act 1991 s 74(3)(b).

42 Water Resources Act 1991 s 74(3)(c).

43 As to the meaning of 'month' see PARA 23 note 10.

44 Water Resources Act 1991 s 74(3). The power of the Secretary of State or the Welsh Ministers to amend an ordinary drought order must not be exercised so as to extend the period of six months beyond the end of the period of one year beginning with the day on which that order came into force: s 74(4).

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### **308. Emergency drought orders.**

If the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>:

- 611 (1) are satisfied that by reason of an exceptional shortage of rain a serious deficiency of supplies of water in any area exists or is threatened<sup>3</sup>; and
- 612 (2) are further satisfied that the deficiency is such as to be likely to impair the economic or social well-being of persons<sup>4</sup> in the affected area<sup>5</sup>,

he or they may by order (an 'emergency drought order')<sup>6</sup> make such provision as appears to him or them to be expedient with a view to meeting the deficiency<sup>7</sup>. The power to make an emergency drought order in relation to any area is not exercisable unless an application<sup>8</sup> is made to the Secretary of State or, where appropriate, the Welsh Ministers by the Environment Agency<sup>9</sup> or by a water undertaker<sup>10</sup> which supplies water to premises in that area<sup>11</sup>.

An emergency drought order made on the application of the Agency may contain any of the provisions which could be included<sup>12</sup> in an ordinary drought order made on the application of the Agency<sup>13</sup>. An emergency drought order made on the application of a water undertaker may contain any of the following provisions:

- 613 (a) any provision which could be included<sup>14</sup> in an ordinary drought order made on the application of a water undertaker, except provision authorising<sup>15</sup> the water undertaker to prohibit or limit the use of water for any specified purpose<sup>16</sup>;
- 614 (b) provision authorising the water undertaker to prohibit or limit the use of water for such purposes as the water undertaker thinks fit<sup>17</sup>;
- 615 (c) provision authorising the water undertaker to supply water in its area, or in any place within its area, by means of stand-pipes or water tanks<sup>18</sup>; and to erect or set up and maintain stand-pipes or water tanks in any street<sup>19</sup> in that area<sup>20</sup>.

The period for which (i) an authorisation given by or under an emergency drought order<sup>21</sup>, (ii) a prohibition or limitation imposed by or under any such order<sup>22</sup>; or (iii) a suspension or modification effected by or under any such order<sup>23</sup>, has effect must expire before the end of the period of three months<sup>24</sup> beginning with the day on which the order comes into force unless that period of three months is extended, in relation to that order, by virtue of the exercise by the Secretary of State or the Welsh Ministers of the power to amend the order<sup>25</sup>.

Where powers have been conferred by an emergency drought order on any person, the Secretary of State or, as the case may be, the Welsh Ministers may give to that person such directions as the Secretary of State or the Welsh Ministers consider necessary or expedient as to the manner or the circumstances in which any of those powers is, or is not, to be exercised<sup>26</sup>. It is the duty of that person to comply with any such direction<sup>27</sup>; and where that person is a water undertaker or sewerage undertaker<sup>28</sup> that duty is enforceable<sup>29</sup> by the Secretary of State or the Welsh Ministers<sup>30</sup>. The giving of such a direction in relation to any power does not affect the validity of anything done in the exercise of that power before the giving of the direction<sup>31</sup>, or any obligation<sup>32</sup> or liability incurred before the giving of the direction<sup>33</sup>.

An emergency drought order may<sup>34</sup> make different provision for different cases, including different provision in relation to different persons, circumstances or localities<sup>35</sup>, and may contain such supplemental, incidental or consequential provision as the Secretary of State or, where appropriate, the Welsh Ministers consider appropriate<sup>36</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 ss 73, 75 (subject as stated below) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. In respect of the functions of the Secretary of State under the Water Resources Act 1991 s 75(5)(c) (see the text to notes 28-30): (1) such functions so far as relating to matters concerning the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to Wales; (2) such functions so far as relating to matters other than the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to those parts of Wales which are outside the catchment areas of the rivers Dee, Wye and Severn; (3) it is directed that such functions so far as relating to matters other than the construction or enlargement of reservoirs are, in relation to those parts of Wales which are within the catchment areas of the rivers Dee, Wye and Severn, exercisable by the Welsh Ministers concurrently with the Secretary of State: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 Sch 11 para 32. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Water Resources Act 1991 s 73(2)(a).

4 As to the meaning of 'person' see PARA 13 note 29.

5 Water Resources Act 1991 s 73(2)(b).

6 The power to make an emergency drought order is exercisable by statutory instrument: see the Water Resources Act 1991 s 73(4). Such orders, being local in nature, are not recorded in this work.

7 Water Resources Act 1991 s 73(2).

8 As to the procedure on the application see PARA 304.

9 As to the Environment Agency see PARA 17.

10 As to the meaning of 'water undertaker' see PARA 137 note 4.

11 Water Resources Act 1991 s 73(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

12 Ie by virtue of the Water Resources Act 1991 s 74(1): see PARA 307.

13 Water Resources Act 1991 s 75(1) (amended by the Environment Act 1995 Sch 22 para 128).

14 Ie by virtue of the Water Resources Act 1991 s 74(2): see PARA 307.

15 Ie by virtue of the Water Resources Act 1991 s 74(2)(b): see PARA 307.

16 See the Water Resources Act 1991 s 75(2)(a).

17 Water Resources Act 1991 s 75(2)(b). See also PARA 309.

18 Water Resources Act 1991 s 75(2)(c)(i).

19 'Street' has the same meaning as in the New Roads and Street Works 1991 Pt III (ss 48-106) (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 9): Water Resources Act 1991 s 221(1); Water Industry Act 1991 s 219(1).

20 Water Resources Act 1991 s 75(2)(c)(ii).

21 Water Resources Act 1991 s 75(3)(a).

22 Water Resources Act 1991 s 75(3)(b).

23 Water Resources Act 1991 s 75(3)(c).

24 As to the meaning of 'month' see PARA 23 note 10.

25 Water Resources Act 1991 s 75(3). The power of the Secretary of State or the Welsh Ministers to amend an emergency drought order must not be exercised so as to extend the period of three months beyond the end of the period of five months beginning with the day on which that order came into force: s 75(4).

26 Water Resources Act 1991 s 75(5)(a).

27 Water Resources Act 1991 s 75(5)(b).

28 As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

29 Ie under the Water Industry Act 1991 s 18: see PARA 163.

30 Water Resources Act 1991 s 75(5)(c).

31 Water Resources Act 1991 s 75(6)(a).

32 As to the meaning of 'obligation' see PARA 305 note 8.

33 Water Resources Act 1991 s 75(6)(b).

34 Ie without prejudice to the Water Resources Act 1991 ss 76-81: see PARAS 309-316.

35 Water Resources Act 1991 s 75(7)(a).

36 Water Resources Act 1991 s 75(7)(b). As to provisions of drought orders with respect to abstractions and discharges see PARA 310. As to works under drought orders see PARA 311. As to compensation and charges where a drought order is made see PARAS 312-314. As to offences in relation to drought orders see PARA 315.

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### **309. Provisions of drought orders restricting the use of water.**

Where a drought order<sup>1</sup> contains a provision authorising a water undertaker<sup>2</sup> to prohibit or limit the use of water:

- 616 (1) the power may be exercised in relation to consumers generally, a class of consumer or a particular consumer<sup>3</sup>;
- 617 (2) the water undertaker must take such steps as it thinks appropriate for bringing the prohibition or limitation to the attention of the persons<sup>4</sup> to whom the prohibition or limitation will apply and, in particular, must (as the undertaker thinks appropriate) (a) cause notice of the prohibition or limitation to be published in one or more local newspapers circulating within that part of the water undertaker's area which would be affected by the provision of the order<sup>5</sup>; or (b) send notice<sup>6</sup> of the prohibition or limitation to the persons to whom the prohibition or limitation will apply<sup>7</sup>;
- 618 (3) the prohibition or limitation does not come into operation until the end of the period of 72 hours beginning with the day on which the notice is published or, as the case may be, sent to the person in question<sup>8</sup>.

<sup>1</sup> As to the meaning of 'drought order' see PARA 304 note 1. As to the provisions of drought orders see PARAS 307, 308.

<sup>2</sup> As to the meaning of 'water undertaker' see PARA 137 note 4.

<sup>3</sup> Water Resources Act 1991 s 76(1)(a).

<sup>4</sup> As to the meaning of 'person' see PARA 13 note 29.

<sup>5</sup> Water Resources Act 1991 s 76(1)(b)(i).

<sup>6</sup> As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

<sup>7</sup> Water Resources Act 1991 s 76(1)(b)(ii).

<sup>8</sup> Water Resources Act 1991 s 76(1)(c).



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### **310. Provisions of drought order with respect to abstractions and discharges.**

Any drought order<sup>1</sup> which:

- 619 (1) authorises the taking of water<sup>2</sup> from a source from which water is supplied to an inland navigation<sup>3</sup>; or
- 620 (2) suspends or modifies<sup>4</sup> a restriction<sup>5</sup> as respects the taking of water from such a source, or an obligation<sup>6</sup> to discharge compensation water<sup>7</sup> into a canal or into any river or stream which forms part of, or from which water is supplied to, an inland navigation<sup>8</sup>,

may include provision for prohibiting or imposing limitations on the taking of water from the inland navigation, or for the suspension or modification of any obligation to which a navigation authority<sup>9</sup> is subject as respects the discharge of water from the inland navigation<sup>10</sup>.

Where a drought order made on the application of a water undertaker<sup>11</sup> confers power on the Environment Agency<sup>12</sup> to prohibit or limit the taking of water from any source<sup>13</sup>, or to suspend or vary, or attach conditions to, any consent for the discharge of any effluent<sup>14</sup>, the Agency must exercise that power in such manner as will ensure, so far as reasonably practicable, that the supplies of water available to the water undertaker are not seriously affected<sup>15</sup>. Where any drought order confers power on the Agency to suspend or vary, or attach conditions to, any consent for the discharge of any effluent<sup>16</sup>, and the Agency exercises that power so as to restrict the discharge of effluent by a sewerage undertaker<sup>17</sup>, the sewerage undertaker may so modify any consents or agreements relating to the discharge by other persons of trade effluent<sup>18</sup> as to enable it to comply with any requirements or conditions imposed on it by or under the order with respect to discharges from sewers<sup>19</sup> or works of the undertaker<sup>20</sup>.

1 As to the meaning of 'drought order' see PARA 304 note 1. As to the provisions of drought orders see PARAS 307, 308.

2 As to the meaning of 'taking of water' see PARA 304 note 5.

3 Water Resources Act 1991 s 77(1)(a). 'Inland navigation' includes any canal or navigable river: s 77(6).

4 As to the meaning of 'modify' see PARA 141 note 20.

5 As to the meaning of 'restriction' see PARA 305 note 8.

6 As to the meaning of 'obligation' see PARA 305 note 8.

7 As to the meaning of 'compensation water' see PARA 305 note 22.

8 Water Resources Act 1991 s 77(1)(b).

9 As to the meaning of 'navigation authority' see PARA 189 note 1.

10 Water Resources Act 1991 s 77(1). A prohibition or limitation by or under a drought order on the taking of water from any source may be imposed so as to have effect in relation to a source from which a person to whom the prohibition or limitation applies has a right to take water whether by virtue of an enactment or instrument, an agreement or the ownership of land: s 77(2). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'land' see PARA 14 note 21.

- 11 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 12 As to the Environment Agency see PARA 17.
- 13 Water Resources Act 1991 s 77(3)(a).
- 14 Water Resources Act 1991 s 77(3)(b). As to the meaning of 'effluent' see PARA 262 note 31.
- 15 Water Resources Act 1991 s 77(3) (s 77(3), (5) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 16 Water Resources Act 1991 s 77(5)(a) (as amended: see note 15).
- 17 Water Resources Act 1991 s 77(5)(b) (as amended: see note 15). As to the meaning of 'sewerage undertaker' see PARA 137 note 4.
- 18 As to the meaning of 'trade effluent' see PARA 304 note 5.
- 19 As to the meaning of 'sewer' see PARA 187 note 2.
- 20 Water Resources Act 1991 s 77(5).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(6) WATER SHORTAGES/(ii) Drought Permits and Drought Orders/C. DROUGHT ORDERS/311. Works under drought orders.

### **311. Works under drought orders.**

A drought order<sup>1</sup> may authorise the Environment Agency<sup>2</sup> or a water undertaker<sup>3</sup>, subject to any specified conditions and restrictions<sup>4</sup>, to carry out any works<sup>5</sup> required for the performance of any duty or the exercise of any power which is imposed or conferred by or under the order<sup>6</sup>. Such an order may authorise the Agency or a water undertaker to enter upon any land<sup>7</sup> specified in the order and to occupy and use the land to such extent and in such manner as may be requisite for the carrying out and maintenance of the works<sup>8</sup>. The Secretary of State or, in relation to Wales, the Welsh Ministers must, however, include in any drought order authorising the Agency or a water undertaker to enter any land provisions requiring the Agency or that undertaker to give to the occupier of the land, and to such other persons<sup>9</sup> concerned with the land as may be specified in the order, not less than 24 hours' notice<sup>10</sup> of any intended entry<sup>11</sup>.

Compensation is payable in respect of the entry upon or the occupation or use of land under a drought order<sup>12</sup>.

1 As to the meaning of 'drought order' see PARA 304 note 1. As to the provisions of drought orders see PARAS 307, 308.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'water undertaker' see PARA 137 note 4.

4 As to the meaning of 'restriction' see PARA 305 note 8.

5 Any works to be carried out under the authority of an emergency drought order are included in the definition of 'emergency works' in the New Roads and Street Works Act 1991 s 52 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 431); Water Resources Act 1991 s 78(5). As to emergency drought orders see PARA 308.

6 Water Resources Act 1991 s 78(1) (s 78(1)-(3) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 As to the meaning of 'land' see PARA 14 note 21.

8 Water Resources Act 1991 s 78(2)(a) (as amended: see note 6). The order may apply in relation to the carrying out of the works such of the provisions of Pt VII (ss 154-186) or of the Water Industry Act 1991 Pt VI (ss 155-192) (see PARA 453 et seq) as appear to the Secretary of State or, in relation to Wales, the Welsh Ministers to be appropriate, subject to such modifications as may be specified in the order: Water Resources Act 1991 s 78(2)(b). As to the meaning of 'modifications' see PARA 141 note 20. The functions of the Secretary of State under the Water Resources Act 1991 s 78, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

9 As to the meaning of 'person' see PARA 13 note 29.

10 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

11 Water Resources Act 1991 s 78(3) (as amended: see note 6). Subject to this requirement, a drought order may make any such provision in relation to the authorised entry on any land as corresponds to provisions relating to powers of entry having effect by virtue of s 173 (see Sch 20; and PARAS 482-485) or to provision contained in the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) (see PARAS 482-485): Water Resources Act 1991 s 78(4).

12 As to compensation in respect of drought orders see PARAS 307-314.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(6) WATER SHORTAGES/(ii) Drought Permits and Drought Orders/D. COMPENSATION AND CHARGES DURING DROUGHTS/312. Compensation to be made in the case of all drought orders and drought permits.

## ***D. COMPENSATION AND CHARGES DURING DROUGHTS***

### **312. Compensation to be made in the case of all drought orders and drought permits.**

Where a drought order<sup>1</sup> has been made or a drought permit<sup>2</sup> has been issued, compensation in respect of the entry upon or occupation or use of land<sup>3</sup> must be made by the applicant for the order or permit<sup>4</sup> to the owners<sup>5</sup> and occupiers of the land<sup>6</sup>, and to all other persons<sup>7</sup> interested in the land or injuriously affected by the entry upon, occupation or use of the land<sup>8</sup>, for loss or damage sustained by reason of the entry upon, occupation or use of the land<sup>9</sup>. A claim for compensation must be made by serving<sup>10</sup> upon the applicant for the order or permit a notice<sup>11</sup> stating the grounds of the claim and the amount claimed<sup>12</sup>. Any question as to the right of a claimant to recover compensation, or as to the amount of compensation recoverable, must in default of agreement be referred to and determined by the Lands Tribunal<sup>13</sup>.

1 As to the meaning of 'drought order' see PARA 304 note 1. As to the provisions of drought orders see PARAS 307, 308.

2 The Water Resources Act 1991 Sch 9 applies in relation to drought permits and their issue as it applies in relation to ordinary drought orders and their making: s 79A(9) (s 79A added by the Environment Act 1995 s 120, Sch 22 para 140). As to drought permits see PARA 305. As to ordinary drought orders see PARA 307.

3 As to the meaning of 'land' see PARA 14 note 21.

4 As to applications for drought orders and permits see PARA 304.

5 As to the meaning of 'owner' see PARA 22 note 9.

6 Water Resources Act 1991 Sch 9 para 1(a).

7 As to the meaning of 'person' see PARA 13 note 29.

8 Water Resources Act 1991 Sch 9 para 1(b).

9 Water Resources Act 1991 Sch 9 para 1. As to the payment of additional compensation in respect of the making of ordinary drought orders and drought permits see PARA 313.

10 As to the service of documents see PARA 22.

11 As to the meaning of 'notice' see PARA 22 note 1.

12 Water Resources Act 1991 Sch 9 para 3(1). Interest is payable on the compensation payable from the date of entry upon, occupation or use of the land: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58). Payments on account of compensation or interest may be made: see the Planning and Compensation Act 1991 s 80(2), (3).

13 Water Resources Act 1991 Sch 9 para 3(2). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

## **UPDATE**

**312 Compensation to be made in the case of all drought orders and drought permits**

TEXT AND NOTE 13--Reference to the Lands Tribunal is now to the Upper Tribunal: Water Resources Act 1991 Sch 9 para 3(2) (amended by SI 2009/1307).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(6) WATER SHORTAGES/(ii) Drought Permits and Drought Orders/D. COMPENSATION AND CHARGES DURING DROUGHTS/313. Additional compensation in the case of ordinary drought orders and drought permits.

### **313. Additional compensation in the case of ordinary drought orders and drought permits.**

Where an ordinary drought order<sup>1</sup> has been made or a drought permit<sup>2</sup> has been issued, additional compensation<sup>3</sup> must be made by the applicant for the order or permit<sup>4</sup>:

- 621 (1) in respect of the taking of water<sup>5</sup> from a source or its taking from a source otherwise than in accordance with a restriction or obligation<sup>6</sup> which has been suspended or modified<sup>7</sup>, to the owners<sup>8</sup> of the source of water and to all other persons<sup>9</sup> interested in the source of water or injuriously affected by the taking of the water, for loss or damage sustained by reason of the taking of the water<sup>10</sup>;
- 622 (2) in respect of water's being discharged or not discharged to any place or its being discharged otherwise than in accordance with a restriction or obligation (whether relating to the treatment or to the discharge of water), which has been suspended or modified, to the owners of the place of discharge and to all other persons interested in the place of discharge or injuriously affected by the discharge or lack of discharge, for loss or damage sustained by reason of the water being discharged or not discharged or being discharged otherwise than in accordance with the restriction or obligation<sup>11</sup>;
- 623 (3) in respect of the imposition of a prohibition or limitation on the taking of water from a source, to any persons to whom the prohibition or limitation applies, for loss or damage sustained by reason of the prohibition or limitation<sup>12</sup>;
- 624 (4) in respect of a power to make discharges of sewage effluent or trade effluent<sup>13</sup> in pursuance of any consent, to any person who has been exercising that power for loss or damage sustained by reason of the suspension or variation of the consent or the attachment of conditions to the consent<sup>14</sup>.

A claim for such compensation may be made<sup>15</sup> at any time not later than six months<sup>16</sup> after the end of the period for which the order or permit authorises, as the case may be, the taking or discharge of water, the imposition of a prohibition or limitation on the taking of water, the suspension or modification of any restriction or obligation, or the suspension or variation of, or the attachment of conditions to, any consent relating to the discharge of sewage effluent or trade effluent<sup>17</sup>. Where such a claim is made during the continuance of the ordinary drought order or drought permit, the Lands Tribunal may, if it thinks fit, award a sum representing the loss or damage which is likely to be sustained by the claimant in respect of each day on which, as the case may be, water is taken or discharged, water is not discharged or is discharged otherwise than in accordance with an obligation or restriction, or sewage effluent or trade effluent is discharged otherwise than in accordance with a consent originally given<sup>18</sup>.

<sup>1</sup> As to ordinary drought orders see PARA 307.

<sup>2</sup> The Water Resources Act 1991 Sch 9 applies in relation to drought permits and their issue as it applies in relation to ordinary drought orders and their making: s 79A(9) (s 79A added by the Environment Act 1995 s 120, Sch 22 para 140). As to drought permits see PARA 305.

3 le compensation in addition to that which must be made under the Water Resources Act 1991 Sch 9 para 1 (see PARA 312): see Sch 9 para 2(1).

4 As to applications for drought orders and permits see PARA 304.

5 As to the meaning of 'taking of water' see PARA 304 note 5.

6 As to the meanings of 'restriction' and 'obligation' see PARA 305 note 8.

7 As to the meaning of 'modify' see PARA 141 note 20.

8 As to the meaning of 'owner' see PARA 22 note 9.

9 As to the meaning of 'person' see PARA 13 note 29.

10 See the Water Resources Act 1991 Sch 9 para 2(2).

11 See the Water Resources Act 1991 Sch 9 para 2(3).

12 See the Water Resources Act 1991 Sch 9 para 2(4).

13 As to the meanings of 'sewage effluent' and 'trade effluent' see PARA 304 note 5.

14 See the Water Resources Act 1991 Sch 9 para 2(5).

15 A claim for compensation must be made by serving upon the applicant a notice stating the grounds of the claim and the amount claimed: Water Resources Act 1991 Sch 9 para 3(1). Any question as to the right of a claimant to recover compensation, or as to the amount of compensation recoverable, must, in default of agreement, be referred to, and determined by, the Lands Tribunal: Sch 9 para 3(2). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

16 As to the meaning of 'month' see PARA 23 note 10.

17 Water Resources Act 1991 Sch 9 para 4(1). Interest is payable on the compensation payable: in the case of a claim under heads (1) and (2) in the text, from the date of the ordinary drought order or the drought permit; in the case of a claim under head (3) in the text, from the date of decision to prohibit or limit the taking of water; and in the case of a claim under head (4) in the text, from the date of suspension or variation of consent to make discharges or of the attachment of conditions to such consent: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58; SI 1996/593). Payments on account of compensation or interest may be made: see the Planning and Compensation Act 1991 s 80(2), (3).

18 Water Resources Act 1991 Sch 9 para 4(2). In assessing the compensation to be made under head (1) in the text, the Lands Tribunal may, if it thinks fit, have regard to the amount of water which, on an equitable apportionment of the water available from the source between the claimant, the applicant and other persons taking water from the source, may fairly be apportioned to the claimant: Sch 9 para 4(3). In assessing the compensation to be made under head (2) in the text in respect of the lack of discharge of compensation water the tribunal may, if it thinks fit, have regard to the amount of water which, under the conditions existing by reason of the shortage of rain, would have been available to the claimant during the period during which the deficiency of supplies of water is continued, if the applicant in relation to which the obligation was imposed had never carried on its undertaking: Sch 9 para 4(4). As to the meaning of 'compensation water' see PARA 305 note 22: definition applied by Sch 9 para 4(5).

## UPDATE

### 313 Additional compensation in the case of ordinary drought orders and drought permits

TEXT AND NOTE 18--References to the Lands Tribunal are now to the Upper Tribunal: Water Resources Act 1991 Sch 9 para 4(2)-(4) (amended by SI 2009/1307).



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(6) WATER SHORTAGES/(ii) Drought Permits and Drought Orders/D. COMPENSATION AND CHARGES DURING DROUGHTS/314. Other civil liabilities where drought order made or drought permit issued.

### **314. Other civil liabilities where drought order made or drought permit issued.**

Apart from the statutory provisions with respect to the payment of compensation<sup>1</sup>, neither the Environment Agency<sup>2</sup> nor any water undertaker or sewerage undertaker<sup>3</sup> will incur any liability to any person<sup>4</sup> for loss or damage sustained by reason of anything done, or of any omission, in pursuance of a drought order<sup>5</sup> or drought permit<sup>6</sup>.

Nothing in any drought order or drought permit affects the right of the Agency or any water undertaker or sewerage undertaker, in the event of an interruption or diminution of the supply of water, to recover any fixed or minimum charge which might have been recovered from any person by the Agency or that undertaker if there had been no such interruption or diminution<sup>7</sup>.

1    In the Water Resources Act 1991 Sch 9: see PARAS 312-313.

2    As to the Environment Agency see PARA 17.

3    As to the meanings of 'water undertaker' and 'sewerage undertakers' see PARA 137 note 4.

4    As to the meaning of 'person' see PARA 13 note 29.

5    As to the meaning of 'drought order' see PARA 304 note 1. As to the provisions of drought orders see PARAS 307, 308.

6    Water Resources Act 1991 s 79(2) (s 79(2), (3) amended by the Environment Act 1995 Sch 22 para 128). The Water Resources Act 1991 s 79 applies in relation to drought permits and their issue as it applies in relation to ordinary drought orders and their making: s 79A(9) (s 79A added by the Environment Act 1995 s 120 Sch 22, para 140). As to drought permits see PARA 305.

7    Water Resources Act 1991 s 79(3) (as amended: see note 6). As to water resources charges see PARA 273 et seq. As to water supply charges see PARA 417 et seq.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(6) WATER SHORTAGES/(ii) Drought Permits and Drought Orders/E. OFFENCES RELATING TO DROUGHT ORDERS OR PERMITS/315. Offences against drought order or drought permit.

## ***E. OFFENCES RELATING TO DROUGHT ORDERS OR PERMITS***

### **315. Offences against drought order or drought permit.**

A person<sup>1</sup> is guilty of an offence<sup>2</sup> if he:

- 625 (1) takes<sup>3</sup> or uses water in contravention<sup>4</sup> of a prohibition or limitation imposed by or under any drought order<sup>5</sup>, or takes or uses water otherwise than in accordance with any condition or restriction imposed by or under any such order or by a drought permit<sup>6</sup>; or
- 626 (2) discharges water otherwise than in accordance with any condition or restriction imposed by or under a drought order<sup>7</sup>; or
- 627 (3) fails to construct or maintain in good order a gauge, weir or other apparatus for measuring the flow of water required to be constructed or maintained by any drought order or drought permit<sup>8</sup>; or
- 628 (4) fails to allow some person authorised for the purpose by or under any such order, or by virtue of any such permit, to inspect and examine any such apparatus or any records<sup>9</sup> made by that apparatus or kept by that person in connection with the apparatus or to take copies of any such records<sup>10</sup>.

In any proceedings against any person for such an offence it is a defence for that person to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence<sup>11</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 A person who is guilty of any such offence is liable, on summary conviction, to a fine not exceeding the statutory maximum (Water Resources Act 1991 s 80(4)(a)); or on conviction on indictment, to a fine (s 80(4)(b)). As to the statutory maximum see PARA 169 note 20.

3 As to the meaning of 'taking of water' see PARA 304 note 5.

4 As to the meaning of 'contravention' see PARA 20 note 5.

5 As to the meaning of 'drought order' see PARA 304 note 1. As to the provisions of drought orders see PARAS 307, 308.

6 Water Resources Act 1991 s 80(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 141(a)). As to drought permits see PARA 305.

7 Water Resources Act 1991 s 80(1)(b).

8 Water Resources Act 1991 s 80(2)(a) (amended by the Environment Act 1995 Sch 22 para 141(b)).

9 As to the meaning of 'records' see PARA 117 note 13.

10 Water Resources Act 1991 s 80(2)(b) (amended by the Environment Act 1995 Sch 22 para 141(c)).

11 Water Resources Act 1991 s 80(3).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/5. WATER RESOURCES/(6) WATER SHORTAGES/(iii) Other Temporary Restrictions/316. Hosepipe bans.

### **(iii) Other Temporary Restrictions**

#### **316. Hosepipe bans.**

If a water undertaker<sup>1</sup> is of the opinion that a serious deficiency<sup>2</sup> of water available for distribution by that undertaker exists, or is threatened, it may, for such period as it thinks necessary, prohibit or restrict, as respects the whole or any part of its area<sup>3</sup>, the use, for the purpose of watering private gardens<sup>4</sup> or washing private motor cars<sup>5</sup>, of any water supplied by that undertaker or a licensed water supplier<sup>6</sup> and drawn through a hosepipe or similar apparatus<sup>7</sup>. Before the prohibition or restriction comes into force, the undertaker must give public notice of it, and of the date when it will come into force, in two or more newspapers circulating in the locality affected by the prohibition or restriction<sup>8</sup>. During any period when any such prohibition or restriction is in force, any person designated for the purpose by the water undertaker which imposed it may, on producing some duly authenticated document showing his authority, at all reasonable times enter any premises to which the prohibition or restriction applies for the purpose of ascertaining whether there is or has been any contravention of it<sup>9</sup>.

Any person<sup>10</sup> who contravenes<sup>11</sup> the provisions of such a prohibition or restriction at a time while it is in force is guilty of an offence<sup>12</sup>.

Where such a prohibition or restriction is imposed by a water undertaker, charges made by the undertaker for the use of a hosepipe or similar apparatus are subject to a reasonable reduction, and, in the case of a charge paid in advance, the undertaker must make any necessary repayment or adjustment<sup>13</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 There must be a 'serious deficiency' of water; it is not enough that there is a shortage of rain; cf the position in relation to emergency variations of spray irrigation licences, where an 'exceptional shortage of rain' is sufficient: see PARA 262.

3 As to a water undertaker's area see PARA 318.

4 Water Industry Act 1991 s 76(1)(a). 'Private garden' is not defined for these purposes but it is submitted that the prohibition applies to all gardens and parts of gardens which are not open to the public and are not commercial in nature. Thus, while a prohibition or restriction under this provision is in force, the watering by a hosepipe or similar apparatus of private allotments and vegetable gardens, and of lawns and ornamental gardens which are not open to the public, is affected by the prohibition or restriction. The watering by such means of commercial allotments and market gardens, of ornamental gardens open to the public as of right and of sports grounds of any description is unaffected. However, as to the position when any prohibition or restriction under the drought provisions of the Water Resources Act 1991 is in force see PARA 309.

5 Water Industry Act 1991 s 76(1)(b). For these purposes, 'private motor car' means any mechanically propelled vehicle intended or adapted for use on roads, other than a public service vehicle within the meaning of the Public Passenger Vehicles Act 1981 (see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1136) or a goods vehicle within the meaning of the Road Traffic Act 1988 (see **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 220), and includes any vehicle drawn by a private car: Water Industry Act 1991 s 76(5).

6 As to the meaning of 'licensed water supplier' see PARA 152.

7 Water Industry Act 1991 s 76(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 25).

8 See the Water Industry Act 1991 s 76(2).

- 9 See the Water Industry Act 1991 s 170(4); and PARA 480.
- 10 As to the meaning of 'person' see PARA 13 note 29.
- 11 As to the meaning of 'contravene' see PARA 20 note 5.
- 12 Water Industry Act 1991 s 76(3). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 76(3). As to the standard scale see PARA 141 note 18.
- 13 Water Industry Act 1991 s 76(4).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(1) EUROPEAN COMMUNITY LEGISLATION/317. Power to give effect to international obligations.

## 6. WATER SUPPLY

### (1) EUROPEAN COMMUNITY LEGISLATION

#### 317. Power to give effect to international obligations.

The Secretary of State<sup>1</sup> may by regulations<sup>2</sup> provide that the provisions of the Water Industry Act 1991 relating to water supply<sup>3</sup> have effect with such modifications<sup>4</sup> as may be prescribed to enable Her Majesty's government in the United Kingdom<sup>5</sup> to give effect to any Community obligations<sup>6</sup>, or to any international agreement to which the United Kingdom is for the time being a party<sup>7</sup>.

The quality of water supplied for human consumption is increasingly regulated by European Community legislation<sup>8</sup>, which either has direct effect<sup>9</sup> or is effective through national legislation made for the purpose of implementing a European Directive<sup>10</sup>. Additionally, member states must ensure by 2010 that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of the Water Framework Directive<sup>11</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the making of regulations see PARA 21. By virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), the following regulations have effect as if made under the Water Industry Act 1991 s 92: the Surface Waters (Dangerous Substances) (Classification) Regulations 1989, SI 1989/2286, and the Bathing Waters (Classification) Regulations 1991, SI 1991/1597. See further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 330, 331.

3 I.e. the Water Industry Act 1991 Pt III Chs I-III (ss 37-86A) (see PARA 319 et seq), but excluding s 71 (see PARA 370), s 72 (see PARA 369), s 76 (see PARA 316) and any other provisions of Pt III (ss 1-93) so far as they have effect for the purposes of, or in relation to, ss 71, 72 or 76: see s 92(1), (2).

4 As to the meaning of 'modifications' see PARA 141 note 20.

5 As to the meaning of 'United Kingdom' see PARA 22 note 5.

6 Water Industry Act 1991 s 92(1)(a). As to the meaning of 'Community obligation' see the European Communities Act 1972 s 1, Sch 1 Pt II; Interpretation Act 1978 s 5, Sch 1.

7 Water Industry Act 1991 s 92(1)(b).

8 See generally PARAS 7-8.

9 As to the principle of direct effect see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 24.

10 See eg the Water Supply (Water Quality) Regulations 2000, SI 2000/3184 (in relation to England), and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911 (in relation to Wales); and PARA 376 et seq. These regulations are directed at the achievement of the objective set out in the Drinking Water Directive to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean: see EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 1(2); and PARA 371.

See also the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785 (in relation to England), and the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165 (in relation to Wales), which have been made for the purpose of implementing EC Council Directive 80/777 (OJ L229, 30.8.80, p 1) on the approximation of the laws of the

member states relating to the exploitation and marketing of natural mineral waters; EC Commission Directive 2003/40 (OJ L126, 22.5.2003, p 34) establishing the list, concentration limits and labelling requirements for the constituents of natural mineral waters and the conditions for using ozone-enriched air for the treatment of natural mineral waters and spring waters, and in relation to spring water and bottled drinking water, EC Council Directive 98/83 (OJ L330, 3.11.98, p 32) relating to the quality of water intended for human consumption. See further PARAS 447-452.

11 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 9(1). As to the Water Framework Directive see PARA 7. As to water pricing see PARA 417 et seq.

## **UPDATE**

### **317 Power to give effect to international obligations**

NOTE 10--SI 2007/2785 amended: SI 2009/1598. Directive 80/777 replaced: European Parliament and EC Council Directive 2009/54 on the exploitation and marketing of natural mineral waters. SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(2) DUTIES OF WATER UNDERTAKERS IN RELATION TO SUPPLY/(i) General Duties/318. Water undertakers and their appointed areas.

## **(2) DUTIES OF WATER UNDERTAKERS IN RELATION TO SUPPLY**

### **(i) General Duties**

#### **318. Water undertakers and their appointed areas.**

The area within which it is the duty of a water undertaker<sup>1</sup> to supply water<sup>2</sup> is the area defined in its appointment<sup>3</sup>. In the appointment the area of supply is defined by reference to a map. Properties outside the boundary on the map may be listed as being in the undertaker's area of supply; and properties inside the area on the map may be listed as outside the area of supply<sup>4</sup>. Occupiers of premises within that area<sup>5</sup> are entitled on certain conditions to receive on demand a supply of water for domestic purposes<sup>6</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the duty to supply water see PARA 319.

3 As to the appointment of water undertakers see PARA 137 et seq.

4 The instruments of appointment of the water undertakers are available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

5 The Water Industry Act 1991 s 45(1) (as originally enacted) (duty to make connections with main: see PARA 335) placed a duty on a water undertaker to make a connection to a water main only in relation to properties in the undertaker's area. The words 'in the undertaker's area' were deleted by the Competition and Service (Utilities) Act 1992 ss 43(1), 56(7), Sch 2. Before this amendment the position was, strictly speaking, that an amendment of the appointment was needed if a person living outside the undertaker's area requested a connection. This could happen, eg, where a person lived near the border of two undertakers' areas and the nearest main was in the area of the undertaker in whose area the applicant's property was not situated. Following the 1992 amendment a person, regardless of where he lives, can request a connection to any undertaker's main. Until that change was made, supply to persons outside that area and in excess of any such powers could possibly be restrained at the instance of the Attorney General: see *A-G v West Gloucestershire Water Co* [1909] 2 Ch 338, CA, where it was also held that the fact that the junction of the pipes of the person supplied with the company's mains was inside the limits was immaterial. The duties to supply water for non-domestic purposes, and to supply water to premises other than buildings, still apply only to premises in the area of a water undertaker: see PARA 347.

6 See PARA 335.

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### **319. General duty to maintain water supply system etc.**

It is the duty of every water undertaker<sup>1</sup> to develop and maintain an efficient and economical system of water supply within its area<sup>2</sup> and to ensure that all such arrangements have been made:

- 629 (1) for providing supplies of water to premises in that area and for making such supplies available to persons<sup>3</sup> who demand them<sup>4</sup>; and
- 630 (2) for maintaining, improving and extending the undertaker's water mains<sup>5</sup> and other pipes<sup>6</sup>,

as are necessary for securing that the undertaker is, and continues to be, able to meet its obligations under the provisions of the Water Industry Act 1991<sup>7</sup> relating to water supply<sup>8</sup>.

The obligations imposed on a water undertaker by those water supply provisions, and the remedies available in respect of contraventions<sup>9</sup> of those obligations, are in addition to any duty imposed or remedy available by virtue of the above duty and are not in any way qualified by any such duty or remedy<sup>10</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the area of a water undertaker see PARA 318.

3 As to the meaning of 'person' see PARA 13 note 29.

4 Water Industry Act 1991 s 37(1)(a).

5 As to the meaning of 'water main' see PARA 138 note 11.

6 Water Industry Act 1991 s 37(1)(b). As to the meaning of 'pipe' see PARA 138 note 11.

7 ie under the Water Industry Act 1991 Pt III (ss 37-93).

8 Water Industry Act 1991 s 37(1). Unless otherwise stated, references in the Water Industry Act 1991 to the supply system of a water undertaker are to the water mains and other pipes which it is the undertaker's duty to develop and maintain by virtue of s 37: s 219(4A) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 50(1), (3)).

The duty under the Water Industry Act 1991 s 37 is enforceable under s 18 (see PARA 163) by the Secretary of State or, in relation to Wales, by the Welsh Ministers (s 37(2)(a)), or, with the consent of, or in accordance with a general authorisation given by the Secretary of State or, as the case may be, the Welsh Ministers, by the Water Services Regulation Authority (s 37(2)(b) (amended by the Water Act 2003 s 36(2))). The Secretary of State or, in relation to Wales, the Welsh Ministers may make regulations to help determine whether an undertaker is in breach of the duty under the Water Industry Act 1991 s 37: see s 38(1)(a); and PARA 325. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. As to the Water Services Regulation Authority see PARA 109. The functions of the Secretary of State under the Water Industry Act 1991 ss 37, 38 in relation to any water undertaker whose area is wholly or mainly in Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(iii)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.



- 9 As to the meaning of 'contravention' see PARA 20 note 5.
- 10 Water Industry Act 1991 s 37(3).

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### **320. Duty to promote efficient use of water.**

It is the duty of every water undertaker<sup>1</sup> or licensed water supplier<sup>2</sup> to promote the efficient use of water by its customers<sup>3</sup>. The Water Services Regulation Authority may require a water undertaker or licensed water supplier, in its performance of this duty, to take any such action<sup>4</sup> or achieve any such overall standards of performance<sup>5</sup> as it may specify in the document imposing the requirement<sup>6</sup>. Such a requirement may<sup>7</sup> require a water undertaker or licensed water supplier to: (1) make specified facilities available to its customers or potential customers<sup>8</sup>; or (2) provide or make available to them specified information<sup>9</sup>, and may specify the form in which, the times at which or the frequency with which any such information is to be provided or made available<sup>10</sup>. Before imposing any such requirement on a water undertaker or licensed water supplier, the Authority must consult that undertaker or supplier<sup>11</sup>, and in exercising these powers in regard to any such undertaker or supplier the Authority must have regard to the extent to which water resources are available to that undertaker or supplier<sup>12</sup>.

Nothing in the above provisions, however, has effect to authorise or require a water undertaker or licensed water supplier to impose any requirement on any of its customers or potential customers<sup>13</sup>; or authorises the Authority to impose any requirement on a water undertaker or licensed water supplier which has, or may have, that effect<sup>14</sup>.

Where the Authority imposes any requirement on a water undertaker or licensed water supplier under these provisions, the Authority may arrange for that requirement to be publicised<sup>15</sup> in any such manner as it may consider appropriate for the purpose of bringing it to the attention of that undertaker's or supplier's customers<sup>16</sup>. Where a water undertaker or licensed water supplier is subject to any requirement imposed under these provisions, the Authority may also arrange for there to be given to the customers of that undertaker or supplier, at such times or with such frequency, and in any such manner<sup>17</sup>, as the Authority may consider appropriate, such information about the level of performance achieved by the undertaker or supplier in relation to that requirement as appears to the Authority to be expedient to be given to those customers<sup>18</sup>.

At such times and in such form or manner as the Authority may direct, a water undertaker or licensed water supplier must provide the Authority with such information as may be specified in the direction in connection with the undertaker's or supplier's performance in relation to any requirement imposed upon the undertaker or supplier under these provisions<sup>19</sup>. A water undertaker or licensed water supplier who fails without reasonable excuse to do anything so required of it is guilty of an offence<sup>20</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'licensed water supplier' see PARA 152.

3 Water Industry Act 1991 s 93A(1) (ss 93A-93D added by the Environment Act 1995 s 120(1), Sch 22 para 102; Water Industry Act 1991 s 93A(1) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 29(a)). This duty is enforceable under the Water Industry Act 1991 s 18 (see PARA 163) by the Secretary of State or, in relation to Wales, by the Welsh Ministers, or by the Water Services Regulation Authority with the consent of, or in accordance with a general direction given by, the Secretary of State or the Welsh Ministers: see s 93A(2) (as so added; and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8, paras 2, 29(b)). As to the meaning of 'customer or potential customer' see PARA 118 note 7. As to the Water Services Regulation Authority see PARA

109. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

The functions of the Secretary of State under the Water Industry Act 1991 s 93A in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, and any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003, s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 Water Industry Act 1991 s 93B(1)(a) (as added: see note 3).

5 Water Industry Act 1991 s 93B(1)(b) (as added: see note 3).

6 Water Industry Act 1991 s 93B(1) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 30(1), (2)). Where the Authority, in the document imposing a requirement on a water undertaker or licensed water supplier, stipulates that any contravention of the requirement by the undertaker or supplier will be a breach of its duty under the Water Industry Act 1991 s 93A (see the text to notes 1-3), any contravention of that requirement by the undertaker or supplier is a breach of that duty: s 93B(2) (as so added; and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 30(1), (3)). As to the meaning of 'contravention' see PARA 20 note 5.

7 *le* without prejudice to the generality of the Water Industry Act 1991 s 93B(1): see the text to notes 4-6.

8 See the Water Industry Act 1991 s 93B(3)(a) (as added (see note 3); and amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 30(1), (4)).

9 As to the meaning of 'information' see PARA 117 note 13.

10 See the Water Industry Act 1991 s 93B(3)(b) (as added (see note 3); and amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 30(1), (4)).

11 Water Industry Act 1991 s 93B(5) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 30(1), (6)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

12 Water Industry Act 1991 s 93B(4) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 30(1), (5)).

13 Water Industry Act 1991 s 93A(3) (as added (see note 3); and amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 29(c)).

14 See the Water Industry Act 1991 s 93B(6) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 30(1), (7)).

15 Without prejudice to the generality of this provision, the Authority may arrange for such publicising by itself publicising the requirement or causing it to be publicised, or by directing the undertaker or supplier to inform or arrange to inform its customers of the requirement: see the Water Industry Act 1991 s 93C(2) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 31(1), (3)).

16 Water Industry Act 1991 s 93C(1) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 31(1), (2)).

17 Without prejudice to the generality of this provision, the Authority may arrange for such giving of information by itself disseminating the information or causing it to be disseminated, or by directing the undertaker or supplier to give or arrange to give the information to its customers: see the Water Industry Act 1991 s 93D(2) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 32(1), (3)).

18 Water Industry Act 1991 s 93D(1) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 32(1), (2)).

19 Water Industry Act 1991 s 93D(3) (as added (see note 3); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 32(1), (4)).

20 Water Industry Act 1991 s 93D(4) (as added (see note 3); and amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 32(1), (5)). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: Water Industry Act 1991 s 93D(4) (as so added). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

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### **321. Duty to prepare, maintain and revise water resources management plans.**

It is the duty of each water undertaker<sup>1</sup> to prepare and maintain a water resources management plan<sup>2</sup>, that is, a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its water supply obligations<sup>3</sup>. A water resources management plan must address in particular:

- 631 (1) the water undertaker's estimate of the quantities of water required to meet those obligations<sup>4</sup>;
- 632 (2) the measures which the water undertaker intends to take or continue for the purpose for which the plan is required<sup>5</sup>, also taking into account for that purpose the introduction of water into the undertaker's supply system<sup>6</sup> by or on behalf of licensed water suppliers<sup>7</sup>;
- 633 (3) the likely sequence and timing for implementing those measures<sup>8</sup>; and
- 634 (4) such other matters as the Secretary of State or, where appropriate, the Welsh Ministers may specify in directions<sup>9</sup>.

Before preparing its water resources management plan (including a revised plan), the water undertaker must consult the Environment Agency<sup>10</sup>, the Water Services Regulation Authority<sup>11</sup>, the Secretary of State or, as appropriate, the Welsh Ministers<sup>12</sup>, and any licensed water supplier which supplies water to premises in the undertaker's area via the undertaker's supply system<sup>13</sup>. It is the duty of each licensed water supplier to provide the water undertaker with such information<sup>14</sup> as the water undertaker may reasonably request for the purposes of preparing or revising its water resources management plan<sup>15</sup>. In the event of any dispute between a water undertaker and a licensed water supplier as to the reasonableness of the water undertaker's request under this provision, either party may refer the matter for determination by the Secretary of State or, as the case may be, to the Welsh Ministers, and any such determination is final<sup>16</sup>.

Before each anniversary of the date when its plan (or revised plan) was last published<sup>17</sup>, the water undertaker must review its plan<sup>18</sup> and send a statement of the conclusions of its review to the Secretary of State or, as appropriate, to the Welsh Ministers<sup>19</sup>. The water undertaker must prepare a revised plan in each of the following cases<sup>20</sup>: (a) following conclusion of its annual review, if the review indicated a material change of circumstances<sup>21</sup>; (b) if directed to do so by the Secretary of State or the Welsh Ministers<sup>22</sup>; (c) in any event, not later than the end of the period of five years beginning with the date when the plan (or revised plan) was last published<sup>23</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 Water Industry Act 1991 s 37A(1) (ss 37A-37D added by the Water Act 2003 s 62). The procedure for preparing a water resources management plan (including a revised plan) is set out in the Water Industry Act 1991 s 37B (see PARA 322): s 37A(4) (as so added). Water resources management plans may require strategic environmental assessment (see PARA 9) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

3 See the Water Industry Act 1991 s 37A(2) (as added: see note 2). The water supply obligations referred to in the text are the undertaker's obligations under Pt III (ss 37-93). The Secretary of State or, in relation to

Wales, the Welsh Ministers may give directions specifying: (1) the form which a water resources management plan must take (s 37A(7)(a) (as so added)); (2) the planning period to which a water resources management plan must relate (s 37A(7)(b) (as so added)).

The functions of the Secretary of State under the Water Industry Act 1991 ss 37A-37D, and s 39B and s 39C (see PARA 323) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253). Those functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. In respect of those functions it is provided as follows: (a) functions so far as relating to matters concerning the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to Wales; (b) functions so far as relating to matters other than the construction or enlargement of reservoirs are transferred to the Welsh Ministers in relation to any water undertaker whose area is wholly or mainly in Wales; and (c) the functions of the Welsh Ministers referred to in head (b) above so far as they are exercisable in relation to England are exercisable only after consultation with the Secretary of State: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1 (amended by the Water Act 2003 s 100(2)(a)(ix), (g)); Government of Wales Act 2006 Sch 11 para 30. The functions of the Secretary of State under the Water Industry Act 1991 ss 37A-37D, s 39B and s 39C so far as relating to matters other than the construction or enlargement of reservoirs are exercisable only after consultation with the Welsh Ministers: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 5, Sch 2 (amended by the Water Act 2003 s 100(3)); Government of Wales Act 2006 Sch 11 para 32. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'England' see PARA 19 note 8. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the exercise by the Secretary of State and the Welsh Ministers of the powers and duties relating to the regulation of undertakers see s 2; and PARA 130. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

4 Water Industry Act 1991 s 37A(3)(a) (as added: see note 2).

5 le the purpose set out in the Water Industry Act 1991 s 37A(2): see the text to note 3.

6 As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

7 Water Industry Act 1991 s 37A(3)(b) (as added: see note 2). As to the meaning of 'licensed water supplier' see PARA 152.

8 Water Industry Act 1991 s 37A(3)(c) (as added: see note 2).

9 Water Industry Act 1991 s 37A(3)(d) (as added: see note 2). Directions given under s 37A may be: (1) general directions applying to all water undertakers (s 37D(1)(a) (as so added)); or (2) directions applying only to one or more water undertakers specified in the directions (s 37D(1)(b) (as so added)), and must be given by an instrument in writing (s 37D(1) (as so added)). It is the duty of each water undertaker to whom directions apply to comply with the directions: s 37D(2) (as so added). The duties of a water undertaker under ss 37A-37D, and a licensed water supplier under s 37C (see the text to notes 14-16), are enforceable by the Secretary of State or, where appropriate, the Welsh Ministers under s 18 (see PARA 163): s 37D(3) (as so added). As to the meaning of 'writing' see PARA 22 note 1.

10 Water Industry Act 1991 s 37A(8)(a) (as added: see note 2). As to the Environment Agency see PARA 17.

11 Water Industry Act 1991 s 37A(8)(b) (as added: see note 2). As to the Water Services Regulation Authority see PARA 109.

12 Water Industry Act 1991 s 37A(8)(c) (as added: see note 2).

13 Water Industry Act 1991 s 37A(8)(d) (as added: see note 2).

14 As to the meaning of 'information' see PARA 117 note 13.

15 Water Industry Act 1991 s 37C(1) (as added: see note 2). The water undertaker must not use any unpublished information save for the purpose of facilitating the performance by it of any of the duties imposed on it by or under the Water Industry Act 1991, any of the other consolidation Acts or the Water Act 1989: Water Industry Act 1991 s 37C(4) (as so added). For these purposes, 'unpublished information' means confidential information which: (1) is provided to the water undertaker by a licensed water supplier under s 37C; (2) relates to the affairs of any individual or to any particular business; and (3) by virtue of s 37B (see PARA 322), is not published: s 37C(5)(a) (as so added). The 'other consolidation Acts' has the same meaning as in s 206 (see PARA 133 note 5): s 37C(5)(b) (as so added).

16 Water Industry Act 1991 s 37C(2) (as added: see note 2). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

17 In relation to a water resources management plan, 'published' means published in accordance with the Water Industry Act 1991 s 37B(8)(a) (see PARA 322): s 37A(10) (as added: see note 2).

18 Water Industry Act 1991 s 37A(5)(a) (as added: see note 2).

19 Water Industry Act 1991 s 37A(5)(b) (as added: see note 2).

20 In the preparation of a revised plan the water undertaker must follow the procedure in the Water Industry Act 1991 s 37B (see PARA 322) (whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan): see s 37A(6) (as added: see note 2).

21 Water Industry Act 1991 s 37A(6)(a) (as added: see note 2).

22 Water Industry Act 1991 s 37A(6)(b) (as added: see note 2). The Secretary of State or, as the case may be, the Welsh Ministers must consult the Environment Agency before giving such a direction: s 37A(9) (as so added).

23 Water Industry Act 1991 s 37A(6)(c) (as added: see note 2).

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### **322. Procedure for preparation and revision of water resources management plans.**

A water undertaker must<sup>1</sup>:

- 635 (1) send a draft water resources management plan<sup>2</sup> to the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>3</sup>;
- 636 (2) state whether it appears to the undertaker that any information<sup>4</sup> contained in that plan is or might be commercially confidential (as regards itself or another person)<sup>5</sup>; and
- 637 (3) give the Secretary of State or, where appropriate, the Welsh Ministers the name of each such other person and his address for service of a notice<sup>6</sup> that such information is included in the draft plan<sup>7</sup>.

If the water undertaker states that it so appears in relation to any such information, the Secretary of State or, where appropriate, the Welsh Ministers must, if the person to whom or to whose business the information relates is not the water undertaker, give that person notice<sup>8</sup> that the information is included in a draft water resources management plan and, unless excluded<sup>9</sup>, is required to be published<sup>10</sup>; and give each person (including the water undertaker) to whom any such information relates a reasonable opportunity of objecting to the publication of the information relating to him on the ground that it is commercially confidential<sup>11</sup>, and of making representations to the Secretary of State or, as the case may be, the Welsh Ministers for the purpose of justifying any such objection<sup>12</sup>. The Secretary of State or the Welsh Ministers must determine, taking any such objections and representations into account, whether the information is or is not commercially confidential<sup>13</sup>.

A water undertaker must publish the draft water resources management plan in the prescribed<sup>14</sup> way or, if no way is prescribed, in a way calculated to bring it to the attention of persons likely to be affected by it<sup>15</sup>. The undertaker must publish with the draft plan a statement whether any information has been excluded<sup>16</sup> from the published draft plan; if it has, the general nature of that information<sup>17</sup>, and that any person may make representations in writing about the plan to the Secretary of State or the Welsh Ministers before the end of a period specified in the statement<sup>18</sup>. The undertaker must send a copy of the published draft plan and accompanying statement to such persons (if any) as may be prescribed<sup>19</sup>.

The Secretary of State or the Welsh Ministers must send to the water undertaker a copy of any representations he or they receive following such publication of the draft plan and must give it a reasonable period of time within which to comment on the representations<sup>20</sup>. The Secretary of State or the Welsh Ministers may in regulations prescribe how such representations and any comments by the water undertaker on them are to be dealt with<sup>21</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers may direct a water undertaker that its water resources management plan must differ from the draft sent to him or them in ways specified in such a direction, and it is the duty<sup>22</sup> of the water undertaker to comply with the direction<sup>23</sup>. If, however, the water undertaker considers that publishing a water resources management plan complying with such a direction would mean including in the published plan any information (other than any information in relation to which the Secretary of State or the Welsh Ministers have already made a determination<sup>24</sup>) which might be commercially confidential (as regards itself or another person) the water undertaker must send



the Secretary of State or the Welsh Ministers a notice saying so, and giving the Secretary of State or the Welsh Ministers the name of any such other person and his address for service of a notice<sup>25</sup> that the information is included in a water resources management plan and, unless excluded, is required to be published<sup>26</sup>. The Secretary of State or the Welsh Ministers may either confirm the direction<sup>27</sup> (which is to be treated as a new such direction) or revoke the previous such direction (or the previous one so treated) and give a new one<sup>28</sup>.

The water undertaker must publish<sup>29</sup> the water resources management plan in the prescribed way or, if no way is prescribed, in a way calculated to bring it to the attention of persons likely to be affected by it<sup>30</sup>. It must also publish with that plan a statement whether any information has been excluded from the published plan<sup>31</sup> and, if it has, the general nature of that information<sup>32</sup>.

1 Any steps to be taken by a water undertaker under the Water Industry Act 1991 s 37B must be completed by such time or within such period as the Secretary of State or, in relation to Wales, the Welsh Ministers may direct: s 37B(11) (ss 37B-37D added by the Water Act 2003 s 62). The duties of a water undertaker under the Water Industry Act 1991 ss 37B, 37C (see note 5) are enforceable by the Secretary of State or, in relation to Wales, the Welsh Ministers under s 18 (see PARA 163): s 37D(3) (as so added). As to the meaning of 'water undertaker' see PARA 137 note 4. As to the Secretary of State see PARA 15 note 1. As to the exercise of functions under the Water Industry Act 1991 ss 37B-37D by the Secretary of State, and their transfer, in relation to Wales, to the Welsh Ministers see PARA 321 note 3. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

2 As to the meaning of 'water resources management plan' see PARA 321.

3 Water Industry Act 1991 s 37B(1)(a) (as added: see note 1).

4 As to the meaning of 'information' see PARA 117 note 13.

5 Water Industry Act 1991 s 37B(1)(b) (as added: see note 1). As to the meaning of 'person' see PARA 13 note 29. The water undertaker must identify in its statement any information: (1) provided by a licensed water supplier pursuant to the Water Industry Act 1991 s 37C(1) (see PARA 321) (s 37C(3)(a) (as so added)); and (2) contained in the water undertaker's draft water resources management plan (s 37C(3)(b) (as so added)), which the licensed water supplier has (at the time of providing it to the water undertaker) specifically identified as being, in the licensed water supplier's opinion, commercially confidential (s 37C(3) (as so added)). The water undertaker must not use any unpublished information save for the purpose of facilitating the performance by it of any of the duties imposed on it by or under the Water Industry Act 1991, any of the other consolidation Acts or the Water Act 1989: Water Industry Act 1991 s 37C(4) (as so added). As to the meaning of 'licensed water supplier' see PARA 152. As to the meanings of 'unpublished information' and 'consolidation Acts' see PARA 321 note 15. As to the duty of licensed water suppliers to provide information to water undertakers see s 37C(1), (2); and PARA 321.

6 I.e a notice under the Water Industry Act 1991 s 37B(2)(a): see the text to notes 8-10.

7 Water Industry Act 1991 s 37B(1)(c) (as added: see note 1).

8 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

9 I.e unless the Water Industry Act 1991 s 37B(10) applies: see note 15.

10 Water Industry Act 1991 s 37B(2)(a) (as added: see note 1).

11 Water Industry Act 1991 s 37B(2)(b)(i) (as added: see note 1).

12 Water Industry Act 1991 s 37B(2)(b)(ii) (as added: see note 1).

13 Water Industry Act 1991 s 37B(2) (as added: see note 1).

14 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Industry Act 1991 s 219(1). A draft water resources management plan published in accordance with s 37B(3)(a) must be published both in paper form and on a website: Water Resources Management Plan Regulations 2007, SI 2007/727, reg 2(1). The Water Resources Management Plan Regulations 2007, SI 2007/727, extend to both England and Wales: reg 1(2). As to the meaning of 'England' see PARA 19 note 8.

15 Water Industry Act 1991 s 37B(3)(a) (as added: see note 1). The published version of a draft water resources management plan so published, and a water resources management plan published under s 37B(8) (a) (see the text to notes 29-30), must exclude any information which the Secretary of State or, as the case may be, the Welsh Ministers: (1) have determined under s 37B(2) (see the text to note 13) (or that subsection as applied by s 37B(9): see the text to note 26) is commercially confidential (s 37B(10)(a) (as so added)); or (2) direct the water undertaker to exclude on the ground that it appears to them that its publication would be contrary to the interests of national security (s 37B(10)(b) (as so added)). Directions given under s 37B may be: (a) general directions applying to all water undertakers (s 37D(1)(a) (as so added)); or (b) directions applying only to one or more water undertakers specified in the directions (s 37D(1)(b) (as so added)), and must be given by an instrument in writing (s 37D(1) (as so added)). It is the duty of each water undertaker to whom directions apply to comply with the directions: s 37D(2) (as so added). As to the meaning of 'writing' see PARA 22 note 1.

16 le by virtue of the Water Industry Act 1991 s 37B(10): see note 15.

17 Water Industry Act 1991 s 37B(3)(b)(i) (as added: see note 1).

18 Water Industry Act 1991 s 37B(3)(b)(ii) (as added: see note 1). Where a water undertaker publishes a statement accompanying the draft water resources management plan in accordance with s 37B(3)(b), it must specify in the statement that any person making representations: (1) to the Welsh Ministers, must send a copy of those representations to the Secretary of State if those representations are made in response to a draft water resources management plan sent to the Welsh Ministers in accordance with the Water Resources Management Plan Regulations 2007, SI 2007/727, reg 2(2)(j) or (k) (see heads (10) and (11) in note 19); and (2) to the Secretary of State, must send a copy of those representations to the Welsh Ministers if those representations are made in response to a draft water resources management plan sent to the Secretary of State in accordance with reg 2(2)(h) (see head (8) in note 19): reg 3; Government of Wales Act 2006 Sch 11 para 32.

19 Water Industry Act 1991 s 37B(3)(c) (as added: see note 1). The persons to whom a water undertaker must send a copy of the published draft water resources management plan and accompanying statement are: (1) those bodies and persons specified in s 37A(8) (see PARA 321); (2) any regional development agencies, established under the Regional Development Agencies Act 1998 (see **TRADE AND INDUSTRY** vol 97 (2010) PARA 988), in the water undertaker's area; (3) if the water undertaker's area includes any part of England, any elected regional assembly, established under an enactment following a referendum held under the Regional Assemblies (Preparations) Act 2003 s 1 (see **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 548), in the water undertaker's area or that part of its area which is in England; (4) all local authorities (except the council of any parish or community), as defined in the Local Government Act 1972 s 270(1) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22), in the water undertaker's area; (5) any National Park authorities established under the Environment Act 1995 s 63 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526) for any part of the water undertaker's area; (6) if the water undertaker's area includes any part of the Broads, as defined in the Norfolk and Suffolk Broads Act 1988 s 2(3) (see PARA 735 note 2), the Broads Authority; (7) if the water undertaker's area includes any part of England, Natural England and the Historic Buildings and Monuments Commission for England; (8) if the water undertaker's area is mainly but not wholly in Wales, the Secretary of State; (9) if the water undertaker's area includes any part of Wales, the Countryside Council for Wales and Cadw, being the executive agency responsible for carrying out the functions vested in the Welsh Ministers relating to the historic environment; (10) if the water undertaker's area includes any part of Wales, but is not wholly or mainly in Wales, the Welsh Ministers; (11) if the water undertaker abstracts water in Wales, but its area does not include any part of Wales, the Welsh Ministers; (12) any navigation authority, exercising functions in relation to any canal or other inland navigation which is wholly or partly in the water undertaker's area; (13) any other water undertaker (a) which supplies water to, receives water from, or shares a water resource with, the water undertaker; (b) whose water resources are identified by the water undertaker, in its draft water resources management plan, as a possible supply; or (c) which is identified by the water undertaker, in its draft water resources management plan, as a potential partner for the development of new water resources; and (14) the Consumer Council for Water: Water Resources Management Plan Regulations 2007, SI 2007/727, reg 2(2)(a)-(n); Government of Wales Act 2006 Sch 11 para 32. As to water undertakers' areas see PARA 318. As to the Broads Authority see PARA 734. As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq. As to the Historic Buildings and Monuments Commission for England see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 803 et seq. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the Consumer Council for Water see PARA 115.

20 Water Industry Act 1991 s 37B(4) (as added: see note 1).

21 Water Industry Act 1991 s 37B(5) (as added: see note 1). Such regulations: (1) may provide for the Secretary of State or, as the case may be, the Welsh Ministers to cause an inquiry or other hearing to be held in connection with the draft water resources management plan (s 37B(6)(a) (as so added)); and (2) if they do so provide, may provide for the Local Government Act 1972 s 250(2)-(5) (local inquiries: evidence and costs: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) to apply with prescribed modifications to such an inquiry or hearing

as it applies to inquiries under that provision (Water Industry Act 1991 s 37B(6)(b) (as so added)). 'Prescribed' means prescribed by the regulations: see s 219(1). As to the making of regulations see PARA 21.

A water undertaker must, in relation to any representations received by the Secretary of State or the Welsh Ministers and sent to that undertaker in accordance with s 37B(4) (see the text to note 20), prepare a statement detailing: (a) the consideration that it has given to those representations; (b) any changes that it has made to the draft water resources management plan as a result of its consideration of those representations and its reasons for doing so; and (c) where no change has been made to the draft water resources management plan as a result of its consideration of any representation, the reason for this: Water Resources Management Plan Regulations 2007, SI 2007/727, reg 4(1); Government of Wales Act 2006 Sch 11 para 32. The water undertaker must publish the statement in paper form and on its website, and send a copy of the statement to any person who has made representations in writing in relation to the draft water resources management plan to the Secretary of State or the Welsh Ministers in accordance with the Water Industry Act 1991 s 37B(4): Water Resources Management Plan Regulations 2007, SI 2007/727, reg 4(2); Government of Wales Act 2006 Sch 11 para 32. The Secretary of State or the Welsh Ministers may cause an inquiry or other hearing to be held in connection with a draft water resources management plan: Water Resources Management Plan Regulations 2007, SI 2007/727, reg 5(1); Government of Wales Act 2006 Sch 11 para 32. Where the Secretary of State or the Welsh Ministers so cause an inquiry or other hearing to be held, the Local Government Act 1972 s 250(2)-(5) applies to such inquiry or other hearing as it applies to inquiries under that section, except that for any reference in that section to a 'local authority' there must be read instead a reference to the water undertaker whose draft water resources management plan is the subject of the inquiry or other hearing: Water Resources Management Plan Regulations 2007, SI 2007/727, reg 5(2); Government of Wales Act 2006 Sch 11 para 32.

22    le subject to the Water Industry Act 1991 s 37B(9): see the text to notes 24-28.

23    Water Industry Act 1991 s 37B(7) (as added: see note 1).

24    le a determination under the Water Industry Act 1991 s 37B(2): see the text to note 13.

25    le a notice under the Water Industry Act 1991 s 37B(2)(a): see the text to notes 8-10.

26    Water Industry Act 1991 s 37B(9)(a) (as added: see note 1). Section 37B(2) (see the text to notes 8-13) applies in relation to that information as it applies in relation to the information referred to there: s 37B(9)(b) (as so added).

27    le the direction under the Water Industry Act 1991 s 37B(7): see the text to notes 22-23.

28    Water Industry Act 1991 s 37B(9) (as added: see note 1).

29    le subject to the Water Industry Act 1991 s 37B(10): see note 15.

30    Water Industry Act 1991 s 37B(8)(a) (as added: see note 1). A water resources management plan so published must be published both in paper form and on a website: Water Resources Management Plan Regulations 2007, SI 2007/727, reg 6.

31    le by virtue of the Water Industry Act 1991 s 37B(10): see note 15.

32    Water Industry Act 1991 s 37B(8)(b) (as added: see note 1).

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### **323. Duty to prepare, maintain and review drought plans.**

It is the duty of each water undertaker<sup>1</sup> to prepare and maintain a drought plan<sup>2</sup>. A drought plan is a plan for how the water undertaker will continue, during a period of drought, to discharge its duties to supply adequate quantities of wholesome water<sup>3</sup>, with as little recourse as reasonably possible to drought orders or drought permits<sup>4</sup>. A drought plan must address, in particular, the following matters:

- 638 (1) what measures the water undertaker might need to take to restrain the demand for water within its area<sup>5</sup>;
- 639 (2) what measures the water undertaker might need to take to obtain extra water from other sources (also taking into account for that purpose the introduction of water into the undertaker's supply system<sup>6</sup> by or on behalf of licensed water suppliers)<sup>7</sup>;
- 640 (3) how the water undertaker will monitor the effects of the drought and of the measures taken under the drought plan<sup>8</sup>;
- 641 (4) such other matters as the Secretary of State or, in relation to Wales, the Welsh Ministers may specify in directions<sup>9</sup>.

Before preparing its drought plan (including a revised plan), the water undertaker must consult the Environment Agency<sup>10</sup>, the Water Services Regulation Authority<sup>11</sup>, the Secretary of State or, as the case may be, the Welsh Ministers<sup>12</sup>, and any licensed water supplier which supplies water to premises in the undertaker's area via the undertaker's supply system<sup>13</sup>. It is the duty of each licensed water supplier to provide the water undertaker with such information<sup>14</sup> as the water undertaker may reasonably request for the purposes of preparing or revising its drought plan<sup>15</sup>. In the event of any dispute between a water undertaker and a licensed water supplier as to the reasonableness of the water undertaker's request, either party may refer the matter for determination by the Secretary of State or, in relation to Wales, the Welsh Ministers and any such determination is final<sup>16</sup>.

The procedure for preparing and publishing water resources management plans<sup>17</sup>, including any power to make regulations<sup>18</sup> or give directions, applies in relation to drought plans (including revised plans) as it applies in relation to water resources management plans<sup>19</sup>.

Each water undertaker must review (or further review) its drought plan and prepare a revised plan in each of the following cases: (a) if there is a material change of circumstances<sup>20</sup>; (b) if directed to do so by the Secretary of State or the Welsh Ministers<sup>21</sup>; (c) in any event, not later than the end of the period of three years beginning with the date when the plan (or revised plan) was last<sup>22</sup> published<sup>23</sup>.

1 The duty of a water undertaker under the Water Industry Act 1991 s 39B is enforceable by the Secretary of State or, in relation to Wales, by the Welsh Ministers under s 18 (see PARA 163): s 39B(12) (ss 39B, 39C added by the Water Act 2003 s 63). As to the exercise of functions under the Water Industry Act 1991 ss 39B, 39C by the Secretary of State, and their transfer, in relation to Wales, to the Welsh Ministers see PARA 321 note 3. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'water undertaker' see PARA 137 note 4.

2 Water Industry Act 1991 s 39B(1) (as added: see note 1). The Secretary of State or, in relation to Wales, the Welsh Ministers may give directions specifying the form which a drought plan must take: s 39B(8) (as so added). Directions given under s 39B (including directions given under s 37B as applied by s 39B(5) (see the text to notes 17-19)) may be: (1) general directions applying to all water undertakers (s 39B(9)(a) (as so added)); or (2) directions applying only to one or more water undertakers specified in the directions (s 39B(9)(b) (as so added)), and must be given by an instrument in writing (s 39B(9) (as so added)). It is the duty of each water undertaker to whom directions apply to comply with the directions: s 39B(10) (as so added). As to the meaning of 'writing' see PARA 22 note 1. Drought plans may require strategic environmental assessment (see PARA 9) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

3 The duties referred to in the text include in particular those imposed under or by virtue of the Water Industry Act 1991 s 37 (see PARA 319), ss 67-69 (see PARAS 373-375): s 39B(3) (as added: see note 1).

4 Water Industry Act 1991 s 39B(2) (as added: see note 1). As to drought orders and drought permits see the Water Resources Act 1991 Pt II Ch III (ss 73-81); and PARA 302 et seq.

5 Water Industry Act 1991 s 39B(4)(a) (as added: see note 1). As to water undertakers' areas see PARA 318.

6 As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

7 Water Industry Act 1991 s 39B(4)(b) (as added: see note 1). As to the meaning of 'licensed water supplier' see PARA 152.

8 Water Industry Act 1991 s 39B(4)(c) (as added: see note 1).

9 Water Industry Act 1991 s 39B(4)(d) (as added: see note 1). See also note 2.

10 Water Industry Act 1991 s 39B(7)(a) (as added: see note 1). As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 Water Industry Act 1991 s 39B(7)(b) (as added: see note 1). As to the Water Services Regulation Authority see PARA 109.

12 Water Industry Act 1991 s 39B(7)(c) (as added: see note 1).

13 Water Industry Act 1991 s 39B(7)(d) (as added: see note 1).

14 As to the meaning of 'information' see PARA 117 note 13.

15 Water Industry Act 1991 s 39C(1) (as added: see note 1). The duties of a licensed water supplier and a water undertaker under s 39C are enforceable by the Secretary of State or, as appropriate, the Welsh Ministers under s 18 (see PARA 163): s 39C(6) (as so added).

16 Water Industry Act 1991 s 39C(2) (as added: see note 1). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

17 Ie the Water Industry Act 1991 s 37B: see PARA 322.

18 As to the regulations made see the Drought Plan Regulations 2005, SI 2005/1905, which make provision as to the publication of draft drought plans (see reg 2), the publication of statements accompanying draft drought plans (see reg 3), the procedure in respect of any representations received by the Secretary of State or the Welsh Ministers (see reg 4), the holding of inquiries (see reg 5) and the publication of drought plans (see reg 6). The regulations extend to both England and Wales: reg 1(2).

19 Water Industry Act 1991 s 39B(5) (as added: see note 1). For the purposes of s 37B(1)(b) (see PARA 322) as so applied, the water undertaker must identify in its statement under that provision any information provided by a licensed water supplier pursuant to s 39C(1) (see the text to notes 14-15) and contained in the water undertaker's draft drought plan, which the licensed water supplier has (at the time of providing it to the water undertaker) specifically identified as being, in the licensed water supplier's opinion, commercially confidential: s 39C(3) (as so added). The water undertaker must not use any unpublished information save for the purpose of facilitating the performance by it of any of the duties imposed on it by or under the Water Industry Act 1991, any of the other consolidation Acts or the Water Act 1989: Water Industry Act 1991 s 39C(4) (as so added). For these purposes, 'unpublished information' means confidential information which is provided to the water undertaker by a licensed water supplier under s 39C, relates to the affairs of any individual or to any particular business, and by virtue of s 37B as applied by s 39B(5), is not published: s 39C(5)(a) (as so added). As to the meaning of 'other consolidation Acts' see PARA 133 note 5: definition applied by s 39C(5)(b) (as so added). See also note 15.

20 Water Industry Act 1991 s 39B(6)(a) (as added: see note 1).

21 Water Industry Act 1991 s 39B(6)(b) (as added: see note 1). The Secretary of State or the Welsh Ministers must consult the Environment Agency before giving such a direction: s 39B(11) (as so added). See also note 2.

22 le in accordance with the Water Industry Act 1991 s 37B(8)(a) (see PARA 322) as applied by s 39B(5) (see the text to notes 17-19).

23 Water Industry Act 1991 s 39B(6)(c) (as added: see note 1). Each water undertaker must follow the procedure in s 37B (see PARA 322) as applied by s 39B(5) (see the text to notes 17-19), whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan: s 39B(6) (as so added).

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**324. Asset management plans.**

The water undertakers<sup>1</sup> are required by the conditions of their appointments to prepare asset management plans, which must be kept under review<sup>2</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 The instruments of appointment of the water undertakers are available on the Water Services Regulation Authority website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk). Asset management plans may require strategic environmental assessment: see PARA 9.

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### **325. Standards of performance in connection with water supply.**

For the purpose of:

- 642 (1) facilitating the determination of the extent to which breaches of the obligations imposed by the water supply provisions of the Water Industry Act 1991<sup>1</sup> are to amount to breaches of the general duty<sup>2</sup> to maintain a water supply system<sup>3</sup>; and
- 643 (2) supplementing that duty by establishing overall standards of performance in relation to it<sup>4</sup>,

the Secretary of State<sup>5</sup> or, in relation to Wales, the Welsh Ministers<sup>6</sup>, may by regulations<sup>7</sup> provide for contraventions<sup>8</sup> of prescribed<sup>9</sup> requirements to be treated as breaches of that duty<sup>10</sup>. The Secretary of State or the Welsh Ministers may also<sup>11</sup> by regulations prescribe such standards of performance in connection with the provision of supplies of water as ought, in his or their opinion, to be achieved in individual cases<sup>12</sup>; and may provide thereby that if a water undertaker fails to meet a prescribed standard it must pay such amount as may be prescribed to any person who is affected by the failure and is of a prescribed description<sup>13</sup>.

The Secretary of State or the Welsh Ministers may make regulations under the above provisions on an application<sup>14</sup> by the Water Services Regulation Authority<sup>15</sup>, or otherwise than on such an application<sup>16</sup>. Where the Authority has made to the Secretary of State or the Welsh Ministers a written<sup>17</sup> application complying with the statutory requirements<sup>18</sup>, the Secretary of State or, as the case may be, the Welsh Ministers may make such regulations if<sup>19</sup>:

- 644 (a) the Secretary of State or the Welsh Ministers are satisfied that a copy of the application has been served by the Authority<sup>20</sup> on every water undertaker specified in the application<sup>21</sup>; on persons or bodies appearing to the Secretary of State or the Welsh Ministers to be representative of persons likely to be affected by the regulations<sup>22</sup>; on the Consumer Council for Water<sup>23</sup>; and on such other persons or bodies as the Secretary of State or the Welsh Ministers may consider appropriate<sup>24</sup>;
- 645 (b) such period as the Secretary of State or the Welsh Ministers consider appropriate has been allowed for the making by the Authority and by any affected water undertaker or person or body on whom a copy of the application has been served under head (a) above, of representations or objections with respect to the Authority's proposals and any modifications proposed by the Secretary of State or the Welsh Ministers<sup>25</sup>; and
- 646 (c) the Secretary of State or the Welsh Ministers have considered the summary of the results of the research submitted by the Authority<sup>26</sup>, the Authority's reasons for its proposals, and every representation or objection which has been duly made with respect to those proposals, or any proposed modifications of those proposals, and has not been withdrawn<sup>27</sup>.

The Secretary of State or the Welsh Ministers must not make any regulations on an application by the Authority except where<sup>28</sup>: (i) the only provisions of the regulations are those which in the opinion of the Secretary of State or the Welsh Ministers give effect to the proposals set out in



the Authority's application or to those proposals with such modifications<sup>29</sup> as the Secretary of State or the Welsh Ministers consider appropriate<sup>30</sup>; and (ii) each of the modifications (if any) of the Authority's proposals to which effect is given by the regulations is a modification the proposal to make which has been notified to the Authority<sup>31</sup>, to any water undertaker appearing to the Secretary of State or the Welsh Ministers to be likely to be affected by the modifications<sup>32</sup>, and to any person or body who was served<sup>33</sup> with a copy of the Authority's application<sup>34</sup>.

Where no such application from the Water Services Regulation Authority has been made, the Secretary of State or the Welsh Ministers may make regulations under these provisions only if he or they consider: (A) that the regulations will contribute towards the attainment of policies relating to public health or the environment<sup>35</sup>; or (B) if he or they do not consider that the regulations will so contribute, that there are exceptional reasons why it is otherwise in the public interest that the regulations should be made<sup>36</sup>. Before so making regulations, the Secretary of State or the Welsh Ministers must give notice<sup>37</sup> of the proposals<sup>38</sup>, consider the results of the research carried out<sup>39</sup>, and consider every representation or objection with respect to the proposals which has been duly made and not withdrawn<sup>40</sup>.

1    Ie the obligations imposed by the Water Industry Act 1991 ss 38A-93.

2    Ie the duty imposed by the Water Industry Act 1991 s 37: see PARA 319.

3    Water Industry Act 1991 s 38(1)(a).

4    Water Industry Act 1991 s 38(1)(b).

5    As to the Secretary of State see PARA 15 note 1.

6    The functions of the Secretary of State under the Water Industry Act 1991 ss 38, 39 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water suppliers): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; Water Act 2003 s 100(2)(a)(ix), (b)(iii), (x)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'water undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7    Ie in accordance with the Water Industry Act 1991 s 39: see the text to notes 14-40. As to the making of regulations see PARA 21. The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, have been made: see PARAS 327-328.

8    As to the meaning of 'contravention' see PARA 20 note 5.

9    'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Industry Act 1991 s 219(1).

10   Water Industry Act 1991 s 38(1).

11   Ie in accordance with the Water Industry Act 1991 s 39: see the text to notes 14-40.

12   Water Industry Act 1991 s 38(2). Without prejudice to the generality of the power conferred by s 38(2), regulations under that provision may: (1) include in a standard of performance a requirement for a water undertaker, in prescribed circumstances, to inform a person of his rights by virtue of any such regulations (s 38(4)(a)); (2) provide for any dispute under the regulations to be referred by either party to the dispute to the Water Services Regulation Authority (s 38(4)(b) (s 38(4)(b), (c) amended by the Water Act 2003 s 36(2))); (3) make provision for the procedure to be followed in connection with any such reference and for the Authority's determination on such a reference to be enforceable in such manner as may be prescribed (Water Industry Act 1991 s 38(4)(c) (as so amended)); (4) prescribe circumstances in which a water undertaker is to be exempted from requirements of the regulations (s 38(4)(d)). Where the Authority determines any dispute in accordance with regulations under s 38 it must, in such manner as may be specified in the regulations, give its reasons for

reaching its decision with respect to the dispute: s 38(5) (added by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 18; and amended by the Water Act 2003 s 36(2)). As to the meaning of 'person' see PARA 13 note 29. As to the Water Services Regulation Authority see PARA 109. The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, have been made: see PARAS 327-328.

13 Water Industry Act 1991 s 38(3).

14 ie an application in accordance with the Water Industry Act 1991 s 39(1)-(3): see the text to notes 17-34.

15 Water Industry Act 1991 s 39(A1)(a) (s 39(A1) added by the Water Act 2003 s 41(1), (2)).

16 Water Industry Act 1991 s 39(A1)(b) (as added: see note 15). Regulations made under this provision are to be made in accordance with s 39(4)-(8) (see the text to notes 35-40): see s 39(A1)(b) (as so added).

17 As to the meaning of 'written' see PARA 22 note 1.

18 Before making an application to the Secretary of State or the Welsh Ministers the Authority must arrange for such research as it considers appropriate with a view to discovering the views of a representative sample of persons likely to be affected and consider the results: Water Industry Act 1991 s 39(1A) (added by the Competition and Service (Utilities) Act 1992 s 26(1), (3); and amended by the Water Act 2003 s 36(2)). An application made by the Authority to the Secretary of State or the Welsh Ministers complies with the statutory requirements if it:

45 (1) sets out the Authority's proposals for the making of regulations under the Water Industry Act 1991 s 38 (see the text to notes 1-13) (s 39(2)(a) (amended by the Water Act 2003, ss 36(2), 41(1), (4)(a)));

46 (2) specifies the water undertaker or undertakers in relation to which it is proposed the regulations should apply (Water Industry Act 1991 s 39(2)(b) (amended by the Water Act 2003 s 41(1), (4)(b)));

47 (3) is accompanied by a written summary of the results of the research carried out in accordance with s 39(1A) above (Water Industry Act 1991 s 39(2)(bb) (added by the Competition and Service (Utilities) Act 1992 s 26(1), (4))); and

48 (4) summarises the Authority's reasons for its proposals (Water Industry Act 1991 s 39(2)(c) (amended by the Water Act 2003 s 36(2))).

19 Water Industry Act 1991 s 39(1) (amended by the Water Act 2003 s 41(1), (3)(a)).

20 Water Industry Act 1991 s 39(1)(b) (s 39(1)(b) substituted by the Competition and Service (Utilities) Act 1992 ss 26(1), (2), 56(6), Sch 1 para 19; and amended by the Water Act 2003 s 36(2)). As to the service of documents see PARA 22.

21 Water Industry Act 1991 s 39(1)(b)(i) (as substituted: see note 20).

22 Water Industry Act 1991 s 39(1)(b)(ii) (as substituted: see note 20).

23 Water Industry Act 1991 s 39(1)(b)(iii) (s 39(1)(b) as substituted (see note 20); s 39(1)(b)(iii), (iv) added by the Water Act 2003 s 41(1), (3)(b)). As to the Consumer Council for Water see PARA 115.

24 Water Industry Act 1991 s 39(1)(b)(iv) (as substituted and added: see note 23).

25 Water Industry Act 1991 s 39(1)(c) (amended by the Competition and Service (Utilities) Act 1992 ss 26(1), (2), 56(6), Sch 1 para 19; the Water Act 2003 ss 36(2), 41(1), (3)(c)).

26 ie the summary mentioned in the Water Industry Act 1991 s 39(2)(bb): see note 18.

27 Water Industry Act 1991 s 39(1)(d) (amended by the Competition and Service (Utilities) Act 1992 ss 26(1), (2), 56(6), Sch 1 para 19; the Water Act 2003 s 36(2)).

28 Water Industry Act 1991 s 39(3) (amended by the Water Act 2003 s 41(1), (5)(a)).

29 As to the meaning of 'modifications' see PARA 141 note 20.

30 Water Industry Act 1991 s 39(3)(a) (amended by the Water Act 2003 s 41(1), (5)(b)).

31 Water Industry Act 1991 s 39(3)(b)(i) (amended by the Water Act 2003 ss 36(2), 41(1), (5)(c), 101(2), Sch 9 Pt 2).

32 Water Industry Act 1991 s 39(3)(b)(ii).

33 le under the Water Industry Act 1991 s 39(1)(b): see the text to notes 20-24.

34 See the Water Industry Act 1991 s 39(3)(b)(iii) (added by the Water Act 2003, s 41(1), (5)(c)).

35 Water Industry Act 1991 s 39(4)(a) (s 39(4)-(8) added by the Water Act 2003 s 41(1), (6)).

36 Water Industry Act 1991 s 39(4)(b) (as added: see note 35).

37 Before giving such notice the Secretary of State or the Welsh Ministers must arrange for such research as he or they consider appropriate with a view to discovering the views of a representative sample of persons likely to be affected: Water Industry Act 1991 s 39(7) (as added: see note 35). The notice must be given by serving a copy on the Water Services Regulation Authority, the Consumer Council for Water, every water undertaker to which the regulations apply, persons or bodies appearing to the Secretary of State or the Welsh Ministers to be representative of persons likely to be affected by the regulations, and such other persons or bodies as the Secretary of State or the Welsh Ministers may consider appropriate: s 39(8) (as so added). The notice must (1) summarise the Secretary of State's or Welsh Ministers' reasons for the proposals; (2) specify the water undertaker or undertakers in relation to which it is proposed the regulations should apply; and (3) specify the period within which objections or representations with respect to the proposals may be made: s 39(6) (as so added). As to the meaning of 'notice' see PARA 22 note 1.

38 Water Industry Act 1991 s 39(5)(a) (as added: see note 35).

39 Water Industry Act 1991 s 39(5)(b) (as added: see note 35). The research referred to in the text is that carried out under s 39(7): see note 37.

40 Water Industry Act 1991 s 39(5)(c) (as added: see note 35).

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### **326. Information about levels of performance.**

The Water Services Regulation Authority<sup>1</sup> must from time to time collect information<sup>2</sup> with respect<sup>3</sup> to the compensation paid<sup>4</sup> by water undertakers<sup>5</sup>, and with respect to the levels of overall performance achieved by water undertakers in connection with the provision of water supplies<sup>6</sup>. At such times as the Authority may direct, each water undertaker must give to the Authority the following information<sup>7</sup>:

- 647 (1) as respects each prescribed standard of performance in individual cases<sup>8</sup>, the number of cases in which compensation was paid and the aggregate amount or value of that compensation<sup>9</sup>;
- 648 (2) as respects each established standard of overall performance<sup>10</sup>, such information with respect to the level of performance achieved by the undertaker as may be specified<sup>11</sup>.

A water undertaker who without reasonable excuse fails to do anything so required of it is guilty of an offence<sup>12</sup>.

At least once in every year the Authority must arrange for the publication, in such form and in such manner as it considers appropriate, of such of the information collected by or given to it under these provisions as it may appear to the Authority expedient to give to customers or potential customers<sup>13</sup> of water undertakers<sup>14</sup>. In arranging for the publication of any such information, the Authority must have regard to the need for excluding, so far as practicable, any matter which relates to the affairs of an individual or which relates specifically to the affairs of a particular body of persons<sup>15</sup>, whether corporate or unincorporate, where publication of that matter would or might, in the Authority's opinion, seriously and prejudicially affect the interests of that individual or body<sup>16</sup>.

Each water undertaker must<sup>17</sup>, in such form and manner and with such frequency as the Authority may direct, take steps to inform its customers, and, if the direction so specifies, licensed water suppliers<sup>18</sup> using the undertaker's supply system<sup>19</sup> for the purpose of supplying water to the premises of customers or those customers, of<sup>20</sup>: (a) the overall performance standards which have been established<sup>21</sup> and which are applicable to that undertaker<sup>22</sup>; and (b) its level of performance as respects each of those standards<sup>23</sup>. In giving any such direction, the Authority must not specify a frequency of less than once in every period of 12 months<sup>24</sup>. The licensed water suppliers referred to above must, if the Authority so directs, pass on the information about the matters mentioned in heads (a) and (b) above to their customers<sup>25</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the meaning of 'information' see PARA 117 note 13.

3 Water Industry Act 1991 s 38A(1) (s 38A added by the Competition and Service (Utilities) Act 1992 s 27; and amended by the Water Act 2003 s 36(2)).

4 I.e. under regulations under the Water Industry Act 1991 s 38(2); see PARA 325.

5 Water Industry Act 1991 s 38A(1)(a) (as added: see note 3). As to the meaning of 'water undertaker' see PARA 137 note 4.

- 6 Water Industry Act 1991 s 38A(1)(b) (as added: see note 3). As to standards of performance see PARA 325.
- 7 Water Industry Act 1991 s 38A(2) (as added and amended: see note 3).
- 8 le each standard prescribed by regulations under the Water Industry Act 1991 s 38(2): see PARA 325.
- 9 Water Industry Act 1991 s 38A(2)(a) (as added: see note 3).
- 10 le each standard established by regulations under the Water Industry Act 1991 s 38(1)(b): see PARA 325.
- 11 Water Industry Act 1991 s 38A(2)(b) (as added: see note 3).
- 12 Water Industry Act 1991 s 38A(3) (as added: see note 3). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: s 38A(3) (as so added). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185. As to offences relating to the provision of false information see PARA 184.
- 13 As to the meaning of 'customer or potential customer' see PARA 118 note 7.
- 14 Water Industry Act 1991 s 38A(4) (as added and amended: see note 3). Reports relating to such information are available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 15 As to the meaning of 'person' see PARA 13 note 29.
- 16 See the Water Industry Act 1991 s 38A(5) (as added and amended: see note 3). As to restrictions on the publication of information in general see PARA 183.
- 17 The duty of a water undertaker to comply with the Water Industry Act 1991 s 39A is enforceable by the Authority under s 18 (see PARA 163): s 39A(3) (s 39A added by the Competition and Service (Utilities) Act 1992 s 28).
- 18 As to the meaning of 'licensed water supplier' see PARA 152.
- 19 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 39A(2B) (s 39A as added (see note 17); Water Industry Act 1991 s 39A(2A), (2B) subsequently added by the Water Act 2003 s 101(1), Sch 8 paras 2, 13(1), (3)).
- 20 Water Industry Act 1991 s 39A(1) (as added (see note 17); and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 13(1), (2)).
- 21 le under the Water Industry Act 1991 s 38(1)(b): see PARA 325.
- 22 Water Industry Act 1991 s 39A(1)(a) (as added: see note 17).
- 23 Water Industry Act 1991 s 39A(1)(b) (as added: see note 17).
- 24 Water Industry Act 1991 s 39A(2) (as added (see note 17); and amended by the Water Industry Act 1991 s 36(2)). As to the meaning of 'month' see PARA 23 note 10.
- 25 Water Industry Act 1991 s 39A(2A) (as added: see note 19). The duty of a licensed water supplier to comply with the Water Industry Act 1991 s 39A is enforceable by the Authority under s 18 (see PARA 163): s 39A(3) (as so added; and amended by the Water Act 2003 ss 36(2), 101(1), Sch 8 paras 2, 13(1), (4)).

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### **327. Customer service standards; in general.**

Customer service standards are set by the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008<sup>1</sup> in relation to the keeping of appointments<sup>2</sup>, complaints<sup>3</sup>, account queries and requests about payment arrangements<sup>4</sup>, notice of interruption of supply<sup>5</sup>, entitlement to payment or credit where supply not restored as promised<sup>6</sup>, and the maintenance of pressure standard<sup>7</sup>.

A relevant undertaker<sup>8</sup> must, at least once in every financial year<sup>9</sup>, give every customer<sup>10</sup> to whom it sends an account in that year a detailed statement of the rights provided by the regulations<sup>11</sup>. If a relevant undertaker is aware that accounts to a customer cover the supply of water or sewerage services to other customers, it must give the customer enough copies of the statement to enable the customer to give a copy to each of those other customers<sup>12</sup>, or send a copy of the statement to each of those other customers directly<sup>13</sup>.

The making of a payment by a water undertaker to a customer in consequence of a claim or potential claim for a payment under the regulations is not an admission by that undertaker of any liability other than an obligation to comply with the regulations<sup>14</sup>; and the acceptance by a customer of a payment or credit made in consequence of the regulations does not affect any liability of the undertaker to the customer other than its liability under the regulations<sup>15</sup>. Nothing in the regulations requires a relevant undertaker to give notice to more than one person in respect of the same premises<sup>16</sup>, or to make a payment to more than one person in respect of any one claim<sup>17</sup>; and nothing in the regulations, and nothing done by a relevant undertaker in consequence of the regulations, determines who is beneficially entitled to a payment made under the regulations, or in respect of any one act or omission relating to the same premises<sup>18</sup>.

If a dispute arises between a relevant undertaker and a customer as to the right of the customer to a payment or a credit to the customer's account under the regulations relating to customer service standards, either party may refer the matter to the Water Services Regulation Authority<sup>19</sup> for determination<sup>20</sup>. The parties to a dispute that has been referred to the Authority must give it any evidence or information<sup>21</sup> that it reasonably requires to enable it to determine the dispute<sup>22</sup>. If the Authority determines the dispute in the customer's favour but the undertaker fails to give effect to the determination, the customer may set off the amount in question against any liability that he has to the undertaker<sup>23</sup>.

<sup>1</sup> See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594. As to the power to set such standards see PARA 325. As to the provision of information about levels of performance see PARA 326.

<sup>2</sup> See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6; and PARA 328. The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, extend to England and Wales: reg 3. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

<sup>3</sup> See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7; and PARA 392.

<sup>4</sup> See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7; and PARA 444.

5 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8; and PARA 355.

6 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9; and PARA 356.

7 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 10; and PARA 353. The regulations also make provision as to flooding from sewers in respect of internal flooding of buildings (see reg 11) and external flooding (see reg 12). As to liability for discharges into and from public sewers see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 296.

8 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

9 As to the meaning of 'financial year' see PARA 111 note 2.

10 'Customer' includes: (1) a potential customer; and (2) an occupier of premises whose supply of water or sewerage services is the subject of a separate charge for which a person other than the occupier is liable, but does not include a customer of a licensed water supplier: Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 4(1). For the purposes of the regulations, a licensed water supplier is not a customer of a water undertaker that supplies water to it: reg 4(2). As to the meaning of 'sewerage services' see PARA 129 note 7. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'customer or potential customer' see PARA 118 note 7. As to the meaning of 'person' see PARA 13 note 29.

11 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 16(1).

12 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 16(2)(a).

13 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 16(2)(b).

14 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 15(1).

15 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 15(2). A customer who is entitled to payment under the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, may ask the relevant undertaker concerned to make the payment directly to the customer: reg 14(1). However, if the customer has not asked for direct payment, the undertaker may make the payment directly to the customer or by credit to the customer's account: reg 14(2). If a customer of a relevant undertaker is entitled to a payment under the regulations but owes money to the undertaker, and at the material time, the customer's debt to the undertaker has been outstanding for more than six weeks, the undertaker must make the payment, or so much of it as does not exceed the amount that the customer owes, by credit to the customer's account: reg 14(3). For these purposes, the 'material time' is: (1) if the payment is payable without a written claim being made, the time when it becomes payable (reg 14(4)(a)); or (2) otherwise, the time when the customer makes a written claim for it (reg 14(4)(b)). As to the meaning of 'written' see PARA 22 note 1.

16 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 5(1)(a).

17 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 5(1)(b).

18 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 5(2).

19 As to the Water Services Regulation Authority see PARA 109.

20 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 17(1).

21 As to the meaning of 'information' see PARA 117 note 13.

22 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 17(2).

23 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 17(3).



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### **328. Keeping appointments with customers.**

If a representative of a relevant undertaker<sup>1</sup> is to visit a customer's<sup>2</sup> premises in connection with the provision of water supply services or sewerage services<sup>3</sup>, then if the representative requires access to the premises, or it would otherwise be reasonable to expect the customer or a person acting on the customer's behalf to be on the premises, the undertaker must consult the customer orally or in writing<sup>4</sup> to try to agree on a day to attend the premises<sup>5</sup>, and give the customer notice, orally or in writing, of when the representative will attend the premises<sup>6</sup>. The undertaker's notice must specify: (1) the premises<sup>7</sup>; (2) the date that the representative will attend them<sup>8</sup>; (3) either if the customer so requests, a period of two hours during which the visit will be made<sup>9</sup>, or otherwise, whether the visit will be made during the morning or the afternoon<sup>10</sup>; and (4) if the notice specifies that the visit will be made during the morning or afternoon, at what times the undertaker regards the morning or the afternoon, as the case requires, as beginning and ending<sup>11</sup>. The representative of an undertaker who attended a customer's premises may make and sign a written record stating that the representative attended the premises and the time and date of attendance<sup>12</sup>; and unless the customer establishes that the record is incorrect, it is taken to confirm that the representative attended the premises as stated in the record<sup>13</sup>.

The undertaker must pay the customer £20<sup>14</sup> if the undertaker gives a notice that is not in accordance with heads (1) to (4) above<sup>15</sup>, a representative does not attend the premises on the date specified in the notice<sup>16</sup>, or a representative does attend the premises on that date but not within the specified time<sup>17</sup>. No application by the customer for the payment is necessary<sup>18</sup>. The undertaker must make the payment within ten working days<sup>19</sup> of its becoming payable<sup>20</sup>; and if the undertaker fails to make that payment, it must pay the customer a further £10 if the customer makes a written claim for payment within three months<sup>21</sup> after the payment becomes payable<sup>22</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the meaning of 'customer' see PARA 327 note 10.

3 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(1).

4 As to the meaning of 'writing' see PARA 22 note 1.

5 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(2)(a).

6 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(2)(b). As to the giving of notice see PARA 327.

7 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(3)(a).

8 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(3)(b).

9 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(3)(c)(i).

10 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(3)(c)(ii).

11 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(3)(d).

12 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(8).

13 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(9).

14 However, the undertaker need not pay the customer if: (1) the customer cancels the appointment (Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(6)(a)); (2) the undertaker cancels the appointment by giving the customer at least 24 hours' notice, orally or in writing, of the cancellation (reg 6(6)(b)); or (3) it became impracticable, for a specified reason, for the representative to keep the appointment, and the undertaker could not reasonably have so foreseen in time to enable it to cancel the appointment giving 24 hours' notice, or to make other suitable arrangements for a representative to attend the premises at the arranged time (reg 6(6)(c)). The specified reasons are (a) severe weather; (b) industrial action by employees of the undertaker; and (c) the act or default of a person who is not an officer, employee or agent of the undertaker or a person acting on behalf of the undertaker or of an agent of the undertaker: reg 6(7)(a)-(c). As to the meaning of 'person' see PARA 13 note 29.

15 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(4)(a).

16 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(4)(b).

17 If the notice specified a two-hour period for the attendance, the representative does not attend during the specified period (Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(4)(c)(i)); or if the notice specified that the representative would attend during the morning or afternoon, the representative does not attend during the period specified in the notice as being the period of the morning or the afternoon, as the case requires (reg 6(4)(c)(ii)).

18 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 6(5). As to the making of payments and the effect of the making and acceptance of payments under the regulations see PARA 327. As to the settlement of disputes between a relevant undertaker and a customer as to the right of the customer to a payment see PARA 327.

19 'Working day' means any day that is not a Saturday, a Sunday, Christmas Day, Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321): Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 4(1).

20 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 13(1). A payment under reg 6, reg 7 (see PARAS 392, 444), reg 8 (see PARA 355) or reg 9 (see PARA 356) becomes payable: (1) if the customer concerned must make an application for the payment, at the end of the day on which the undertaker receives that application (reg 13(5)(a)); or (2) if no such application is necessary, at the end of the day on which the relevant breach of a service standard occurred (reg 13(5)(b)). If reg 8 (see PARA 355), reg 9 (see PARA 356), or reg 12 (see PARA 327) requires a relevant undertaker to make a payment to a customer, the undertaker must make it within 20 working days of its becoming payable: reg 13(3). If the undertaker fails to make the payment in accordance with reg 13(3), the undertaker must pay the customer: (a) in the case of a payment in relation to the supply of water to domestic premises, a further £20 (reg 13(4)(a)); and (b) in any other case, a further £50 (reg 13(4)(b)).

21 As to the meaning of 'month' see PARA 23 note 10.

22 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 13(2).

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**329. Provision of accounts and accounting information; codes of practice for customers.**

The water undertakers<sup>1</sup> are required by the conditions of their appointments<sup>2</sup> to give certain accounts and accounting information to the Water Services Regulation Authority<sup>3</sup>. They are also required to prepare codes of practices for customers on disconnections and on leakage<sup>4</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the appointment of undertakers see PARA 137.

3 As to the Water Services Regulation Authority see PARA 109.

4 The instruments of appointment of the undertakers are available on the Water Services Regulation Authority website [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

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## **(ii) Supply Duties**

### **A. BULK SUPPLIES**

#### **330. Orders regarding bulk supplies.**

Where, on the application of a qualifying person<sup>1</sup>:

- 649 (1) it appears to the Water Services Regulation Authority<sup>2</sup> that it is necessary or expedient for the purposes of securing the efficient use of water resources, or the efficient supply of water, that the water undertaker specified in the application (the 'supplier') should give a supply of water in bulk<sup>3</sup> to the applicant<sup>4</sup>; and
- 650 (2) the Authority is satisfied that the giving and taking of such a supply cannot be secured by agreement<sup>5</sup>,

the Authority may by order<sup>6</sup> require the supplier to give, and the applicant to take, such a supply for such period, and on such terms and conditions, as may be provided in the order<sup>7</sup>. Such an order has effect as an agreement between the supplier and the applicant<sup>8</sup>.

In exercising its functions under these provisions, the Authority must have regard to the desirability of<sup>9</sup>:

- 651 (a) facilitating effective competition within the water supply industry<sup>10</sup>;
- 652 (b) the supplier's recovering the expenses of complying with its obligations by virtue of these provisions and securing a reasonable return on its capital<sup>11</sup>;
- 653 (c) the supplier's being able to meet its existing obligations, and likely future obligations, to supply water without having to incur unreasonable expenditure in carrying out works<sup>12</sup>;
- 654 (d) not putting at risk the ability of the supplier to meet its existing obligations, or likely future obligations, to supply water<sup>13</sup>.

Where it appears to the Environment Agency that a bulk supply is necessary in order to secure the proper use of water resources<sup>14</sup>, it may, in carrying out its functions in relation to water resources<sup>15</sup>, propose to a qualifying person that he makes an application under the above provisions for a bulk supply of water from a water undertaker<sup>16</sup>. The Agency may include in its proposal the period for which, and terms and conditions on which, the Agency considers it appropriate that the bulk supply should be given<sup>17</sup>.

The incidental functions of the Agency include the provision of supplies of water in bulk<sup>18</sup>, whether or not such supplies are provided for the purposes of, or in connection with, the carrying out of any other function of the Agency<sup>19</sup>.

1 'Qualifying person' means: (1) a water undertaker; or (2) a person who has made an application for an appointment or variation under the Water Industry Act 1991 s 8 (see PARA 139) which has not been determined: s 40(2) (s 40 substituted by the Competition and Service (Utilities) Act 1992 s 44). This definition is applied for the purposes of the Water Resources Act 1991 s 20C (see the text to notes 14-17): see s 20C(1) (s 20C added

by the Water Act 2003 s 31(1)). As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'person' see PARA 13 note 29.

2 As to the Water Services Regulation Authority see PARA 109.

3 As to the meaning of 'supply of water in bulk' see PARA 138 note 11.

4 Water Industry Act 1991 s 40(1)(a) (as substituted (see note 1); and amended by the Water Act 2003 s 36(2)).

5 Water Industry Act 1991 s 40(1)(b) (as substituted (see note 1); and amended by the Water Act 2003 s 36(2)). An agreement may be made between any water undertakers and any other persons, whether water undertakers or not, for the giving by those other persons, and the taking by the undertakers, of a supply of water in bulk for any period and on any terms and conditions, and, where the supply is to be given by persons who are themselves water undertakers, either within or outside the area of supply of those undertakers. Local legislation may contain provisions as to the bulk supply of water. Any agreement made or having effect as if made under the Water Act 1945 s 12 (repealed) (supply of water in bulk) which was in force immediately before the transfer date (ie 1 September 1989: see PARA 108) continues in force on and after that date notwithstanding the repeal of s 12 but subject to the transfer of rights and liabilities under the agreement in accordance with a transfer scheme under the Water Act 1989 s 4(1)(b), Sch 2 (see PARA 108): s 190(2), Sch 26 para 5(1). The Water Act 1945 s 12 (repealed) provided that an order imposing a bulk supply took effect as an agreement; any such orders still in force could presumably therefore be varied under the Water Industry Act 1991 s 40A: see further PARA 331.

6 The Authority must not make such an order unless it has first consulted the Environment Agency: Water Industry Act 1991 s 40(5) (as substituted (see note 1); and amended by the Environment Act 1995 s 120(1), Sch 22 para 99, the Water Act 2003 s 36(2)). As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

7 Water Industry Act 1991 s 40(1) (as substituted (see note 1); and amended by the Water Act 2003 s 36(2)). Orders under these provisions, not being statutory instruments, are not recorded in this work.

8 Water Industry Act 1991 s 40(4) (as substituted: see note 1). Where the application is made by a person who is a qualifying person by virtue of s 40(2)(b) (see head (2) in note 1), an order made in response to that application must be expressed not to come into force until the applicant becomes a water undertaker for the area specified in the order, or for an area which includes that area: s 40(3) (as so substituted). As to water undertakers' areas see PARA 318. As to the variation and termination of bulk supply agreements see PARA 331.

9 Water Industry Act 1991 s 40(6) (as substituted (see note 1); and amended by the Water Act 2003 s 36(2)).

10 Water Industry Act 1991 s 40(6)(a) (as substituted: see note 1).

11 Water Industry Act 1991 s 40(6)(b) (as substituted: see note 1).

12 Water Industry Act 1991 s 40(6)(c) (as substituted: see note 1). As to the recovery of expenses see PARA 131 note 6.

13 Water Industry Act 1991 s 40(6)(d) (as substituted: see note 1).

14 See the Water Resources Act 1991 s 20C(2) (as added: see note 1).

15 Ie its functions under the Environment Act 1995 s 6(2): see PARA 188.

16 Water Resources Act 1991 s 20C(1) (as added: see note 1). The Agency must not make such a proposal without first consulting the Water Services Regulation Authority: s 20C(3) (as so added).

17 Water Resources Act 1991 s 20C(4) (as added: see note 1).

18 For these purposes, 'supply of water in bulk' means a supply of water for distribution by a water undertaker taking the supply: Environment Act 1995 s 10(6).

19 See the Environment Act 1995 s 10(1), (4). As to the incidental functions of the Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 80.

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### **331. Variation and termination of bulk supply agreements.**

Any party to a bulk supply agreement<sup>1</sup> may apply to the Water Services Regulation Authority<sup>2</sup> for the variation or termination of that agreement<sup>3</sup>. If on such an application it appears to the Authority that it is necessary or expedient for the purposes of securing the efficient use of water resources, or the efficient supply of water, to vary the agreement or to terminate it<sup>4</sup>, and the Authority is satisfied that that cannot be achieved by agreement between the parties<sup>5</sup>, the Authority may by order<sup>6</sup>: (1) vary the agreement by varying the period for which the supply of water is to be given<sup>7</sup> or varying any of the terms or conditions on which that supply is to be given<sup>8</sup>; or (2) terminate the agreement<sup>9</sup>.

In exercising its functions under these provisions, the Authority must have regard to the expenses incurred by the supplier<sup>10</sup> in complying with its obligations under the bulk supply agreement and to the desirability of<sup>11</sup>:

- 655 (a) facilitating effective competition within the water supply industry<sup>12</sup>;
- 656 (b) the supplier's recovering the expenses of complying with its obligations by virtue of these provisions and securing a reasonable return on its capital<sup>13</sup>;
- 657 (c) the supplier's being able to meet its existing obligations, and likely future obligations, to supply water without having to incur unreasonable expenditure in carrying out works<sup>14</sup>;
- 658 (d) not putting at risk the ability of the supplier to meet its existing obligations, or likely future obligations, to supply water<sup>15</sup>.

Where an order is made under these provisions, the agreement concerned either has effect subject to the provision made by the order, or, as the case may be, ceases to have effect<sup>16</sup>. An order may require the payment of compensation by any party to the agreement to any other party<sup>17</sup>.

1 'Bulk supply agreement' means an agreement between one or more water undertakers for the supply of water in bulk and includes: (1) an order under the Water Industry Act 1991 s 40 which is deemed to be an agreement by virtue of s 40(4) (see PARA 330); and (2) any agreement which has been varied by an order under s 40A: Water Industry Act 1991 s 40A(8)(a), (b) (s 40A added by the Competition and Service (Utilities) Act 1992 s 44). As to orders made under the Water Act 1945 s 12 (repealed) and their continuing effect as such agreements see PARA 330 note 5. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'supply of water in bulk' see PARA 138 note 11.

2 As to the Water Services Regulation Authority see PARA 109.

3 See the Water Industry Act 1991 s 40A(1) (as added: see note 1).

4 Water Industry Act 1991 s 40A(1)(a) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

5 Water Industry Act 1991 s 40A(1)(b) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

6 Water Industry Act 1991 s 40A(2) (as added (see note 1); and amended by the Water Act 2003 s 36(2)). Before making any such order the Authority must consult the Environment Agency: Water Industry Act 1991 s 40A(3) (as so added and amended; and further amended by the Environment Act 1995 s 120(1), Sch 22 para 100). As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. Orders under these provisions, not being statutory instruments, are not recorded in this work.

- 7 Water Industry Act 1991 s 40A(2)(a)(i) (as added: see note 1).
- 8 Water Industry Act 1991 s 40A(2)(a)(ii) (as added: see note 1).
- 9 Water Industry Act 1991 s 40A(2)(b) (as added: see note 1).
- 10 'Supplier', in relation to a bulk supply agreement, means any water undertaker which is required by the agreement to provide a bulk supply of water: Water Industry Act 1991 s 40A(8) (as added: see note 1).
- 11 Water Industry Act 1991 s 40A(7) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).
- 12 Water Industry Act 1991 s 40A(7)(a) (as added: see note 1).
- 13 Water Industry Act 1991 s 40A(7)(b) (as added: see note 1). As to the recovery of expenses see PARA 131 note 6.
- 14 Water Industry Act 1991 s 40A(7)(c) (as added: see note 1).
- 15 Water Industry Act 1991 s 40A(7)(d) (as added: see note 1).
- 16 Water Industry Act 1991 s 40A(4) (as added: see note 1).
- 17 Water Industry Act 1991 s 40A(5) (as added: see note 1). The obligations of a water undertaker to pay such compensation are enforceable under s 18 (see PARA 163) by the Water Services Regulation Authority: s 40A(6) (as so added; and amended by the Water Act 2003 s 36(2)).

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## **B. REQUISITIONS**

### **332. Duty to comply with water main requisition.**

It is the duty of a water undertaker<sup>1</sup> to provide a water main<sup>2</sup> to be used for providing such supplies of water to premises in a particular locality in its area<sup>3</sup> as, so far as those premises are concerned, are sufficient for domestic purposes<sup>4</sup> if:

- 659 (1) the undertaker is required to provide the main by a notice served<sup>5</sup> on the undertaker by one or more of the persons<sup>6</sup> who are entitled<sup>7</sup> to require the provision of the main for that locality<sup>8</sup>;
- 660 (2) the premises in that locality to which those supplies would be provided by means of that main are premises consisting in buildings or parts of buildings<sup>9</sup>, or premises which will so consist when proposals made by any person for the erection of buildings or parts of buildings are carried out<sup>10</sup>; and
- 661 (3) certain financial conditions<sup>11</sup> are satisfied in relation to that requirement<sup>12</sup>.

Each of the following persons is entitled to require the provision of a water main for any locality: (a) the owner<sup>13</sup> or occupier of any premises in the locality<sup>14</sup>; (b) any local authority<sup>15</sup> within whose area the whole or any part of that locality is situated<sup>16</sup>; (c) where the whole or any part of that locality is situated in a new town<sup>17</sup>, the new towns residuary body<sup>18</sup> and the development corporation for the new town<sup>19</sup>; and (d) where the whole or any part of that locality is situated within an area designated as an urban development area<sup>20</sup>, the urban development corporation<sup>21</sup>.

This duty of a water undertaker to provide a water main is owed to the person who requires its provision or, as the case may be, to each of the persons who joins in doing so<sup>22</sup>. Where such a duty is owed to any person, any breach of that duty which causes that person to sustain loss or damage<sup>23</sup> is actionable at the suit of that person; but in any proceedings brought against a water undertaker in pursuance of this provision, it is a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach<sup>24</sup>. Moreover, a water undertaker is not in breach of a duty so imposed in relation to any locality unless the period of three months<sup>25</sup> beginning with the relevant day has expired<sup>26</sup>, and the water undertaker has not, before the end of that period, so laid the water main to be provided as to enable, as the case may be, service pipes to premises in that locality or a water main which is the subject of an agreement as to adoption<sup>27</sup> (the 'self-laid main'), to connect with the main at the place or places<sup>28</sup>:

- 662 (i) determined by agreement between the water undertaker and the person or persons who required the provision of the water main<sup>29</sup>; or
- 663 (ii) in default of agreement, determined by the Authority, on a reference<sup>30</sup>, to be the places at which it is reasonable, in all the circumstances, for service pipes to premises in the locality in question, or (as the case may be) the self-laid main, to connect with the water main<sup>31</sup>.



- 1 le in accordance with the Water Industry Act 1991 s 44: see the text to notes 25-31. As to the meaning of 'water undertaker' see PARA 137 note 4.
- 2 As to the meaning of 'water main' see PARA 138 note 11.
- 3 As to water undertakers' areas see PARA 318.
- 4 As to the meaning of 'domestic purposes' see PARA 334.
- 5 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 6 As to the meaning of 'person' see PARA 13 note 29.
- 7 le under the Water Industry Act 1991 s 41(2): see heads (a)-(d) in the text.
- 8 Water Industry Act 1991 s 41(1)(a).
- 9 Water Industry Act 1991 s 41(1)(b)(i).
- 10 Water Industry Act 1991 s 41(1)(b)(ii).
- 11 le the conditions specified in the Water Industry Act 1991 s 42: see PARA 333.
- 12 Water Industry Act 1991 s 41(1)(c).
- 13 As to the meaning of 'owner' see PARA 22 note 9.
- 14 Water Industry Act 1991 s 41(2)(a), (b).
- 15 For these purposes 'local authority', in relation to the Inner Temple and the Middle Temple, includes, respectively, the Sub-treasurer of the Inner Temple and the Under-treasurer of the Middle Temple: Water Industry Act 1991 s 41(5). As to the meaning of 'local authority' generally see PARA 118 note 17. As to the Inner and Middle Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 32.
- 16 Water Industry Act 1991 s 41(2)(c).
- 17 le within the meaning of the New Towns Act 1981: see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1315.
- 18 Water Industry Act 1991 s 41(2)(d)(i) (amended by the Housing and Regeneration Act 2008 s 56, Sch 8 paras 55, 56). 'New towns residuary body' means: (1) in relation to a new town in England, the Homes and Communities Agency so far as exercising functions in relation to anything transferred (or to be transferred) to it as mentioned in the Housing and Regeneration Act 2008 s 52(1)(a) or (b) (see **TOWN AND COUNTRY PLANNING**) (and references to the 'English new towns residuary body' are to be read accordingly); and (2) in relation to a new town in Wales, the Welsh Ministers so far as exercising functions in relation to anything transferred (or to be transferred) to them as mentioned in the New Towns Act 1981 s 36(1)(a)(i) or (ii) (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1384) (and references to the 'Welsh new towns residuary body' are to be read accordingly): Water Industry Act 1991 s 219(1) (definition added by the Housing and Regeneration Act 2008 s 56, Sch 8 paras 55, 59). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.
- 19 Water Industry Act 1991 s 41(2)(d)(ii) (amended by the Government of Wales Act 1998 s 152, Sch 18 Pt IV). As to development corporations see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1322 et seq.
- 20 le under the Local Government, Planning and Land Act 1980 Pt XVI (ss 134-172): see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1426 et seq.
- 21 Water Industry Act 1991 s 41(2)(e). As to urban development corporations see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1428 et seq.
- 22 Water Industry Act 1991 s 41(3).
- 23 As to the meaning of 'damage' see PARA 129 note 7.
- 24 Water Industry Act 1991 s 41(4).
- 25 The period of three months may be extended in any case either by an agreement between the water undertaker and the person or persons who required the provision of the main, or, where there is a dispute as to

whether the period should be extended, by the Water Services Regulation Authority on a reference under the Water Industry Act 1991 s 44(4): s 44(2) (amended by the Water Act 2003 s 91(3)(b)). A reference for the purposes of the Water Industry Act 1991 s 44(2) or (3) (see the text to notes 29-31) may be made to the Authority for determination under s 30A (see PARA 131) by either party to the dispute: s 44(4) (substituted by the Water Act 2003 s 91(3)(d)). As to the meaning of 'month' see PARA 23 note 10. As to the Water Services Regulation Authority see PARA 109.

26 Water Industry Act 1991 s 44(1)(a). 'Relevant day', in relation to a requirement to provide a water main, means the day after whichever is the later of the following: (1) the day on which the conditions specified in s 42 (financial conditions of compliance: see PARA 333) are satisfied in relation to the requirement; and (2) the day on which the place or places where (as the case may be) service pipes to premises in the locality in question or the self-laid main will connect with the main are determined under s 44(3) (see the text to notes 29-31): s 44(5) (amended by the Water Act 2003 ss 91(3)(e), 101(2), Sch 9 Pt 3). As to the meaning of 'service pipe' see PARA 179 note 8.

27 Ie an agreement under the Water Industry Act 1991 s 51A: see PARA 338.

28 Water Industry Act 1991 s 44(1)(b) (substituted by the Water Act 2003 s 91(3)(a)).

29 Water Industry Act 1991 s 44(3)(a).

30 Ie a reference under the Water Industry Act 1991 s 44(4): see note 25.

31 Water Industry Act 1991 s 44(3)(b) (amended by the Water Act 2003 s 91(3)(c)).

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### **333. Financial conditions of compliance with water main requisition.**

The financial conditions<sup>1</sup> are satisfied in relation to a requirement for the provision of a water main<sup>2</sup> by a water undertaker<sup>3</sup> if: (1) such undertakings as the undertaker may have reasonably required<sup>4</sup> have been given by the person<sup>5</sup> or persons who required the provision of the water main<sup>6</sup>; and (2) such security as the undertaker may have reasonably required has been provided for the discharge of any obligations imposed by those undertakings on any person who may be required to secure his undertakings<sup>7</sup>.

The undertakings which a water undertaker may require for these purposes are undertakings which bind the person or persons mentioned above to pay to the undertaker either (at the election of such person or persons): (a) in respect of each of the 12 years following the provision of the main, an amount not exceeding the relevant deficit<sup>8</sup> (if any) for that year on that main<sup>9</sup>; or (b) following provision of the main, a single amount not exceeding the discounted aggregate deficit<sup>10</sup> on that main<sup>11</sup>. In the case of undertakings binding two or more persons, the undertaking may bind them either jointly and severally or with liability to pay apportioned in such manner as they may agree<sup>12</sup>.

Where any sums have been deposited with a water undertaker for these purposes by way of security for the discharge of any obligation, the undertaker must pay interest<sup>13</sup> on every sum of 50 pence so deposited for every three months<sup>14</sup> during which it remains in the hands of the undertaker<sup>15</sup>.

Any dispute between a water undertaker and any other person as to the undertakings or security required by the undertaker for these purposes<sup>16</sup>, or as to the amount required to be paid in pursuance of any such undertaking<sup>17</sup>, may be referred to the Water Services Regulation Authority for determination<sup>18</sup> by either party to the dispute<sup>19</sup>.

1    Ie the financial conditions mentioned in the Water Industry Act 1991 s 41(1)(c): see PARA 332.

2    As to the meaning of 'water main' see PARA 138 note 11.

3    As to the meaning of 'water undertaker' see PARA 137 note 4.

4    Ie in accordance with the Water Industry Act 1991 s 42(2): see the text to notes 8-12.

5    As to the meaning of 'person' see PARA 13 note 29.

6    Water Industry Act 1991 s 42(1)(a).

7    Water Industry Act 1991 s 42(1)(b). A person may be required to secure his undertakings in relation to the provision of a water main if he required, or joined in requiring, the provision of the main by virtue of his entitlement to do so as an owner or occupier of premises in the locality (ie by virtue of s 41(2)(a) or (b): see PARA 332) (see s 42(3)(a)), and is not a public authority (s 42(3)(b)). As to the meaning of 'owner' see PARA 22 note 9. As to the meaning of 'public authority' see PARA 118 note 17.

8    'Relevant deficit' has the meaning given by the Water Industry Act 1991 s 43: see s 42(7) (substituted by the Water Act 2003, s 90(1), (4)). The relevant deficit for any year on a water main is the amount, if any, by which the relevant revenue in respect of that main for that year is exceeded by the annual borrowing costs of a loan of the amount required for the provision of that main: Water Industry Act 1991 s 43(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 14(1), (2)). Any reference for these purposes to the relevant revenue in respect of a main provided by a water undertaker for any year is: (1) in relation to premises connected with the main which are supplied with water by the undertaker, a reference to so much of the aggregate of any charges

payable to the undertaker in respect of services provided in the course of that year as represents charges which have been imposed by the undertaker in relation to those premises and are reasonably attributable to the provision of a supply of water (whether or not for domestic purposes) to those premises by means of that main; (2) in relation to premises connected with the main which are supplied with water by a licensed water supplier, a reference to so much of the aggregate of any charges made during the course of that year which are payable by the supplier to the undertaker in respect of the duty under the Water Industry Act 1991 s 66A(2)(b) (see PARA 341), s 66B(3)(b) (see PARA 342) or s 66C(2)(b)(ii) (see PARA 343) and are reasonably attributable to the use of that main for the purpose of the supplier supplying water to those premises: s 43(7) (substituted by the Water Act 2003 s 101(1), Sch 8 paras 2, 14(1), (3)). As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'licensed water supplier' see PARA 152.

The annual borrowing costs of a loan of the amount required for the provision of a water main are the aggregate amount which would fall to be paid in any year by way of payments of interest and repayments of capital if an amount equal to so much of the costs reasonably incurred in providing that main as were not incurred in the provision of additional capacity had been borrowed, by the water undertaker providing the main, on terms (a) requiring interest to be paid and capital to be repaid in 12 equal annual instalments; and (b) providing for the amount of the interest to be calculated at such rate, and in accordance with such other provision, as may have been determined for these purposes either by the undertaker with the approval of the Water Services Regulation Authority or, in default of such a determination, by the Authority: see the Water Industry Act 1991 s 43(2), (3) (amended by the Water Act 2003 s 36(2)). An approval or determination so given or made by the Authority may be given or made in relation to the provision of a particular water main, of mains of a particular description or of water mains generally, and may be revoked at any time except in relation to a water main in respect of which the conditions referred to in the Water Industry Act 1991 s 42(1) (see the text to notes 1-7) have already been satisfied: s 43(8) (amended by the Water Act 2003 ss 36(2), 91(1)(c)). As to the Water Services Regulation Authority see PARA 109.

For the purposes of the Water Industry Act 1991 s 43, the costs reasonably incurred in providing a water main (the 'new main') include (i) the costs reasonably incurred in providing such other water mains and such tanks, service reservoirs and pumping stations as it is necessary to provide in consequence of the provision of the new main; and (ii) such proportion (if any) as is reasonable of the costs reasonably incurred in providing or procuring the provision of any such additional capacity in an earlier main as falls to be used in consequence of the provision of the new main: s 43(4) (amended by the Water Act 2003 s 91(1)(a)). The reference to an earlier main, in relation to the new main, is a reference to any water main which has been provided in pursuance of a water main requisition or has been vested (by virtue of a declaration made under the Water Industry Act 1991 Pt III Ch II (ss 40-66)) in the water undertaker in the period of 12 years immediately before the provision of the new main: s 43(5) (substituted by the Water Act 2003 s 91(1)(b)). 'Water main requisition' means a requirement under (A) the Water Industry Act 1991 s 41 (see PARA 332) (including, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1, a requirement under the Water Act 1989 s 40 (repealed)); (B) the provisions of the Water Act 1945 ss 36, 37 or Sch 3 s 29 (all repealed); or (C) any local statutory provision corresponding to the Water Industry Act 1991 s 41 or to any of the provisions mentioned in head (B) above: s 43(9). As to the meaning of 'local statutory provision' see PARA 14 note 24. Any reference in s 43 to the provision of additional capacity in a water main provided in pursuance of a requirement under any enactment is a reference to such works carried out or other things done in connection with the provision of that main as are carried out or done for the purpose of enabling that main to be used for purposes in addition to those for which it is necessary to provide the main in order to comply with the requirement: s 43(6). As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'necessary' see *Royco Homes Ltd v Southern Water Authority* [1979] 3 All ER 803, [1979] 1 WLR 1366, HL; *Cherwell District Council v Thames Water Authority* [1975] 1 All ER 763, [1975] 1 WLR 448, HL.

9 Water Industry Act 1991 s 42(2)(a)(i) (s 42(2)(a) substituted by the Water Act 2003 s 90(1), (2)).

10 'Discounted aggregate deficit' has the meaning given by the Water Industry Act 1991 s 43A: see s 42(7) (as substituted: see note 8). The discounted aggregate deficit on a water main is the amount equal to the sum of the estimated relevant deficits for each of the 12 years following the provision of the main, in each case discounted in accordance with the Water Industry Act 1991 s 43A(6): s 43A(1) (s 43A added by the Water Act 2003 s 93(2)). The estimated relevant deficit for any year is the amount (if any) by which the estimated revenue in respect of the water main for that year would be exceeded by the annual borrowing costs of a loan of the amount required for the provision of that main: Water Industry Act 1991 s 43A(2) (as so added). Section 43(2)-(6), (8), (9) (see note 8) applies for these purposes as it applies for the purposes s 43: s 43A(3) (as so added). Any reference to the estimated revenue in respect of a water main for any year: (1) in relation to premises expected to be connected with the main and supplied with water by a water undertaker, is a reference to so much of the aggregate of any charges expected to be payable to the undertaker for the provision of services in the course of that year as would represent charges imposed by the undertaker in relation to those premises and reasonably attributable to the provision of a supply of water (whether or not for domestic purposes) to those premises by means of that main; and (2) in relation to premises expected to be connected with the main and supplied with water by a licensed water supplier, is a reference to so much of the aggregate of any charges expected to be made during the course of that year as would be payable by the supplier to the undertaker in respect of the duty under s 66A(2)(b) (see PARA 341), s 66B(3)(b) (see PARA 342) or s 66C(2)(b)(ii) (see PARA 343) and reasonably attributable to the use of that main for the purpose of the supplier's supplying

water to those premises: s 43A(4) (as so added). For the purpose of calculating estimated revenue under s 43A(4), a thing is expected to be the case if, at the time the calculation is made, it is reasonably likely to occur: s 43A(5) (as so added). The estimated relevant deficit for a year mentioned in s 43(1) (see note 8) must be discounted in order to determine its net present value by applying such factor, and in accordance with such other provision, as may be determined by the Water Services Regulation Authority: s 43A(6) (as so added). A determination made by the Authority for the purposes of s 43A(6) may be made in relation to the provision of a particular water main or in relation to the provision of water mains generally, and may be revoked at any time except in relation to a water main in respect of which the conditions referred to in s 42(1) (see the text to notes 1-7) have already been satisfied: s 43A(7) (as so added).

11 Water Industry Act 1991 s 42(2)(a)(ii) (as substituted: see note 9).

12 Water Industry Act 1991 s 42(2)(b).

13 Interest must be paid at such rate as may be determined either by the undertaker with the approval of the Water Services Regulation Authority or, in default of such a determination, by the Authority: Water Industry Act 1991 s 42(4)(a), (b) (s 42(4)(a), (b), (5) amended by the Water Act 2003 s 36(2)). An approval or determination given or made by the Authority for these purposes may be given or made in relation to the provision of a particular water main, of mains of a particular description or of water mains generally; and may be revoked at any time: Water Industry Act 1991 s 42(5) (as so amended).

14 As to the meaning of 'month' see PARA 23 note 10.

15 Water Industry Act 1991 s 42(4).

16 Water Industry Act 1991 s 42(6)(a).

17 Water Industry Act 1991 s 42(6)(b).

18 Ie for determination under the Water Industry Act 1991 s 30A: see PARA 131.

19 Water Industry Act 1991 s 42(6) (amended by the Water Act 2003 s 90(1), (3)).

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### ***C. DOMESTIC CONNECTIONS***

#### **334. Meaning of 'domestic purposes'.**

References to 'domestic purposes' in the Water Industry Act 1991, in relation to a supply of water to any premises or in relation to any cognate expression, are references to the drinking, washing, cooking, central heating and sanitary purposes for which water supplied to those premises may be used<sup>1</sup>. Where the whole or any part of the premises are, or are to be, occupied as a house<sup>2</sup>, domestic purposes are taken to include:

- 664 (1) the purposes of a profession carried on in that house, or, where that house and another part of the premises are occupied together, and the house comprises the greater part of what is so occupied, in that other part<sup>3</sup>; and
- 665 (2) such purposes outside the house (including the washing of vehicles and the watering of gardens) as are connected with the occupation of the house and may be satisfied by a supply of water from a tap inside the house and without the use of a hosepipe or similar apparatus<sup>4</sup>.

No such reference to domestic purposes is, however, to be taken to include a reference to:

- 666 (a) the use of a bath having a capacity, measured to the centre line of overflow or in such other manner as may be prescribed<sup>5</sup>, of more than 230 litres<sup>6</sup>;
- 667 (b) the purposes of the business of a laundry<sup>7</sup>; or
- 668 (c) any purpose of a business of preparing food or drink for consumption otherwise than on the premises<sup>8</sup>.

1 Water Industry Act 1991 ss 218(1), 219(1).

2 As to the meaning of 'house' see PARA 133 note 5.

3 Water Industry Act 1991 s 218(2)(a).

4 Water Industry Act 1991 s 218(2)(b).

5 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Industry Act 1991 s 219(1). At the date at which this volume states the law no such regulations had been made. The functions of the Secretary of State under the Water Industry Act 1991 s 218, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 Water Industry Act 1991 s 218(3)(a).

7 Water Industry Act 1991 s 218(3)(b).

8 Water Industry Act 1991 s 218(3)(c). As to domestic supply and charges in the London area see also the Metropolitan Water Board (Charges) Act 1907 ss 8, 12; and generally PARA 416; and **LONDON GOVERNMENT**.



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### **335. Duty to make connections with main.**

It is the duty of a water undertaker<sup>1</sup> to make a connection under the following provisions where the owner<sup>2</sup> or occupier of any premises which consist in the whole or any part of a building<sup>3</sup>, or are premises on which any person<sup>4</sup> is proposing to erect any building or part of a building<sup>5</sup>, serves a connection notice<sup>6</sup> on the undertaker requiring it, for the purpose of providing a supply of water for domestic purposes<sup>7</sup> to that building or part of a building, to connect a service pipe<sup>8</sup> to those premises with one of the undertaker's water mains<sup>9</sup>. The notice must be accompanied or supplemented by all such information<sup>10</sup> as the undertaker may reasonably require<sup>11</sup> and must, if it has effect so that a requirement is imposed on the undertaker by virtue of a local authority notice<sup>12</sup>, set out the matters that have given rise to that requirement<sup>13</sup>.

Where a connection notice has been served, the duty imposed on the undertaker is a duty to make the connection required by the notice at the expense of the person serving it<sup>14</sup> if: (1) the main with which the service pipe is required to be connected is neither a trunk main nor a water main which is, or is to be, used solely for the purpose of supplying water otherwise than for domestic purposes<sup>15</sup>; and (2) such conditions as the undertaker may have imposed<sup>16</sup> have been satisfied<sup>17</sup>. The duty arises<sup>18</sup> whether or not the service pipe to which the notice relates has been laid when it is served<sup>19</sup>, and is owed to the person who served the notice by virtue of which the duty arises<sup>20</sup>. Where such a duty is owed to any person, any breach of that duty which causes that person to sustain loss or damage<sup>21</sup> is actionable at his suit; but in any proceedings brought against a water undertaker in pursuance of this provision, it is a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach<sup>22</sup>. Moreover, a water undertaker is not in breach of a duty imposed by virtue of the service of a connection notice unless:

- 669 (a) in the case of a duty to lay any service pipe or to connect any service pipe to which such a duty relates, it has failed to lay that pipe or to make that connection as soon as reasonably practicable after the relevant day<sup>23</sup>;
- 670 (b) in the case of a duty to connect a service pipe the whole of which has already been laid when the notice is served on the undertaker, it has failed to make the connection before the end of the period of 14 days beginning with the relevant day<sup>24</sup>.

Where: (i) a connection notice is served in respect of any premises<sup>25</sup>; and (ii) at the time when it is served, the customer's part of the service pipe to those premises<sup>26</sup> has not been laid<sup>27</sup>, the undertaker's duty to make the connection<sup>28</sup> and the duty to carry out ancillary works<sup>29</sup> does not arise by virtue of that notice until the person serving it has, at his own expense and after having obtained the necessary consents from the owners and occupiers of any affected land, laid so much of the service pipe as it is necessary, for the purpose of making the connection, to lay otherwise than in a street or in land:

- 671 (A) between the boundary of the street and the main<sup>30</sup> or that boundary and the required stopcock<sup>31</sup>; or
- 672 (B) owned or occupied by a person certified by a local authority<sup>32</sup> to have unreasonably refused his consent or to have sought to make his consent subject to unreasonable conditions<sup>33</sup>.



Nothing in these provisions imposes any duty on a water undertaker to connect a service pipe to any premises with a service pipe to any other premises<sup>34</sup>.

1     le subject to the Water Industry Act 1991 ss 46, 47: see PARAS 336-337. As to the meaning of 'water undertaker' see PARA 137 note 4.

2     As to the meaning of 'owner' see PARA 22 note 9.

3     Water Industry Act 1991 s 45(1)(a).

4     As to the meaning of 'person' see PARA 13 note 29.

5     Water Industry Act 1991 s 45(1)(b).

6     A notice served for the purposes of the Water Industry Act 1991 s 45 is referred to in Pt III Ch 11 (ss 40-66) as a 'connection notice': ss 45(8), 93(1). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

7     As to the meaning of 'domestic purposes' see PARA 334.

8     As to the meaning of 'service pipe' see PARA 179 note 8.

9     Water Industry Act 1991 s 45(1) (amended by the Competition and Service (Utilities) Act 1992 s 43(1), Sch 2). In relation to service pipes which do not belong to or fall to be laid by the undertaker, the Water Industry Act 1991 s 45(1) is subject to s 51D(1) (see PARA 338), and any such service pipe which is to vest in the undertaker by virtue of an agreement under s 51A (see PARA 338) must be connected to one of the undertaker's water mains subject to and in accordance with the terms of that agreement: s 45(1A) (added by the Water Act 2003 s 92(2)). This provision does not apply in respect of any water main or service pipe the construction of which was begun before 28 May 2004: see the Water Act 2003 s 92(7); and the Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, art 4(a). For the purposes of the Water Industry Act 1991 Pt III (ss 37-93) a service pipe must be treated as connected with a water main other than a trunk main even if the connection is an indirect connection made by virtue of a connection with another service pipe: s 93(3). As to the meanings of 'water main' and 'trunk main' see PARA 138 note 11.

10    As to the meaning of 'information' see PARA 117 note 13.

11    Water Industry Act 1991 s 45(3)(a). Without prejudice to the effect, if any, of any other contravention of s 45(3), a failure to provide information in pursuance of the obligation to supplement such a notice does not invalidate that notice: s 45(3). Where, however, (1) a person who has served a connection notice on a water undertaker has failed to comply with his obligation to supplement that notice with information required by the undertaker (s 51(5)(a)); and (2) that requirement was made by the undertaker at such time before the end of the period within which the undertaker is required to comply with the duties imposed by virtue of the notice as gave that person a reasonable opportunity to provide the required information within that period (s 51(5)(b)), the undertaker may delay its compliance with those duties until a reasonable time after the required information is provided (s 51(5)). As to the meaning of 'contravention' see PARA 20 note 5.

12    le so that a requirement is imposed by virtue of the Water Industry Act 1991 s 46(4): see PARA 336. As to the meaning of 'local authority' see PARA 118 note 17.

13    Water Industry Act 1991 s 45(3)(b).

14    Where a water undertaker carries out any works which it is its duty under these provisions to carry out at another person's expense, the undertaker is entitled to recover from that person an amount equal to the expenses reasonably incurred by the undertaker in carrying out the works: Water Industry Act 1991 s 45(6). Any dispute between a water undertaker and any other person as to whether the expenses were incurred reasonably may be referred to the Water Services Regulation Authority for determination under s 30A (see PARA 131) by either party to the dispute: s 45(6A) (added by the Competition and Service (Utilities) Act 1992 s 35(1), (2); and amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109. As to the recovery of expenses see PARA 131 note 6.

15    Water Industry Act 1991 s 45(2)(a).

16    le under the Water Industry Act 1991 ss 47-50: see PARA 337.

17    Water Industry Act 1991 s 45(2)(b).

18 le subject to the Water Industry Act 1991 s 51: see the text to notes 23-33.

19 Water Industry Act 1991 s 45(2).

20 Water Industry Act 1991 s 45(4).

21 As to the meaning of 'damage' see PARA 129 note 7.

22 Water Industry Act 1991 s 45(5).

23 Water Industry Act 1991 s 51(1)(a). In any case in which a water undertaker is subject to any such duty, it is to be presumed, unless the contrary is shown in relation to that case, that the period of 21 days beginning with the relevant day is the period within which it is reasonably practicable for a water undertaker to lay so much of any service pipe, and to fit such stopcock, as is necessary to lay or fit in that case for connecting a water main in a street with a service pipe at the boundary of any premises which abut on the part of the street where the main is situated: s 51(2). 'Relevant day', in relation to a duty imposed on a water undertaker by virtue of a connection notice, means the day after whichever is the latest of the following days: (1) the day on which the notice was served on the undertaker; (2) in a case where it is necessary for the person serving the notice to lay any service pipe after serving the notice, the day on which a notice stating that the pipe has been laid is served on the undertaker; (3) the day on which all such conditions are satisfied as the undertaker has, under ss 47-50 (see PARA 337) made conditions of its compliance with that duty: s 51(6). As to the meaning of 'stopcock' see PARA 138 note 11. As to the meaning of 'street' see PARA 308 note 19.

24 Water Industry Act 1991 s 51(1)(b).

25 Water Industry Act 1991 s 51(3)(a).

26 This reference to the customer's part of the service pipe to any premises is a reference to so much of the service pipe to those premises as falls to be laid otherwise than by the water undertaker in pursuance of the Water Industry Act 1991 s 46 (see PARA 336): s 51(4).

27 Water Industry Act 1991 s 51(3)(b).

28 le the duty under the Water Industry Act 1991 s 45: see the text to notes 1-22.

29 le the duty under the Water Industry Act 1991 s 46: see PARA 336.

30 le land mentioned in the Water Industry Act 1991 s 46(5): see PARA 336.

31 le land mentioned in the Water Industry Act 1991 s 46(3): see PARA 336.

32 le land mentioned in the Water Industry Act 1991 s 46(4): see PARA 336.

33 See the Water Industry Act 1991 s 51(3).

34 Water Industry Act 1991 s 45(7).

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### **336. Duty to carry out ancillary works for the purpose of making domestic connection.**

Where a water undertaker<sup>1</sup> is required to make a connection in pursuance of any connection notice<sup>2</sup>, it is also the duty of the undertaker, at the expense of the person serving the notice<sup>3</sup>, to carry out such of the works to which these provisions apply as need to be carried out before the connection can be made<sup>4</sup>. These provisions apply to the laying of so much of the service pipe<sup>5</sup> to be connected with the water main<sup>6</sup> as it is necessary, for the purpose of making that connection, to lay in a street<sup>7</sup>; and the duty imposed by them is a duty owed to the person who served the notice by virtue of which the duty arises<sup>8</sup>, but nothing in them imposes any duty on a water undertaker to connect a service pipe to any premises with a service pipe to any other premises<sup>9</sup>.

In a case where the water main with which the service pipe is to be connected is situated in a street<sup>10</sup>, and:

- 673 (1) the premises consisting in the building or part of a building in question together with any land occupied with it abut on the part of the street where the main is situated<sup>11</sup>; and
- 674 (2) the service pipe to those premises will enter the premises otherwise than through an outer wall of a building abutting on the street and have a stopcock<sup>12</sup> fitted to it by the undertaker in the premises<sup>13</sup>,

the undertaker's duty under these provisions applies to the laying of so much of the service pipe as it is necessary, for the purpose of making the required connection, to lay in land between the boundary of the street and that stopcock<sup>14</sup>. In a case where the connection notice is served in compliance with a requirement imposed by a notice by a local authority<sup>15</sup>, the duty under these provisions applies to the laying of so much of the service pipe to be connected with a water main in pursuance of the connection notice as it is necessary, for the purpose of making the connection, to lay in land owned or occupied by a person who is certified by that authority to have unreasonably refused his consent to the laying of the service pipe<sup>16</sup>, or to have sought to make the giving of his consent subject to unreasonable conditions<sup>17</sup>.

It is the duty of any water undertaker making a connection in pursuance of a connection notice to ensure that a stopcock belonging to the undertaker is fitted to the service pipe which is connected<sup>18</sup>.

A water undertaker may comply with any duty under these provisions to lay a service pipe by laying a water main instead; but it is under no duty<sup>19</sup> to lay a water main where it has no power to lay a service pipe<sup>20</sup>. Where an undertaker exercises its power to lay a water main instead of a service pipe, any additional time reasonably required by reason of the laying of the main instead of the service pipe must be included in the time allowed<sup>21</sup> for the laying of the service pipe, but the expenses recoverable by the undertaker<sup>22</sup> may not exceed such amount as it would have been reasonable for the undertaker to have incurred in laying a service pipe instead of the main<sup>23</sup>.

- 1 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 2 As to the meaning of 'connection notice' see PARA 335 note 6.
- 3 The provisions of the Water Industry Act 1991 s 45(6), (6A) (see PARA 335) as to the carrying out by the undertaker of works at another person's expense apply: see s 46(7) (amended by the Competition and Service (Utilities) Act 1992 s 35(1), (3)). As to the meaning of 'person' see PARA 13 note 29.
- 4 Water Industry Act 1991 s 46(1).
- 5 As to the meaning of 'service pipe' see PARA 179 note 8.
- 6 As to the meaning of 'water main' see PARA 138 note 11. As to references to the connection of a service pipe with a water main see PARA 335 note 9.
- 7 Water Industry Act 1991 s 46(2). As to the meaning of 'street' see PARA 308 note 19.
- 8 See the Water Industry Act 1991 s 45(4); applied by s 46(7) (as amended: see note 3). As to breach of the duty see s 45(5) (as so applied); and PARA 335; and as to the time within which the duty must be performed see s 51; and PARA 335.
- 9 Water Industry Act 1991 s 45(7).
- 10 Water Industry Act 1991 s 46(3)(a). Where a water main is situated alongside a street and within 18 metres of the middle of that street, the Water Industry Act 1991 s 46(2)-(4) has effect in relation to the laying, for the purpose of making a connection with that main, of a service pipe to any premises as if the street included so much of the land between the main and the boundary of the street as is not comprised in those premises or in any land occupied with those premises: s 46(5). As to the meaning of 'land' see PARA 14 note 21.
- 11 Water Industry Act 1991 s 46(3)(b).
- 12 As to the meaning of 'stopcock' see PARA 138 note 11.
- 13 Water Industry Act 1991 s 46(3)(c).
- 14 Water Industry Act 1991 s 46(3).
- 15 Ie under the Water Industry Act 1991 s 80: see PARA 404.
- 16 Water Industry Act 1991 s 46(4)(a).
- 17 Water Industry Act 1991 s 46(4)(b). Except in the cases set out in these provisions, the person requiring the connection is responsible for obtaining the necessary consent and it is in that person's interests to obtain an easement for such a pipe. In practice a licence is sometimes obtained, causing problems if the licence is revoked. Note that a local authority's remedial powers under s 80 only apply when a private supply (eg a well) fails, and are not available when a licence to place a service pipe is revoked. Other practical problems arise on the expiration of such a licence, eg should the water undertaker use s 174 (see PARA 486) to prevent the grantor of the licence from interfering with the service pipe? (probably not if the licence has expired); and is the water undertaker able to lay a new service pipe along the route of the existing service pipe using its power under s 159(2)(a) (see PARA 463)? (probably not if the legal right for the existing service pipe to be there has expired).
- 18 Water Industry Act 1991 s 46(6). As to the positioning of a stopcock see s 163(2); and PARA 463.
- 19 Ie no duty imposed by anything in the Water Industry Act 1991 s 45 (see PARA 335) or s 46.
- 20 See the Water Industry Act 1991 s 46(8). As to the power to lay pipes in streets see PARA 462; and as to powers to lay pipes in other land see PARA 463.
- 21 Ie allowed by the Water Industry Act 1991 s 51(1)(a): see PARA 335.
- 22 Ie by virtue of the Water Industry Act 1991 s 45(6) (see PARA 335) and s 46(7) (see note 3).
- 23 See the Water Industry Act 1991 s 46(9).

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### **337. Conditions of connection with water main.**

Where the owner<sup>1</sup> or occupier of any premises (the 'relevant premises') serves a connection notice<sup>2</sup> on a water undertaker<sup>3</sup>, the water undertaker may make compliance with one or more of the specified requirements a condition of its complying with the duties to which it is subject by virtue of that notice<sup>4</sup>. The specified requirements are:

- 675 (1) a requirement that such security as the undertaker may reasonably require<sup>5</sup> has been provided for the discharge of any financial obligations<sup>6</sup> imposed on the person who served the connection notice<sup>7</sup>;
- 676 (2) a requirement, in a case where the connection required by the connection notice is necessary as a consequence of a disconnection made by reason of any person's failure to pay any charges<sup>8</sup>, that the person serving the connection notice has paid any amount owed by him to the undertaker in respect of a supply of water to the relevant premises or in respect of expenses reasonably incurred<sup>9</sup> in the making of the disconnection<sup>10</sup>;
- 677 (3) a requirement that a meter<sup>11</sup> for use in determining the amount of any charges which have been or may be fixed in relation to the relevant premises by reference to volume has been installed and connected either by the undertaker or in accordance with specifications<sup>12</sup> approved by the undertaker<sup>13</sup>;
- 678 (4) a requirement that, subject to the statutory requirement as to vesting<sup>14</sup>, so much of the service pipe<sup>15</sup> to the relevant premises as does not belong to, vest in or fall to be laid by the undertaker, and the plumbing of the premises, comply with specifications approved by the undertaker for the purpose of ensuring that it will be reasonably practicable for such a meter as is mentioned in head (3) above to be installed and connected as so mentioned<sup>16</sup>;
- 679 (5) a requirement that a separate service pipe has been provided to each house<sup>17</sup> or building on the relevant premises or, where different parts of a building on the relevant premises are separately occupied, to each of those parts or to any of them<sup>18</sup>;
- 680 (6) a requirement in relation to the relevant premises that such a requirement as may be imposed for maintaining pressure<sup>19</sup> has been complied with or, in a case where such a requirement could be imposed but for there already being a cistern fulfilling the statutory requirements<sup>20</sup>, that the cistern and its float-operated valve are in good repair<sup>21</sup>;
- 681 (7) a requirement that there is no contravention<sup>22</sup> in relation to the water fittings<sup>23</sup> used or to be used in connection with the supply of water to the relevant premises, or the use of water in those premises, of certain prescribed<sup>24</sup> requirements<sup>25</sup>; and
- 682 (8) a requirement that every such step has been taken as has been specified in any waste prevention notice<sup>26</sup> served on any person in relation to the relevant premises<sup>27</sup>.

The above provisions are without prejudice to the water undertaker's statutory powers to impose conditions of supply after individual or corporate insolvency<sup>28</sup>.

1 As to the meaning of 'owner' see PARA 22 note 9.

2 As to the meaning of 'connection notice' see PARA 335 note 6.

3 As to the meaning of 'water undertaker' see PARA 137 note 4.

4 Water Industry Act 1991 s 47(1). However, a condition may not be imposed by a water undertaker under these provisions on a person who has served a connection notice except by a counter-notice served on that person before the end of the period of 14 days beginning with the day after the service of the connection notice: s 47(3). As to the meaning of 'person' see PARA 13 note 29. As to the service of documents see PARA 22. As to the meaning of 'notice' see PARA 22 note 1.

5 Any dispute between a water undertaker and any other person as to whether any security required by a condition so imposed was reasonably required may be referred to the Water Services Regulation Authority for determination under the Water Industry Act 1991 s 30A (see PARA 131) by either party to the dispute, as may any dispute as to whether such a requirement has been complied with: see s 47(3A), (3B)(a) (s 47(3A), (3B) added by the Competition and Service (Utilities) Act 1992 s 51(1), (4); and amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

6 In any obligations imposed by virtue of the Water Industry Act 1991 s 45(6) (see PARA 335) or s 46(7)(b) (see PARA 336).

7 Water Industry Act 1991 s 47(2)(a). Where any sums have been deposited for these purposes with a water undertaker by way of security for the discharge of any obligation, the undertaker must pay interest, at such rate as may be determined either by the undertaker with the approval of the Water Services Regulation Authority or in default of such a determination, by the Authority, on every sum of 50p so deposited for every three months during which it remains in the hands of the undertaker: s 48(1) (s 48(1), (2) amended by the Water Act 2003 s 36(2)). An approval or determination by the Authority for these purposes may be given or made in relation to a particular case or description of cases or generally and may be revoked at any time: Water Industry Act 1991 s 48(2) (as so amended). As to the meaning of 'month' see PARA 23 note 10.

8 As to a water undertaker's power to disconnect for non-payment of charges, and premises that are not to be disconnected, see PARAS 357-358.

9 Any dispute between a water undertaker and any other person as to whether those expenses were reasonably incurred may be referred to the Water Services Regulation Authority for determination under the Water Industry Act 1991 s 30A (see PARA 131) by either party to the dispute, as may any dispute as to whether such a requirement has been complied with: see s 47(3A), (3B)(b) (as added and amended: see note 5). As to the recovery of expenses see PARA 131 note 6.

10 Water Industry Act 1991 s 47(2)(b) (amended by the Competition and Service (Utilities) Act 1992 s 51(1), (2)).

11 'Meter' means any apparatus for measuring or showing the volume of water supplied to, or of effluent discharged from, any premises: Water Industry Act 1991 s 219(1). The power conferred on a water undertaker to impose conditions by virtue of s 47(2)(c) or (d) (see head (4) in the text) for the purpose of metering are exercisable in relation to any premises even if the undertaker has no immediate intention, when the power is exercised, of fixing charges in relation to those premises by reference to volume: see s 49(1)(a), (4). This power is not, however, exercisable so as to require the alteration or removal of any pipe laid or plumbing installed before 1 April 1989: s 49(1)(b). Any dispute between a water undertaker and any other person as to the terms of any condition imposed under s 47 for the purposes of metering must be referred to the arbitration of a single arbitrator appointed by agreement between the undertaker and that person or, if no agreement is reached, for determination by the Water Services Regulation Authority under s 30A (see PARA 131): s 49(3) (substituted by the Competition and Service (Utilities) Act 1992 s 35(1), (4); and amended by the Water Act 2003 s 36(2)). References to the fixing of charges in relation to any premises by reference to volume are references to the fixing of those charges by reference to the volume of water supplied to those premises, to the volume of effluent discharged from those premises, to both of those factors or to one or both of those factors taken together with other factors: Water Industry Act 1991 s 219(4). As to the meaning of 'effluent' see PARA 262 note 31. As to the installation of a meter after initial connection see PARA 433.

12 Specifications approved by a water undertaker for the purpose of the Water Industry Act 1991 s 47(2)(c) or (d) (see head (4) in the text) may be approved: (1) in relation to particular premises; or (2) by being published in such manner as the undertaker considers appropriate, in relation to premises generally or to any description of premises: s 49(2).

13 Water Industry Act 1991 s 47(2)(c).

14 In subject to the Water Industry Act 1991 s 51D(1): see PARA 338.

15 As to the meaning of 'service pipe' see PARA 179 note 8. As to the meaning of 'laying a pipe' see PARA 138 note 11.

16 Water Industry Act 1991 s 47(2)(d) (amended by the Water Act 2003 s 92(3)). See also notes 11-12.

17 As to the meaning of 'house' see PARA 133 note 5.

18 Water Industry Act 1991 s 47(2)(e). No such condition may be imposed by a water undertaker unless it is reasonable to do so in order to ensure that the undertaker will be able to perform its functions efficiently in relation to the supply of water to the relevant premises or any part of those premises: s 47(2A) (added by the Competition and Service (Utilities) Act 1992 s 51(1), (3)). Any dispute between a water undertaker and any other person as to whether, in a particular case, a water undertaker is thus prevented from imposing such a requirement may be referred to the Water Services Regulation Authority for determination under the Water Industry Act 1991 s 30A (see PARA 131), as may any dispute as to whether such a requirement has been complied with: see s 47(3A), (3B)(c) (both as added and amended: see note 5). Where the effect of a connection notice served in respect of any house is to require a service pipe to be connected with a water main with which it has previously been connected, the water undertaker on which the connection notice is served is not entitled to make the reconnection subject to any such condition as may otherwise be imposed by virtue of s 47(2)(e) unless the undertaker would have been entitled under s 64 (see PARA 352) to require the provision of a separate service pipe if the reconnection had already been made: see s 50(1), (2). As to references to the connection of a service pipe with a water main see PARA 335 note 9.

19 Ie under the Water Industry Act 1991 s 66: see PARA 354.

20 Ie such a cistern as is mentioned in the Water Industry Act 1991 s 66: see PARA 354.

21 Water Industry Act 1991 s 47(2)(f). Any dispute as to whether any such requirement has been complied with may be referred to the Water Services Regulation Authority for determination under s 30A (see PARA 131) by either party to the dispute: s 47(3A) (as added and amended: see note 5).

22 As to the meaning of 'contravention' see PARA 20 note 5.

23 As to the meaning of 'water fittings' see PARA 134 note 6.

24 Ie such of the requirements of regulations under the Water Industry Act 1991 s 74 (see PARA 366) as are prescribed for these purposes: s 47(2)(g). 'Prescribed' means prescribed by regulations: see s 219(1). At the date at which this volume states the law no such regulations had been made.

25 Water Industry Act 1991 s 47(2)(g).

26 Ie a notice under the Water Industry Act 1991 s 75: see PARA 365.

27 Water Industry Act 1991 s 47(2)(h).

28 See the Water Industry Act 1991 s 47(4). As to the conditions which may be so imposed see the Insolvency Act 1986 ss 233, 372; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 113; **COMPANY AND CORPORATE INSOLVENCY** vol 7(3) (2004 Reissue) PARA 140.

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### **338. Adoption of water mains and service pipes.**

Subject to certain exceptions<sup>1</sup>, a water undertaker<sup>2</sup> may agree with any person<sup>3</sup> constructing or proposing to construct any water main<sup>4</sup> or any service pipe that, if the water main or service pipe is constructed in accordance with the terms of the agreement, the undertaker will, upon completion of the work, at some specified date or on the happening of some future event, declare the water main or, as the case may be, so much of the service pipe as the undertaker could otherwise be required to lay<sup>5</sup> to be vested in that undertaker<sup>6</sup>. This does not apply in the case of water mains or service pipes which are to be used (in whole or in part) for the purpose of supplying water other than for domestic purposes<sup>7</sup>. However, a water undertaker is not prevented<sup>8</sup> from otherwise agreeing<sup>9</sup> to declare any such water main or service pipe (or a part of it, as specified in the agreement) to be vested in the undertaker<sup>10</sup>.

A person constructing or proposing to construct a water main or a service pipe to which the statutory power to make an agreement set out above<sup>11</sup> applies may make an application in writing<sup>12</sup> to a water undertaker requesting the undertaker to make such an agreement<sup>13</sup>. Such an application must be accompanied and supplemented by all such information<sup>14</sup> as the undertaker may reasonably require<sup>15</sup>. Where:

- 683 (1) a person who has made such an application to a water undertaker has failed to comply with his obligation to supplement that application with information required by the undertaker<sup>16</sup>; and
- 684 (2) that requirement was made by the undertaker at such a time before the end of the period within which the undertaker is required<sup>17</sup> to respond to the application as gave that person a reasonable opportunity to provide the required information within that period<sup>18</sup>,

the undertaker may delay its response to the application until a reasonable time after the required information is provided<sup>19</sup>. Subject to that, and without prejudice to the effect (if any) of any other contravention<sup>20</sup> of the statutory requirements in relation to such an application, a failure to provide information in pursuance of the obligation to supplement such an application does not invalidate the application<sup>21</sup>.

In deciding whether or on what terms to grant such an application, a water undertaker must have regard in particular to any effect or potential effect on the quality of water supplies and to any increased danger to life or health which it considers may result<sup>22</sup>. The terms of an agreement under these provisions relating to a water main may, in particular, include terms:

- 685 (a) for the provision, at the expense of the person constructing or proposing to construct the water main, by that person or by the water undertaker of such associated infrastructure at or downstream of the point of connection with the undertaker's supply system<sup>23</sup> as it is necessary to provide in consequence of incorporating the new water main into that system<sup>24</sup>;
- 686 (b) providing that, if the water main and the associated infrastructure are constructed in accordance with the terms of the agreement, the undertaker will, in addition to declaring the water main to be vested in it, declare the associated infrastructure to be so vested<sup>25</sup>;



- 687 (c) where the undertaker considers that the proposed main is, or is likely to be, needed for the provision of water supply services in addition to those for which the person is proposing to construct the main:
- 59
69. (i) requiring that person to construct the main in a manner differing, as regards material or size of pipes, depth or otherwise, from the manner in which that person proposes, or could otherwise be required by the undertaker, to construct it<sup>26</sup>; and
70. (ii) providing for the repayment by the undertaker of any extra expense reasonably incurred by that person in complying with that requirement<sup>27</sup>;
- 60
- 688 (d) for the connection of the new water main to the undertaker's existing supply system at the point or points specified in the agreement<sup>28</sup>;
- 689 (e) for any service pipes which the person constructing or proposing to construct the new water main proposes to connect to that main to be constructed in accordance with the terms of the agreement and, subject to that, to be vested in the undertaker at the same time as the main<sup>29</sup>.

The terms of such an agreement relating to a service pipe may, in particular, include terms for the connection of the new service pipe to the undertaker's existing supply system at the point or points specified in the agreement<sup>30</sup> and for such specified requirements<sup>31</sup> as may be applicable to be complied with before connection takes place<sup>32</sup>. A water undertaker may not make an agreement with respect to a water main or a service pipe situated within the area of another water undertaker<sup>33</sup>, until either that other undertaker has consented in writing to the making of the agreement<sup>34</sup>, or the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>35</sup>, on an application made to him or them, have dispensed with the necessity for such consent, either unconditionally or subject to such conditions as he or they may think fit to impose<sup>36</sup>.

An agreement made under these provisions by a water undertaker is enforceable against the undertaker by the owner<sup>37</sup> or occupier for the time being of any premises connected or to be connected with the water main or service pipe to which it relates<sup>38</sup>.

Where an agreement is, or is to be, entered into under the above provisions in relation to a water main (the 'adopted main') by, or on behalf of, a water undertaker and a person constructing or proposing to construct that water main, the water undertaker may, as a condition of the undertaker's compliance with the agreement, require that person to pay to it the specified costs<sup>39</sup> and may, for the purposes of any payment so required to be made, require the person to provide such security as it may reasonably request<sup>40</sup>. Where these provisions apply, the water undertaker must pay to that person, upon declaring the water main to be vested in the undertaker, a sum equal to the discounted offset amount<sup>41</sup>. Any dispute between the water undertaker and the other person as to the payments so required to be made or the security so required to be provided may be referred to the Water Services Regulation Authority for determination<sup>42</sup> by either party to the dispute<sup>43</sup>.

Where a person, other than a water undertaker, constructs a water main or service pipe which is to be used, in whole or in part, for supplying water for domestic or food production purposes<sup>44</sup> no water undertaker may permit that water main or service pipe to become connected with its supply system unless it vests, to the relevant extent, in a water undertaker<sup>45</sup>.

A person constructing or proposing to construct a water main or service pipe may appeal to the Water Services Regulation Authority where the water undertaker: (A) has refused an application requesting the undertaker to make an agreement under these provisions<sup>46</sup>; (B) has offered to grant such an application on terms to which that person objects<sup>47</sup>; or (C) has failed, before the end of two months<sup>48</sup> from the making of such an application, either to refuse the application or to give notice to the applicant of the terms on which it is prepared to grant the application<sup>49</sup>. On

the hearing of such an appeal, the Authority may uphold the refusal of the undertaker to grant the application or to modify the terms offered, or may, on behalf of the undertaker, refuse the application or enter into any agreement into which the undertaker might have entered on the application<sup>50</sup>. In deciding on such an appeal, the Authority may include such incidental, supplemental and consequential provision, including provision requiring either party to pay a sum in respect of the costs or expenses incurred by the Authority, as the Authority thinks fit; and any such provision as to costs or expenses is enforceable as if it were a judgment of a county court<sup>51</sup>.

1 le subject to the Water Industry Act 1991 s 51A(2), (10): see the text to notes 7-10, 33-36.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the meaning of 'person' see PARA 13 note 29.

4 For the purposes of the Water Industry Act 1991 ss 51A-51D, the definition of 'water main' in s 219(1) (see PARA 138 note 11) is to be treated as if the words 'not being a pipe for the time being vested in a person other than the undertaker' were omitted: s 51E(1) (ss 51A-51E added by the Water Act 2003 s 92(1)). These provisions do not apply in respect of any water main or service pipe the construction of which was begun before 28 May 2004: see the Water Act 2003 s 92(7); the Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, art 4(a). As to the meaning of 'pipe' see PARA 138 note 11. As to the meaning of 'service pipe' see PARA 179 note 8.

5 le by virtue of the Water Industry Act 1991 ss 45-51: see PARAS 335-337. For these purposes, references to so much of the service pipe as the undertaker could otherwise, by virtue of ss 45-51, be required to lay are to be construed disregarding s 46(8) (see PARA 336): s 51E(2) (as added: see note 4).

6 Water Industry Act 1991 s 51A(1) (as added: see note 4). In the Water Industry Act 1991, references to vesting or the making of a declaration of vesting with respect to a service pipe refer to so much of the service pipe as is specified for those purposes in the relevant vesting agreement: s 51E(3) (as so added).

7 Water Industry Act 1991 s 51A(2) (as added: see note 4). As to the meaning of 'domestic purposes' see PARA 334.

8 le nothing in the Water Industry Act 1991 s 51A prevents a water undertaker from agreeing as mentioned in the text.

9 le agreeing apart from the Water Industry Act 1991 s 51A.

10 Water Industry Act 1991 s 51A(2)(a) (as added: see note 4). Such a declaration takes effect as a declaration made under Pt III Ch II (ss 40-66): s 51A(2)(b) (as so added).

11 le the Water Industry Act 1991 s 51A(1): see the text to notes 1-6.

12 As to the meaning of 'writing' see PARA 22 note 1.

13 Water Industry Act 1991 s 51A(3) (as added: see note 4).

14 As to the meaning of 'information' see PARA 117 note 13.

15 Water Industry Act 1991 s 51A(4) (as added: see note 4).

16 Water Industry Act 1991 s 51A(5)(a) (as added: see note 4).

17 le by virtue of the Water Industry Act 1991 s 51B: see head (c) in the text.

18 Water Industry Act 1991 s 51A(5)(b) (as added: see note 4).

19 Water Industry Act 1991 s 51A(5) (as added: see note 4).

20 As to the meaning of 'contravention' see PARA 20 note 5.

21 Water Industry Act 1991 s 51A(4) (as added: see note 4).

22 Water Industry Act 1991 s 51A(6) (as added: see note 4).

- 23 As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.
- 24 Water Industry Act 1991 s 51A(7)(a) (as added: see note 4).
- 25 Water Industry Act 1991 s 51A(7)(b) (as added: see note 4).
- 26 Water Industry Act 1991 s 51A(7)(c)(i) (as added: see note 4).
- 27 Water Industry Act 1991 s 51A(7)(c)(ii) (as added: see note 4).
- 28 Water Industry Act 1991 s 51A(7)(d) (as added: see note 4).
- 29 Water Industry Act 1991 s 51A(7)(e) (as added: see note 4). As to references to the connection of a service pipe with a water main see PARA 335 note 9.
- 30 Water Industry Act 1991 s 51A(8)(a) (as added: see note 4).
- 31 le such requirements of the kind referred to in the Water Industry Act 1991 s 47(2): see PARA 337.
- 32 Water Industry Act 1991 s 51A(8)(b) (as added: see note 4).
- 33 As to water undertakers' areas see PARA 318.
- 34 Water Industry Act 1991 s 51A(10)(a) (as added: see note 4).
- 35 The functions of the Secretary of State under the Water Industry Act 1991 s 51A, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water supplier): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253; Water Act 2003 s 100(2)(a)(ix), (b)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 36 Water Industry Act 1991 s 51A(10)(b) (as added: see note 4).
- 37 As to the meaning of 'owner' see PARA 22 note 9.
- 38 Water Industry Act 1991 s 51A(9) (as added: see note 4).
- 39 Water Industry Act 1991 s 51C(1),(2) (as added: see note 4). The costs are those reasonably incurred by the undertaker in connection with the adopted main equivalent to the costs referred to in s 43(4)(a), (b), as if references there (and in s 43(5)) (see PARA 333) to the provision of the new main were references to the incorporation of the adopted main into the undertaker's supply system: s 51C(3) (as so added).
- 40 Water Industry Act 1991 s 51C(4) (as added: see note 4). The provisions of s 42(4), (5) (see PARA 333) apply to any security so required as they apply to security required under s 42: s 51C(4) (as so added).
- 41 Water Industry Act 1991 s 51C(5) (as added: see note 4). The 'discounted offset amount' is the sum of the estimated offsets for each of the 12 years following the vesting in the undertaker of the water main, in each case discounted in accordance with s 51C(9): s 51C(6) (as so added). The estimated offset for any year is the lesser of: (1) the estimated revenue (if any) in respect of the adopted main for that year; and (2) the annual borrowing costs of a loan of the amount required for the provision of that main: s 51C(7) (as so added). The amounts referred to in heads (1)-(2) must be calculated in accordance with the provisions of s 43A(3)-(5) (see PARA 333) as if the adopted main had been provided in pursuance of a water main requisition (as defined in s 43: see PARA 333 note 8): s 51C(8) (as so added). The estimated offset for a year must be discounted in order to determine its net present value by applying such factor, and in accordance with such other provision, as may be determined by the Water Services Regulation Authority: s 51C(9) (as so added). A determination made by the Authority for these purposes may be made in relation to a particular water main or in relation to water mains generally and may be revoked at any time except in relation to an adopted main in respect of which the agreement referred to in s 51C(1) has already been made: s 51C(10) (as so added). As to the Water Services Regulation Authority see PARA 109.
- 42 le for determination under the Water Industry Act 1991 s 30A: see PARA 131.

43 Water Industry Act 1991 s 51C(11) (as added: see note 4).

44 'Food production purposes' means the manufacturing, processing, preserving or marketing purposes with respect to food or drink for which water supplied to food production premises may be used; and for the purposes of this definition 'food production premises' means premises used for the purposes of a business of preparing food or drink for consumption otherwise than on the premises: Water Industry Act 1991 s 93(1).

45 Water Industry Act 1991 s 51D(1) (as added: see note 4). 'Relevant extent' means the extent specified in the agreement for the vesting in the undertaker of the water main or service pipe in question: s 51D(2) (as so added). The prohibition imposed by s 51D(1) on a water undertaker is enforceable under s 18 (see PARA 163) by the Water Services Regulation Authority: s 51D(3) (as so added).

46 Water Industry Act 1991 s 51B(1)(a) (as added: see note 4).

47 Water Industry Act 1991 s 51B(1)(b) (as added: see note 4).

48 As to the meaning of 'month' see PARA 23 note 10.

49 Water Industry Act 1991 s 51B(1)(c) (as added: see note 4).

50 Water Industry Act 1991 s 51B(2) (as added: see note 4). Where the Authority so makes an agreement on behalf of a water undertaker, it may do so on such terms as it considers reasonable or, as the case may be, on the terms offered by the undertaker subject to such modifications as it considers appropriate for ensuring that the terms of the agreement are reasonable: s 51B(3) (as so added). An agreement so entered into on behalf of a water undertaker is to be deemed, for the purposes of the Water Industry Act 1991, to have been entered into under s 51A (see the text to notes 1-38): s 51B(4) (as so added).

51 Water Industry Act 1991 s 51B(5) (as added: see note 4). As to the recovery of expenses see PARA 131 note 6. As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

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## ***D. DOMESTIC SUPPLIES***

### **339. Duty to supply water for domestic purposes.**

The domestic supply duty of a water undertaker<sup>1</sup> in relation to any premises is a duty, until there is an interruption of that duty<sup>2</sup>, to provide to those premises such a supply of water as is sufficient, so far as those premises are concerned, for domestic purposes<sup>3</sup>, and to maintain the connection between the undertaker's water main<sup>4</sup> and the service pipe<sup>5</sup> by which that supply is provided to those premises<sup>6</sup>.

A water undertaker owes a domestic supply duty in relation to any premises to which these provisions apply<sup>7</sup> if:

- 690 (1) a demand for a supply for domestic purposes has been made to the undertaker by the occupier<sup>8</sup> of the premises at the time when the demand is made, or by the person who is the owner of the premises at that time and agrees with the undertaker to pay all the undertaker's charges in respect of the supply demanded<sup>9</sup>; or
- 691 (2) those premises are premises to which the duty applies by reason of a supply of water provided before 1 September 1989<sup>10</sup>,

and there has been no interruption of the domestic supply duty in relation to those premises since that demand was made or, as the case may be, since the beginning of 1 September 1989<sup>11</sup>.

The domestic supply duty applies to any premises if they consist in the whole or any part of a building and are connected by means of a service pipe to one of the water undertaker's mains<sup>12</sup>, and if the following requirements are satisfied in relation to those premises<sup>13</sup>:

- 692 (a) the pipe by means of which the premises are connected to the water main in question was first connected with that main in pursuance of a connection notice<sup>14</sup> served in respect of those premises<sup>15</sup>;
- 693 (b) that pipe was the means by which a supply of water from that main was being supplied to those premises for domestic purposes immediately before 1 September 1989<sup>16</sup>;
- 694 (c) the condition specified in head (b) above would be satisfied in relation to the premises if any service pipe to those premises had not been temporarily disconnected for the purposes of any necessary works which were being carried out immediately before that date<sup>17</sup>; or
- 695 (d) the condition specified in any of heads (a) to (c) above has been satisfied in relation to the premises at any time on or after that date and would continue to be so satisfied had not the whole or any part of a service pipe to those premises, or the main with which such a pipe had been connected, been renewed on one or more previous occasions<sup>18</sup>.

However, the domestic supply duty does not apply to any premises if they are not in the area of the water undertaker<sup>19</sup>, they are not household premises<sup>20</sup>, and the total quantity of water

estimated to be supplied to them annually for the statutory purposes<sup>21</sup> is not less than the specified quantity<sup>22</sup>.

A duty imposed on a water undertaker under these provisions to provide a supply of water to any premises<sup>23</sup>, or to maintain a connection between a water main and a service pipe by which such a supply is provided<sup>24</sup>, is owed to the consumer<sup>25</sup>. Where such a duty is owed to any person, any breach of that duty which causes him to sustain loss or damage<sup>26</sup> is actionable at his suit; but in any proceedings brought against a water undertaker in pursuance of this provision it is a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach<sup>27</sup>.

Nothing in these provisions imposes any duty on a water undertaker:

- 696 (i) to provide a supply of water directly from, or maintain any connection with, a water main which is a trunk main<sup>28</sup> or is, or is to be, used solely for the purpose of supplying water otherwise than for domestic purposes<sup>29</sup>; or
- 697 (ii) to provide a supply of water to any premises, or maintain the connection between a water main and a service pipe to any premises, during any period when it is reasonable for the supply of water to those premises to be cut off or reduced, or for the pipe to be disconnected, for the purposes of the carrying out of any necessary works<sup>30</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 There is an interruption of the domestic supply duty owed by a water undertaker in relation to any premises if that supply is cut off by anything done by the undertaker in the exercise of any of its disconnection powers, other than a disconnection or cutting off for the purposes of the carrying out of any necessary works: Water Industry Act 1991 s 52(6)(a). A domestic supply duty owed in relation to any premises is not, however, treated as interrupted by reason only of a change of the occupier or owner of the premises: s 52(6)(b). There is also an interruption of the domestic supply duty owed by a water undertaker in relation to any premises where a notice is served in respect of those premises under s 63AA (see PARA 393), and the time specified in that notice has passed: s 52(6A) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 15(1), (4)). References to the disconnection powers of a water undertaker are references to the powers conferred on that undertaker by any of the Water Industry Act 1991 ss 60-62 (see PARAS 355, 357-359) and s 75 (see PARA 365): s 52(8). As to the meaning of 'owner' see PARA 22 note 9. 'Necessary works' includes works carried out, in exercise of any power conferred by or under any enactment, by a person other than a water undertaker: s 93(1). As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'person' see PARA 13 note 29.

3 Water Industry Act 1991 s 52(1)(a). As to the meaning of 'domestic purposes' see PARA 334.

4 As to the meaning of 'water main' see PARA 138 note 11.

5 As to the meaning of 'service pipe' see PARA 179 note 8. As to references to the connection of a service pipe with a water main see PARA 335 note 9.

6 Water Industry Act 1991 s 52(1)(b).

7 As to those premises see the Water Industry Act 1991 s 52(3), (4); and see the text to notes 12-18.

8 The meaning of 'occupier' was considered in *Woodcock v South Western Electricity Board* [1975] 2 All ER 545, [1975] 1 WLR 983 in relation to the electricity supply legislation then in force; the word 'occupier' did not include a person whose original entry onto premises was unlawful and forcible, eg a squatter, and the duty to supply did not apply to such a person. It is submitted that the same reasoning would apply in connection with water supply legislation and a water undertaker is therefore under no duty to give an initial supply of water to a squatter or to continue giving such a supply. See further **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 836, 1094.

9 See the Water Industry Act 1991 s 52(2)(a), (5). See also s 144(1) (occupier liable for charges unless agreement to the contrary): and PARA 422.

10 Water Industry Act 1991 s 52(2)(b).

11 Water Industry Act 1991 s 52(2) (amended by the Competition and Service (Utilities) Act 1992 ss 41, 56(7), Sch 2). As to the conditions of compliance with the domestic supply duty see PARA 340.

12 Water Industry Act 1991 s 52(3)(a) (amended by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 20; the Water Act 2003 s 101(1), Sch 8 paras 2, 15(1), (2)). This provision is expressed to be subject to the Water Industry Act 1991 s 52(4A): see the text to notes 19-22.

13 Water Industry Act 1991 s 52(3)(b).

14 As to the meaning of 'connection notice' see PARA 335 note 6.

15 Water Industry Act 1991 s 52(4)(a).

16 Water Industry Act 1991 s 52(4)(b).

17 Water Industry Act 1991 s 52(4)(c).

18 Water Industry Act 1991 s 52(4)(d).

19 Water Industry Act 1991 s 52(4A)(a) (s 52(4A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 15(1), (3)). As to water undertakers' areas see PARA 318.

20 Water Industry Act 1991 s 52(4A)(b) (as added: see note 19). 'Household premises' means premises defined as such in the Water Industry Act 1991 s 17C (see PARA 152): see s 52(4A)(b) (as so added).

21 In the purposes of the Water Industry Act 1991 s 17D(2): see PARA 152.

22 Water Industry Act 1991 s 52(4A)(c) (as added: see note 19). The specified quantity is the quantity specified in s 17D(2) (see PARA 152): see s 52(4A)(c) (as so added).

23 Water Industry Act 1991 s 54(1)(a).

24 Water Industry Act 1991 s 54(1)(b).

25 Water Industry Act 1991 s 54(1). As to the meaning of 'consumer' see PARA 122 note 35.

26 As to the meaning of 'damage' see PARA 129 note 7.

27 Water Industry Act 1991 s 54(2).

28 As to the meaning of 'trunk main' see PARA 138 note 11.

29 Water Industry Act 1991 s 52(7)(a).

30 Water Industry Act 1991 s 52(7)(b).

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### **340. Conditions of compliance with domestic supply duty.**

Where a demand for a water supply for domestic purposes<sup>1</sup> has been made to a water undertaker<sup>2</sup> in respect of any premises (the 'relevant premises')<sup>3</sup>, the undertaker may make compliance with one or more of the specified requirements a condition of providing its first supply of water in compliance with that demand<sup>4</sup>. The specified requirements are:

- 698 (1) a requirement, in a case where the demand is made as a consequence of a supply having been cut off by reason of any person's<sup>5</sup> failure to pay any charges<sup>6</sup>, that the person making the demand has paid any amount owed by him to the water undertaker in respect of a supply of water to the relevant premises<sup>7</sup>, or in respect of expenses reasonably<sup>8</sup> incurred in cutting off any such supply<sup>9</sup>;
- 699 (2) a requirement, in relation to the relevant premises, that such a requirement as may be imposed for maintaining pressure<sup>10</sup> has been complied with<sup>11</sup> or, in a case where such a requirement could be imposed but for there already being a cistern which fulfils the statutory requirements<sup>12</sup>, that the cistern and its float-operated valve are in good repair<sup>13</sup>;
- 700 (3) a requirement that there is no contravention<sup>14</sup> in relation to the water fittings<sup>15</sup> used, or to be used, in connection with the supply of water to the relevant premises<sup>16</sup>, or the use of water in those premises<sup>17</sup>, of certain prescribed requirements<sup>18</sup>; and
- 701 (4) a requirement that every such step has been taken as has been specified in any waste prevention notice served on any person<sup>19</sup> in relation to the relevant premises<sup>20</sup>.

The above provisions are without prejudice to the water undertaker's statutory powers to impose conditions of supply after individual or corporate insolvency<sup>21</sup>.

1    Ie a demand for the purposes of the Water Industry Act 1991 s 52(2): see PARA 339. As to the meaning of 'domestic purposes' see PARA 334.

2    As to the meaning of 'water undertaker' see PARA 137 note 4.

3    As to the premises in relation to which such a demand may be made see PARA 339.

4    Water Industry Act 1991 s 53(1).

5    As to the meaning of 'person' see PARA 13 note 29.

6    As to disconnections for non-payment of charges, and premises that are not to be disconnected, see PARAS 357-358.

7    Water Industry Act 1991 s 53(2)(a)(i).

8    Any dispute between a water undertaker and any other person as to whether the expenses referred to were incurred reasonably may be referred to the Water Services Regulation Authority for determination under the Water Industry Act 1991 s 30A (see PARA 131) by either party to the dispute: s 53(2A) (added by the Competition and Service (Utilities) Act 1992 s 51(1), (5); and amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109. As to the recovery of expenses see PARA 131 note 6.



9 Water Industry Act 1991 s 53(2)(a)(ii) (amended by the Competition and Service (Utilities) Act 1992 s 51(1), (5)). Any dispute between a water undertaker and any other person as to whether any requirement of a kind mentioned in the Water Industry Act 1991 s 53(2)(a) or (b) (see head 2 in the text) has been complied with may be referred to the Water Services Regulation Authority for determination under s 30A (see PARA 131) by either party to the dispute: s 53(2A) (added by the Competition and Service (Utilities) Act 1992, s 35(1), (5); and amended by the Water Act 2003 s 36(2)).

10 Ie such a requirement as may be imposed under the Water Industry Act 1991 s 66: see PARA 354.

11 Water Industry Act 1991 s 53(2)(b)(i). See also note 9.

12 Ie such a cistern as is mentioned in the Water Industry Act 1991 s 66: see PARA 354.

13 Water Industry Act 1991 s 53(2)(b)(ii).

14 As to the meaning of 'contravention' see PARA 20 note 5.

15 As to the meaning of 'water fittings' see PARA 134 note 6.

16 Water Industry Act 1991 s 53(2)(c)(i).

17 Water Industry Act 1991 s 53(2)(c)(ii).

18 Water Industry Act 1991 s 53(2)(c). The requirements are such of those of regulations under the Water Industry Act 1991 s 74 (see PARA 366) as are prescribed for these purposes: s 53(2)(c). 'Prescribed' means prescribed by regulations: see s 219(1). At the date at which this volume states the law no such regulations had been made.

19 Ie under the Water Industry Act 1991 s 75: see PARA 365.

20 Water Industry Act 1991 s 53(2)(d).

21 Water Industry Act 1991 s 53(3). As to the conditions which may be so imposed see the Insolvency Act 1986 ss 233, 372; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 113; **COMPANY AND CORPORATE INSOLVENCY** vol 7(3) (2004 Reissue) PARA 140.

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### ***E. SUPPLIES TO, AND INTRODUCTIONS OF WATER BY, LICENSED WATER SUPPLIERS***

#### **341. Wholesale water supply by primary water undertaker.**

The following provisions apply where a licensed water supplier<sup>1</sup> requests its primary water undertaker<sup>2</sup> to provide it with a supply of water for the purpose of supplying water to the premises of its customers<sup>3</sup> in accordance with the retail authorisation<sup>4</sup>, and the premises are in the area of the undertaker<sup>5</sup>. In such a case, it is the duty of the primary water undertaker, in accordance with an agreement or determination for such period and containing such terms and conditions as may be provided for<sup>6</sup>:

- 702 (1) to take any such steps for the purpose of connecting the premises in question with the undertaker's supply system<sup>7</sup>, or in respect of that system<sup>8</sup>, as may be so provided for in order to enable the undertaker to provide the requested supply<sup>9</sup>; and
- 703 (2) having taken any such steps, to provide that supply<sup>10</sup>.

A primary water undertaker is not, however, so required to provide a supply of water to a licensed water supplier, or to take any steps to enable it to provide such a supply, if (a) both of the first and second conditions are satisfied<sup>11</sup>; or (b) the third condition is satisfied<sup>12</sup>. The first condition is that the premises to be supplied by the supplier do not consist in the whole or any part of a building<sup>13</sup>, or the supply to be made by it to those premises is for purposes other than domestic purposes<sup>14</sup>. The second condition is that the provision of the supply by the undertaker would:

- 704 (i) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works<sup>15</sup>; or
- 705 (ii) otherwise put at risk its ability to meet any of the existing or probable future obligations mentioned in head (i) above<sup>16</sup>.

The third condition is that there is a contravention<sup>17</sup> in relation to the water fittings<sup>18</sup> used or to be used in connection with the supply of water to the premises to be supplied by the supplier<sup>19</sup>, or the use of water in those premises<sup>20</sup>, of such of the requirements of relevant regulations<sup>21</sup> as are prescribed for these purposes<sup>22</sup>.

Where a request has been made by a licensed water supplier to its primary water undertaker for these purposes<sup>23</sup>, and the steps which the undertaker is required to take by virtue of that request include steps for the purpose of obtaining any necessary authority for, or agreement to, any exercise by it of any of its powers or the carrying out by it of any works<sup>24</sup>, the failure of the undertaker to acquire the necessary authority or agreement does not affect any liability of the licensed water supplier, under any term or condition in accordance with which those steps

are taken, to reimburse the undertaker in respect of some or all of the expenses incurred by it in taking those steps<sup>25</sup>.

1 As to the meaning of 'licensed water supplier' see PARA 152.

2 A water undertaker is the 'primary water undertaker' of a licensed water supplier for the purposes of the Water Industry Act 1991 s 66A and s 66C (see PARA 343) if the undertaker's supply system is to be used for the purpose of making the supply to premises mentioned in those sections: s 66A(8) (ss 66A, 66D-66F added by the Water Act 2003 s 56, Sch 4 paras 1, 3). In the Water Industry Act 1991 s 66A any reference to the supply system of a water undertaker must be construed in accordance with s 17B(5) (see PARA 152 note 8): see s 66A(9)(a) (as so added). As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the meaning of 'customer or potential customer' see PARA 118 note 7.

4 Water Industry Act 1991 s 66A(1)(a) (as added: see note 2). In the Water Industry Act 1991 s 66A, any reference to the 'retail authorisation' is to be construed in accordance with s 17A(2) (see PARA 152): see s 66A(9)(b) (as so added).

5 Water Industry Act 1991 s 66A(1)(b) (as added: see note 2). As to water undertakers' areas see PARA 318.

6 The period for which and terms and conditions on which a water undertaker is to perform any duty under the Water Industry Act 1991 ss 66A-66C are, subject to the provisions of s 66D(3)-(10) and to ss 66E, 66F (see below): (1) those which are, in a case falling within s 66A(2) or s 66B(3) (see PARA 342), agreed between the water undertaker and the licensed water supplier in question (s 66D(2)(a)(i) (as added: see note 2)); and (2) in a case falling within s 66C(2) (see PARA 343), agreed between the water undertakers and the licensed water supplier in question (s 66D(2)(a)(ii) (as so added)); or (3) in default of such agreement, those which are determined by the Water Services Regulation Authority, in a case referred to it by the licensed water supplier in question, if they are acceptable to the supplier (s 66D(2)(b) (as so added)). The charges payable by a licensed water supplier to a water undertaker under an agreement under heads (1) or (2) above or a determination under head (3) above must be fixed in accordance with the costs principle set out in s 66E: s 66D(3) (as so added). The Water Services Regulation Authority must issue guidance in accordance with which the terms and conditions of an agreement under head (1) or (2) must be made: s 66D(4) (as so added). Before issuing such guidance, the Authority must consult such persons as it considers appropriate: s 66D(5) (as so added). The guidance issued under s 66D(4) must include guidance with respect to the fixing of charges in accordance with s 66D(3): s 66D(6) (as so added). If it appears to the Authority that an agreement under head (1) or (2) has not been made in accordance with s 66D(3) or the guidance issued under s 66D(4), the Authority may require the parties to the agreement to modify the agreement or to terminate the agreement, and that requirement is enforceable under s 18 (see PARA 163) by the Authority: see s 66D(7), (8) (as so added). Neither the Office of Fair Trading (the 'OFT') nor the Authority may exercise, in respect of an agreement under head (1) or (2), the powers conferred by (a) the Competition Act 1998 s 32 (directions in relation to agreements: see **COMPETITION** vol 18 (2009) PARA 135); and (b) s 35(2) (interim directions: see **COMPETITION** vol 18 (2009) PARA 135); but head (b) does not apply to the exercise of powers in respect of conduct which is connected with an agreement under head (1) or (2) and in respect of which s 35(1)(b) applies: see the Water Industry Act 1991 s 66D(9), (10) (as so added). (Note that the Competition Act 1998 s 35(1) as substituted by SI 2004/1261 no longer contains a subsection (1)(b)). As to the Water Services Regulation Authority see PARA 109. As to the meaning of 'person' see PARA 13 note 29. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6.

The Water Services Regulation Authority must publish guidance issued under the Water Industry Act 1991 s 66D(4) in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it: s 66F(5) (as so added). The Authority may from time to time revise the guidance so issued: s 66F(6) (as so added). Before so revising any guidance, the Authority must consult such persons as it considers appropriate: s 66F(7) (as so added). Section 66F(5) applies to guidance so revised as it applies to guidance issued under s 66D(4): s 66F(8) (as so added). Where the period for which and terms and conditions on which a water undertaker is to perform any duty under ss 66A-66C are determined in accordance with s 66D(2)(b), they have effect as if they had been agreed between the parties in question (and references in the subsequent provisions of the Water Industry Act 1991 (ie ss 66G-223) to an agreement under that section are to be construed accordingly): s 66F(10) (as so added). The guidance issued by the Authority is available on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

The costs principle referred to in s 66D(3) is that the charges payable by a licensed water supplier to a water undertaker, under the agreement or determination mentioned in that subsection, must enable the undertaker to recover from the supplier: (i) any expenses reasonably incurred in performing any duty under ss 66A-66C in accordance with that agreement or determination (s 66E(1)(a) (as so added)); and (ii) the appropriate amount in respect of qualifying expenses and a reasonable return on that amount (s 66E(1)(b) (as so added)), to the extent that those sums exceed any financial benefits which the undertaker receives as a result of the supplier supplying water to the premises of relevant customers (s 66E(1) (as so added)). 'Qualifying expenses' means

expenses (whether of a capital nature or otherwise) that the water undertaker has reasonably incurred or will reasonably incur in carrying out its functions (s 66E(2) (as so added)); and for the purposes of head (ii), the appropriate amount is the amount which the water undertaker reasonably expected to recover from relevant customers but is unable to recover from those customers as a result of their premises being supplied with water by the licensed water supplier (s 66E(3) (as so added)). Nothing in s 66E(3) enables a water undertaker to recover any amount to the extent that any expenses can be reduced or avoided or to the extent that any amount is recoverable in some other way (other than from other customers of the undertaker): s 66E(4) (as so added). 'Relevant customers' means customers to whose premises the licensed water supplier is to make any supply of water in connection with which the agreement or determination mentioned in s 66E(1) is made: s 66E(5) (as so added).

7 Water Industry Act 1991 s 66A(2)(a)(i) (as added: see note 2).

8 Water Industry Act 1991 s 66A(2)(a)(ii) (as added: see note 2).

9 Water Industry Act 1991 s 66A(2)(a) (as added: see note 2). See also note 10.

10 Water Industry Act 1991 s 66A(2)(b) (as added: see note 2). The Water Services Regulation Authority may determine, in a case referred to it by a licensed water supplier, whether any of the conditions is satisfied, subject to s 66F (see note 6): s 66D(1) (as so added). Unless otherwise directed, the Authority must enter every determination made by it under s 66D(1) in the register kept by it: see s 195(2); and PARA 178.

11 Water Industry Act 1991 s 66A(3)(a) (as added: see note 2).

12 Water Industry Act 1991 s 66A(3)(b) (as added: see note 2).

13 Water Industry Act 1991 s 66A(4)(a) (as added: see note 2).

14 Water Industry Act 1991 s 66A(2)(b) (as added: see note 2). As to the meaning of 'domestic purposes' see PARA 334.

15 Water Industry Act 1991 s 66A(5)(a) (as added: see note 2).

16 Water Industry Act 1991 s 66A(5)(b) (as added: see note 2).

17 As to the meaning of 'contravention' see PARA 20 note 5.

18 As to the meaning of 'water fittings' see PARA 134 note 6.

19 Water Industry Act 1991 s 66A(6)(a) (as added: see note 2).

20 Water Industry Act 1991 s 66A(6)(b) (as added: see note 2).

21 Ie regulations under the Water Industry Act 1991 s 74: see PARA 366.

22 Water Industry Act 1991 s 66A(6) (as added: see note 2). 'Prescribed' means prescribed by regulations: see s 219(1). The prescribed requirements for these purposes are the requirements in the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, regs 3, 4 and 5(1)(c) in so far as they apply by virtue of reg 2 of those regulations (see PARA 367): Water Supply Licence (Prescribed Water Fittings Requirements) Regulations 2005, SI 2005/3077, reg 2.

23 Water Industry Act 1991 s 66A(7)(a) (as added: see note 2).

24 Water Industry Act 1991 s 66A(7)(b) (as added: see note 2).

25 Water Industry Act 1991 s 66A(7) (as added: see note 2). As to the recovery of expenses see PARA 131 note 6.

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### 342. Introduction of water into water undertaker's supply system.

The following provisions apply:

- 706 (1) where a qualifying licensed water supplier<sup>1</sup> requests a water undertaker<sup>2</sup> to permit it to introduce water into the undertaker's supply system<sup>3</sup>, by means of which any particular supply of water to any premises in accordance with the retail authorisation<sup>4</sup> is to take place, in connection with that supply<sup>5</sup> and the premises are in the area of the undertaker<sup>6</sup>; and also
- 707 (2) where:
- 61
71. (a) a water undertaker agrees to permit a qualifying licensed water supplier to introduce water into the undertaker's treatment works<sup>7</sup>;
72. (b) in connection with that introduction, the supplier requests the undertaker to permit it to introduce water into the undertaker's supply system, by means of which any particular supply of water to any premises in accordance with the retail authorisation is to take place, in connection with that supply<sup>8</sup>; and
73. (c) the premises are in the area of the undertaker<sup>9</sup>.
- 62

Where these provisions apply, it is the duty of the water undertaker, in accordance with an agreement or determination for such period and containing such terms and conditions as may be provided for<sup>10</sup>:

- 708 (i) to take any such steps:
- 63
74. (A) for the purpose of connecting the premises in question with the undertaker's supply system<sup>11</sup>;
75. (B) for the purpose of connecting the treatment works of the qualifying licensed water supplier with that system (in a case falling within head (1) above)<sup>12</sup>;
76. (C) for the purpose of connecting with that system any source used by the qualifying licensed water supplier for the purpose of supplying water other than for domestic or food production purposes<sup>13</sup> (in a case falling within head (1) above)<sup>14</sup>; or
77. (D) in respect of that system<sup>15</sup>,
- 64
- 709 as may be so provided for in order to enable the supplier to make the requested introduction of the water into that system<sup>16</sup>; and
- 710 (ii) having taken any such steps, to permit the requested introduction of the water into that system<sup>17</sup>.

A water undertaker is not, however, so required to permit the introduction of water into its supply system, or to take any steps to enable a qualifying water supplier to make such an introduction, if the first or second condition is satisfied<sup>18</sup>. The first condition is that permitting the introduction of the water into the water undertaker's supply system would require the undertaker, in order to meet all its existing obligations to supply water for domestic or other

purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works<sup>19</sup>, or otherwise put at risk its ability to meet any such existing or probable future obligations<sup>20</sup>. The second condition is that there is a contravention<sup>21</sup> in relation to the water fittings<sup>22</sup> used or to be used in connection with the supply of water to the premises to be supplied by the supplier<sup>23</sup>, or the use of water in those premises<sup>24</sup>, of such of the requirements of relevant regulations as are prescribed<sup>25</sup> for the statutory purposes<sup>26</sup>.

Where a request has been made by a qualifying licensed water supplier to a water undertaker for the purposes of head (1) or head (2) above<sup>27</sup>, and the steps which the undertaker is required to take by virtue of that request include steps for the purpose of obtaining any necessary authority for, or agreement to, any exercise by it of any of its powers or the carrying out by it of any works<sup>28</sup>, the failure of the undertaker to acquire the necessary authority or agreement does not affect any liability of the supplier, under any term or condition in accordance with which those steps are taken, to reimburse the undertaker in respect of some or all of the expenses incurred by it in taking those steps<sup>29</sup>.

1 In the Water Industry Act 1991 s 66B and s 66C (see PARA 343), references to a 'qualifying licensed water supplier' are references to a licensed water supplier which is the holder of a combined licence (within the meaning of the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152): s 66B(12) (ss 66A, 66B, 66D, 66F added by the Water Act 2003 s 56, Sch 4 paras 1, 3). As to the meaning of 'licensed water supplier' see PARA 152.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 66A(9)(a) (as added: see note 1).

4 As to the meaning of 'retail authorisation' see PARA 152: definition applied by the Water Industry Act 1991 s 66A(9)(b) (as added: see note 1).

5 Water Industry Act 1991 s 66B(1)(a) (as added: see note 1).

6 Water Industry Act 1991 s 66B(1)(b) (as added: see note 1). As to water undertakers' areas see PARA 318.

7 Water Industry Act 1991 s 66B(2)(a) (as added: see note 1). 'Treatment works' (1) in relation to a water undertaker, means the works designated as treatment works by the Secretary of State for the purposes of s 17B(6) (see PARA 152); (2) in relation to a qualifying licensed water supplier, means the works designated from time to time by the Secretary of State as treatment works for these purposes: s 66B(8) (as so added). Before designating any works for the purposes of head (2), the Secretary of State must consult the Welsh Ministers: s 66B(9) (as so added); Government of Wales Act 2006 Sch 11 para 32. A list of any works designated for the purposes of head (2) must be published from time to time by the Secretary of State in such manner as he considers appropriate for the purpose of bringing the designations to the attention of persons likely to be affected by them: Water Industry Act 1991 s 66B(10) (as so added). As to the Secretary of State see PARA 15 note 1. As to the meaning of 'person' see PARA 13 note 29. Functions under s 66B(9) which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

8 Water Industry Act 1991 s 66B(2)(b) (as added: see note 1).

9 Water Industry Act 1991 s 66B(2)(c) (as added: see note 1).

10 In the Water Industry Act 1991 s 66D(2): see PARA 341 note 6. Before the Water Services Regulation Authority makes a determination for the purposes of s 66D(2)(b) (see PARA 341 note 6) as to the period for which and terms and conditions on which a water undertaker is to perform any duty under s 66B it must consult the Secretary of State (see s 66F(1)(b) (as added: see note 1)), or if the determination is in relation to premises supplied with water using the supply system of a water undertaker whose area is wholly or mainly in Wales, the Welsh Ministers (and not the Secretary of State) (see s 66F(3)(a) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to the Water Services Regulation Authority see PARA 109. As to the meaning of 'Wales' see PARA 16 note 2. Functions under the Water Industry Act 1991 s 66F, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 Water Industry Act 1991 s 66B(3)(a)(i) (as added: see note 1).

12 Water Industry Act 1991 s 66B(3)(a)(ii) (as added: see note 1). Any pipe laid in pursuance of s 66B(3)(a)(ii) or (iii) (see the text to notes 13-14) must be regarded as a water main for the purposes of the Water Industry Act 1991, subject to any provision to the contrary: s 66B(11) (as so added). As to the meanings of 'water main' and 'pipe' see PARA 138 note 11.

13 As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44.

14 Water Industry Act 1991 s 66B(3)(a)(iii) (as added: see note 1). See also note 12.

15 Water Industry Act 1991 s 66B(3)(a)(iv) (as added: see note 1).

16 Water Industry Act 1991 s 66B(3)(a) (as added: see note 1).

17 Water Industry Act 1991 s 66B(3)(b) (as added: see note 1).

18 Water Industry Act 1991 s 66B(4) (as added: see note 1). The Water Services Regulation Authority may determine, in a case referred to it by a licensed water supplier, whether either of those conditions is satisfied, subject to s 66F: see s 66D(1) (as so added). Before the Authority makes such a determination as to whether any such condition is satisfied, it must consult the Secretary of State (see s 66F(1)(a) (as so added)), or if such a determination is in relation to premises supplied with water using the supply system of a water undertaker whose area is wholly or mainly in Wales, the Welsh Ministers (and not the Secretary of State) (see s 66F(3)(a) (as so added); Government of Wales Act 2006 Sch 11 para 32). Unless otherwise directed, the Authority must enter every determination made by it under the Water Industry Act 1991 s 66D(1) in the register kept by it: see s 195(2); and PARA 178.

19 Water Industry Act 1991 s 66B(5)(a) (as added: see note 1).

20 See the Water Industry Act 1991 s 66B(5)(b) (as added: see note 1).

21 As to the meaning of 'contravention' see PARA 20 note 5.

22 As to the meaning of 'water fittings' see PARA 134 note 6.

23 Water Industry Act 1991 s 66B(6)(a) (as added: see note 1).

24 Water Industry Act 1991 s 66B(6)(b) (as added: see note 1).

25 In such of the requirements of regulations under the Water Industry Act 1991 s 74 (see PARA 366) prescribed for the purposes of the Water Industry Act 1991 s 66A(6) (see PARA 341 note 22).

26 Water Industry Act 1991 s 66B(6) (as added: see note 1).

27 Water Industry Act 1991 s 66B(7)(a) (as added: see note 1).

28 Water Industry Act 1991 s 66B(7)(b) (as added: see note 1).

29 Water Industry Act 1991 s 66B(7) (as added: see note 1). As to the recovery of expenses see PARA 131 note 6.

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### **343. Wholesale water supply by secondary water undertaker.**

The following provisions apply where a qualifying licensed water supplier<sup>1</sup>:

- 711 (1) requests a water undertaker<sup>2</sup> other than its primary water undertaker<sup>3</sup> (the 'secondary water undertaker') to provide a supply of water for the purpose of the supplier supplying water, using the primary water undertaker's supply system<sup>4</sup>, to the premises of the supplier's customers<sup>5</sup> in accordance with the retail authorisation<sup>6</sup>; and
- 712 (2) requests its primary water undertaker to permit it to introduce that water into its supply system<sup>7</sup>;

and where the premises are in the area of the primary water undertaker<sup>8</sup>. In such a case it is the duty of the secondary water undertaker, in accordance with an agreement or determination for such period and containing such terms and conditions as may be provided for<sup>9</sup>, to take any such steps in respect of its supply system as may be so provided for in order to enable it to provide the requested supply<sup>10</sup> and, having taken any such steps, to provide that supply<sup>11</sup>. Likewise, it is the duty of the primary water undertaker, in accordance with an agreement or determination for such period and containing such terms and conditions as may be provided for<sup>12</sup>, to take any such steps:

- 713 (a) for the purpose of connecting the premises in question with the primary water undertaker's supply system<sup>13</sup>;
- 714 (b) for the purpose of connecting that system with the secondary water undertaker's supply system<sup>14</sup>; or
- 715 (c) in respect of the primary water undertaker's supply system<sup>15</sup>,

as may be so provided for in order to enable the licensed water supplier to make the introduction of the requested supply of water into the primary water undertaker's supply system<sup>16</sup> and, having taken any such steps, to permit the introduction of that supply of water into that supply system<sup>17</sup>.

If, however, the first or second condition is satisfied<sup>18</sup>, a secondary water undertaker is not so required to provide a supply of water to a licensed water supplier<sup>19</sup>, and a primary water undertaker is not so required to permit the introduction of water into its supply system, or to take any steps to enable the licensed water supplier to make such an introduction<sup>20</sup>. The first condition is that the provision of the supply or permitting the introduction would:

- 716 (i) require the undertaker in question, in order to meet all its existing obligations to supply water for domestic or other purposes<sup>21</sup>, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works<sup>22</sup>; or
- 717 (ii) otherwise put at risk its ability to meet any of the existing or probable future obligations mentioned in head (i) above<sup>23</sup>.



The second condition is that there is a contravention<sup>24</sup> in relation to the water fittings<sup>25</sup> used or to be used in connection with the supply of water to the premises to be supplied by the supplier<sup>26</sup>, or the use of water in those premises<sup>27</sup>, of such of the requirements of the relevant regulations as are prescribed<sup>28</sup> for the statutory purposes<sup>29</sup>.

Where requests have been made by a licensed water supplier to its primary water undertaker and secondary water undertaker for the purposes of heads (1) and (2) above<sup>30</sup>, and the steps which either of those undertakers is required to take by virtue of the request made to it include steps for the purpose of obtaining any necessary authority for, or agreement to, any exercise by it of any of its powers or the carrying out by it of any works<sup>31</sup>, the undertaker's failure to acquire the necessary authority or agreement does not affect any liability of the licensed water supplier, under any term or condition in accordance with which those steps are taken, to reimburse the undertaker in respect of some or all of the expenses incurred by it in taking those steps<sup>32</sup>.

1 As to the meaning of 'qualifying licensed water supplier' see PARA 342 note 1.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the meaning of 'primary water undertaker' see PARA 341 note 2.

4 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 66A(9)(a) (ss 66A, 66C, 66D, 66F added by the Water Act 2003 s 56, Sch 4 paras 1, 3).

5 As to the meaning of 'customer or potential customer' see PARA 118 note 7.

6 Water Industry Act 1991 s 66C(1)(a)(i) (as added: see note 4). As to the meaning of 'retail authorisation' see PARA 152: definition applied by s 66A(9)(b) (as so added).

7 Water Industry Act 1991 s 66C(1)(a)(ii) (as added: see note 4).

8 Water Industry Act 1991 s 66C(1)(b) (as added: see note 4). As to water undertakers' areas see PARA 318.

9 Ie under the Water Industry Act 1991 s 66D(2): see PARA 341 note 6. Before the Water Services Regulation Authority makes a determination for the purposes of s 66D(2)(b) (see PARA 341 note 6) as to the period for which and terms and conditions on which the water undertakers are to perform any duty under s 66C it must consult the Secretary of State and the Environment Agency (see s 66F(2)(b) (as added: see note 4)). However, if the determination is in relation to premises supplied with water using the supply system of a water undertaker whose area is wholly or mainly in Wales, and the area of the secondary water undertaker in question is wholly or mainly in Wales, the Authority must consult the Welsh Ministers (and not the Secretary of State): see s 66F(3) (as so added); Government of Wales Act 2006 Sch 11 para 32. Also if a determination is in relation to premises supplied with water using the supply system of a water undertaker whose area is wholly or mainly in England or Wales, but the area of the secondary water undertaker in question is (respectively) wholly or mainly in Wales or England, the Authority must consult the Welsh Ministers (as well as the Secretary of State): Water Industry Act 1991 s 66F(4) (as so added); Government of Wales Act 2006 Sch 11 para 32. As to the Water Services Regulation Authority see PARA 109. As to the Secretary of State see PARA 15 note 1. As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'England' see PARA 19 note 8. As to the Welsh Ministers see PARA 16 note 5. Functions under the Water Industry Act 1991 s 66F, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

10 Water Industry Act 1991 s 66C(2)(a)(i) (as added: see note 4).

11 Water Industry Act 1991 s 66C(2)(a)(ii) (as added: see note 4).

12 Ie under the Water Industry Act 1991 s 66D(2): see PARA 341 note 6. See also note 9.

13 Water Industry Act 1991 s 66C(3)(a) (as added: see note 4).

14 Water Industry Act 1991 s 66C(3)(b) (as added: see note 4). Any pipe laid for these purposes must be regarded as a water main for the purposes of the Water Industry Act 1991, subject to any provision to the contrary: see s 66C(8) (as so added). As to the meanings of 'pipe' and 'water main' see PARA 138 note 11.

- 15 Water Industry Act 1991 s 66C(3)(c) (as added: see note 4).
- 16 Water Industry Act 1991 s 66C(2)(b)(i) (as added: see note 4).
- 17 Water Industry Act 1991 s 66C(2)(b)(ii) (as added: see note 4).
- 18 The Water Services Regulation Authority may determine, in a case referred to it by a licensed water supplier, whether any condition specified in the Water Industry Act 1991 s 66C(5) or (6) (see the text to notes 21-29) is satisfied, subject to s 66F: see s 66D(1) (as added: see note 4). Before the Authority makes such a determination it must consult the Secretary of State (subject to s 66F(3), (4) (see note 9)), and the Environment Agency: see s 66F(2)(a) (as so added). Unless otherwise directed, the Authority must enter every such determination in the register kept by it: see s 195(2); and PARA 178.
- 19 Water Industry Act 1991 s 66C(4)(a) (as added: see note 4).
- 20 Water Industry Act 1991 s 66C(4)(b) (as added: see note 4).
- 21 As to the meaning of 'domestic purposes' see PARA 334.
- 22 Water Industry Act 1991 s 66C(5)(a) (as added: see note 4).
- 23 Water Industry Act 1991 s 66C(5)(b) (as added: see note 4).
- 24 As to the meaning of 'contravention' see PARA 20 note 5.
- 25 As to the meaning of 'water fittings' see PARA 134 note 6.
- 26 Water Industry Act 1991 s 66C(6)(a) (as added: see note 4).
- 27 Water Industry Act 1991 s 66C(6)(b) (as added: see note 4).
- 28 In such of the requirements of regulations under the Water Industry Act 1991 s 74 (see PARA 366) as are prescribed for the purposes of s 66A(6) (see PARA 341 note 22).
- 29 Water Industry Act 1991 s 66C(6) (as added: see note 4).
- 30 Water Industry Act 1991 s 66C(7)(a) (as added: see note 4).
- 31 Water Industry Act 1991 s 66C(7)(b) (as added: see note 4).
- 32 Water Industry Act 1991 s 66C(7) (as added: see note 4). As to the recovery of expenses see PARA 131 note 6.

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### **344. Designation of strategic supply.**

If at any time the Water Services Regulation Authority<sup>1</sup> determines that an introduction of water which a water undertaker<sup>2</sup> is required to permit<sup>3</sup> in accordance with an agreement<sup>4</sup> constitutes a strategic supply of water, the Authority must designate the introduction as a strategic supply<sup>5</sup>. For these purposes, an introduction of water is a strategic supply if, without that introduction being made, there is a substantial risk that the water undertaker would be unable to maintain supplies to its own customers<sup>6</sup> as well as supplying customers of the licensed water supplier<sup>7</sup> in question with water for domestic purposes<sup>8</sup>.

If a water undertaker requests the Authority to make a determination that an introduction of water constitutes a strategic supply for these purposes<sup>9</sup>, or if the Authority otherwise proposes to make a determination that an introduction of water constitutes a strategic supply for these purposes<sup>10</sup>, the Authority must give notice<sup>11</sup> of the request or proposed determination to the Secretary of State<sup>12</sup>, the Welsh Ministers<sup>13</sup>, the Environment Agency<sup>14</sup>, the other party or parties, or the parties, to the agreement<sup>15</sup>, and such other persons<sup>16</sup> (if any) as the Authority thinks it appropriate to notify<sup>17</sup>. Any such notice must specify the time, not being less than 28 days from the date on which the notice was given, within which representations or objections with respect to the request or proposed determination may be made<sup>18</sup>. The Authority must consider any representations or objections which are duly made and not withdrawn<sup>19</sup>.

If the Authority determines that an introduction designated under these provisions as a strategic supply no longer constitutes such a supply, it must cancel its designation<sup>20</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 I.e. under the Water Industry Act 1991 s 66B (see PARA 342) or s 66C (see PARA 343).

4 I.e. an agreement under the Water Industry Act 1991 s 66D: see PARAS 342, 343.

5 Water Industry Act 1991 s 66G(1), (2) (s 66G added by the Water Act 2003 s 56, Sch 4 paras 1, 3). Unless otherwise directed, the Authority must enter every designation made by it under the Water Industry Act 1991 s 66G in the register kept by it: see s 195(2); and PARA 178.

6 As to the meaning of 'customer or potential customer' see PARA 118 note 7.

7 As to the meaning of 'licensed water supplier' see PARA 152.

8 Water Industry Act 1991 s 66G(10) (as added: see note 5). As to the meaning of 'domestic purposes' see PARA 334.

9 Water Industry Act 1991 s 66G(3)(a) (as added: see note 5).

10 Water Industry Act 1991 s 66G(3)(b) (as added: see note 5).

11 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

12 Water Industry Act 1991 s 66G(4)(a) (as added: see note 5). As to the Secretary of State see PARA 15 note 1.

13 Water Industry Act 1991 s 66G(4)(b) (as added: see note 5); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 66G which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

14 Water Industry Act 1991 s 66G(4)(c) (as added: see note 5). As to the Environment Agency see PARA 17.

15 Water Industry Act 1991 s 66G(4)(d) (as added: see note 5). The agreement referred to is that under s 66D: see PARAS 342, 343.

16 As to the meaning of 'person' see PARA 13 note 29.

17 Water Industry Act 1991 s 66G(4)(e) (as added: see note 5).

18 Water Industry Act 1991 s 66G(5) (as added: see note 5).

19 Water Industry Act 1991 s 66G(6) (as added: see note 5).

20 Water Industry Act 1991 s 66G(7) (as added: see note 5). If the Authority proposes to make such a determination that an introduction no longer constitutes a strategic supply, it must give notice of the proposed determination to the Secretary of State, the Welsh Ministers, the Environment Agency, and the other party or parties, or the parties, to the agreement (ie the persons specified in s 66G(4)(a)-(d): see the text to notes 11-15): see s 66G(8) (as so added). Section 66G(5) (see the text to note 18) applies to a notice under s 66G(8) as it applies to a notice under s 66G(4) (and s 66G(6) (see the text to note 19) applies accordingly): s 66G(9) (as so added).

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### **345. Designation of collective strategic supply.**

If at any time the Water Services Regulation Authority<sup>1</sup> determines that two or more introductions of water which are made by a licensed water supplier<sup>2</sup>, and which a water undertaker<sup>3</sup> is required to permit<sup>4</sup> in accordance with agreements<sup>5</sup>, constitute a collective strategic supply of water, the Authority must designate the introductions as a collective strategic supply<sup>6</sup>. For these purposes, introductions of water are a collective strategic supply if, without those introductions being made, there is a substantial risk that the water undertaker would be unable to maintain supplies to its own customers<sup>7</sup> as well as supplying the customers of the licensed water supplier in question with water for domestic purposes<sup>8</sup>.

If a water undertaker requests the Authority to make a determination that two or more introductions of water constitute a collective strategic supply for these purposes<sup>9</sup>, or if the Authority otherwise proposes to make a determination that two or more introductions of water constitute a collective strategic supply for these purposes<sup>10</sup>, the Authority must give notice<sup>11</sup> of the request or proposed determination to the Secretary of State<sup>12</sup>, the Welsh Ministers<sup>13</sup>, the Environment Agency<sup>14</sup>, the other party or parties, or the parties, to the agreements<sup>15</sup>, and such other persons<sup>16</sup> (if any) as the Authority thinks it appropriate to notify<sup>17</sup>. Any such notice must specify the time, not being less than 28 days from the date on which the notice was given, within which representations or objections with respect to the request or proposed determination may be made<sup>18</sup>. The Authority must consider any representations or objections which are duly made and not withdrawn<sup>19</sup>.

If the Authority determines that introductions so designated as a collective strategic supply no longer constitute such a supply, it must cancel their designation<sup>20</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 Water Industry Act 1991 s 66H(1)(a) (s 66H added by the Water Act 2003 s 56, Sch 4 paras 1, 3). As to the meaning of 'licensed water supplier' see PARA 152.

3 As to the meaning of 'water undertaker' see PARA 137 note 4.

4 Ie under the Water Industry Act 1991 s 66B (see PARA 342) or s 66C (see PARA 343).

5 Water Industry Act 1991 s 66H(1)(b) (as added: see note 2). The agreements referred to are those under s 66D: see PARAS 342, 343.

6 Water Industry Act 1991 s 66H(1), (2) (as added: see note 2). Unless otherwise directed, the Authority must enter every designation made by it under s 66H in the register kept by it: see s 195(2); and PARA 178.

7 As to the meaning of 'customer or potential customer' see PARA 118 note 7.

8 Water Industry Act 1991 s 66H(10) (as added: see note 2). As to the meaning of 'domestic purposes' see PARA 334.

9 Water Industry Act 1991 s 66H(3)(a) (as added: see note 2).

10 Water Industry Act 1991 s 66H(3)(b) (as added: see note 2).

11 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

12 Water Industry Act 1991 s 66H(4)(a) (as added: see note 2). As to the Secretary of State see PARA 15 note 1.

13 Water Industry Act 1991 s 66H(4)(b) (as added: see note 2); Government of Wales Act 2006 Sch 11 para 32. Functions under the Water Industry Act 1991 s 66H which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

14 Water Industry Act 1991 s 66H(4)(c) (as added: see note 2). As to the Environment Agency see PARA 17.

15 Water Industry Act 1991 s 66H(4)(d) (as added: see note 2). The agreements referred to are those under s 66D: see PARAS 342, 343.

16 As to the meaning of 'person' see PARA 13 note 29.

17 Water Industry Act 1991 s 66H(4)(e) (as added: see note 2).

18 Water Industry Act 1991 s 66H(5) (as added: see note 2).

19 Water Industry Act 1991 s 66H(6) (as added: see note 2).

20 Water Industry Act 1991 s 66H(7) (as added: see note 2). If the Authority proposes to make such a determination that introductions no longer constitute a collective strategic supply, it must give notice of the proposed determination to the Secretary of State, the Welsh Ministers, the Environment Agency, the other party or parties, or the parties, to the agreements (ie the persons specified in s 66H(4)(a)-(d) (see the text to notes 11-15)): see s 66H(8) (as so added). Section 66H(5) (see the text to note 18) applies to such a notice as it applies to a notice under s 66H(4) (and s 66H(6) (see the text to note 19) applies accordingly): s 66H(9) (as so added).

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### **346. Offences relating to unauthorised use of supply systems and unauthorised introduction of water.**

Subject to certain exceptions<sup>1</sup>, no person<sup>2</sup> may use a water undertaker's supply system<sup>3</sup> for the purpose of supplying water to any premises of a customer<sup>4</sup>; but this does not apply where the supply is made by the water undertaker<sup>5</sup>, or by a licensed water supplier<sup>6</sup> in pursuance of its licence<sup>7</sup>. A person who contravenes<sup>8</sup> this prohibition is guilty of an offence<sup>9</sup>. Any undertaking entered into which involves a contravention of this prohibition is unenforceable<sup>10</sup>.

Also, subject to certain exceptions<sup>11</sup>, no person may introduce water into a water undertaker's supply system, other than the undertaker itself<sup>12</sup>; but this does not apply where the water is introduced by a licensed water supplier in pursuance of its licence<sup>13</sup>, or by another water undertaker under an agreement for a supply of water in bulk<sup>14</sup>. A person who contravenes this prohibition is guilty of an offence<sup>15</sup>. Any undertaking entered into which involves a contravention of this prohibition is unenforceable<sup>16</sup>.

The Secretary of State or, in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales, the Welsh Ministers<sup>17</sup> may by order made by statutory instrument<sup>18</sup> grant exemption from either of the above prohibitions to: (1) a person or persons of a class<sup>19</sup>; (2) generally or to such extent as may be specified in the order<sup>20</sup>; and (3) unconditionally or subject to such conditions as may be so specified<sup>21</sup>. Before making such an order the Secretary of State or, as the case may be, the Welsh Ministers must give notice<sup>22</sup>:

- 718 (a) stating that they propose to make such an order and setting out the terms of the proposed order<sup>23</sup>;
- 719 (b) stating the reasons why they propose to make the order in the terms proposed<sup>24</sup>; and
- 720 (c) specifying the time, not being less than 28 days from the date of publication of the notice, within which representations or objections with respect to the proposals may be made<sup>25</sup>,

and must consider any representations or objections which are duly made and not withdrawn<sup>26</sup>.

An exemption may be granted indefinitely<sup>27</sup>, or for a period specified in, or determined by or under, the exemption<sup>28</sup>. Notice of an exemption granted to a person must be given by serving a copy of the exemption on him<sup>29</sup>, and by publishing the exemption in such manner as the Secretary of State or, as the case may be, the Welsh Ministers consider appropriate for bringing it to the attention of other persons who may be affected by it<sup>30</sup>. Notice of an exemption granted to persons of a class must be given by publishing the exemption in such manner as the Secretary of State or the Welsh Ministers consider appropriate for bringing it to the attention of persons of that class<sup>31</sup>, and other persons who may be affected by it<sup>32</sup>.

The Secretary of State or, as appropriate, the Welsh Ministers may by order made by statutory instrument<sup>33</sup> revoke an order by which an exemption was granted to a person<sup>34</sup> or vary an order by which more than one exemption was so granted so as to terminate any of the exemptions: (i) at the person's request<sup>35</sup>; (ii) in accordance with any provision of the order by which the exemption was granted<sup>36</sup>; or (iii) if it appears to the Secretary of State or, as the case may be,

the Welsh Ministers inappropriate that the exemption should continue to have effect<sup>37</sup>. The Secretary of State or the Welsh Ministers may also, by order made by statutory instrument<sup>38</sup>, revoke an order by which an exemption was granted to persons of a class<sup>39</sup> or vary an order by which more than one exemption was so granted so as to terminate any of the exemptions in accordance with any provision of the order by which the exemption was granted<sup>40</sup>, or if it appears to the Secretary of State or Welsh Ministers inappropriate that the exemption should continue to have effect<sup>41</sup>. Further, the Secretary of State or the Welsh Ministers<sup>42</sup> may by direction withdraw an exemption granted to persons of a class<sup>43</sup> from any person of that class: (A) at the person's request<sup>44</sup>; (B) in accordance with any provision of the order by which the exemption was granted<sup>45</sup>; or (C) if it appears to the Secretary of State or, as the case may be, the Welsh Ministers inappropriate that the exemption should continue to have effect in the case of the person<sup>46</sup>.

Before making an order under head (ii) or head (iii) above, or an order revoking or varying a class exemption<sup>47</sup>, or giving a direction under head (B) or head (C) above, the Secretary of State or, as the case may be, the Welsh Ministers must consult the Water Services Regulation Authority<sup>48</sup>. The Secretary of State or the Welsh Ministers must also give notice<sup>49</sup> stating that they propose to make such an order or give such a direction<sup>50</sup>, stating the reasons why it is proposed to make such an order or give such a direction<sup>51</sup>, and specifying the time, not being less than 28 days from the date of publication of the notice, within which representations or objections with respect to the proposals may be made<sup>52</sup>. The Secretary of State or the Welsh Ministers must consider any representations or objections which are duly made and not withdrawn<sup>53</sup>.

1    le subject to the Water Industry Act 1991 s 66I(2), (3) (see the text to notes 5-7), and s 66K (see the text to notes 17-32).

2    As to the meaning of 'person' see PARA 13 note 29.

3    As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 66I(9) (ss 66I-66L added by the Water Act 2003 s 56, Sch 4 paras 1, 3). As to the meaning of 'water undertaker' see PARA 137 note 4.

4    Water Industry Act 1991 s 66I(1) (as added: see note 3). As to the meaning of 'customer or potential customer' see PARA 118 note 7.

5    Water Industry Act 1991 s 66I(2)(a) (as added: see note 3).

6    As to the meaning of 'licensed water supplier' see PARA 152.

7    Water Industry Act 1991 s 66I(2)(b) (as added: see note 3). As to water supply licences see PARA 152 et seq. The Secretary of State may by regulations specify further circumstances in which s 66I(1) does not apply: s 66I(3) (as so added). The function of making such regulations is exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales: see s 66I(8)(a) (as so added); Government of Wales Act 2006 Sch 11 para 32. As to the making of regulations see PARA 21. As to the Secretary of State see PARA 15 note 1. Functions under the Water Industry Act 1991 ss 66I, 66J, 66L which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

The Water Industry Act 1991 s 66I(1) does not apply where: (1) a water undertaker ('A') is using the supply system of another water undertaker ('B') under an agreement for a supply of water in bulk by B to A; (2) A is using B's supply system under any enactment requiring that a supply of water in bulk be made by B to A; or (3) a relevant person ('C') is using the supply system of a water undertaker ('D') pursuant to a relevant undertaking for the purpose of making a private supply to any premises: Water Supply (Exceptions from Supply System Prohibitions) Regulations 2005, SI 2005/3075, reg 3(1). However, head (1) above does not apply in so far as (a) A uses B's supply system for the purpose of supplying water to premises within the geographical area to which A's appointment relates; and (b) the water has been introduced into B's supply system for that purpose by A or by any relevant person under an agreement with A: reg 3(2). 'Relevant person' means: (i) in head (3) above, a person who is not a water undertaker or a licensed water supplier; and (ii) in head (b) above, a person other than A or B: reg 3(3)(a). 'Relevant undertaking' means an undertaking entered into by D with C before 31 July 2002 under which a supply of water was made by D to C before that date: reg 3(3)(b). As to the meaning of



'supply of water in bulk' see PARA 138 note 11. As to the meaning of 'private supply' see PARA 373 note 15: definition applied by reg 2. 'Enactment' includes subordinate legislation within the meaning of the Interpretation Act 1978 s 21 (see PARA 21 note 36) but excludes subordinate legislation made by 'A' where head (2) above applies: Water Supply (Exceptions from Supply System Prohibitions) Regulations 2005, SI 2005/3075, reg 2.

8 As to the meaning of 'contravene' see PARA 20 note 5.

9 Water Industry Act 1991 s 66I(4) (as added: see note 3). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum or, on conviction on indictment, a fine: s 66I(6) (as so added). As to the statutory maximum see PARA 169 note 20. No proceedings for such an offence may be instituted except by the Secretary of State, or by the Water Services Regulation Authority (s 66I(7)(a), (b) (as so added)); however, the function of the Secretary of State in instituting proceedings is exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales (see s 66I(8)(b) (as so added); Government of Wales Act 2006 Sch 11 para 32). As to offences by bodies corporate see PARA 185.

10 Water Industry Act 1991 s 66I(5) (as added: see note 3).

11 le subject to the Water Industry Act 1991 s 66J(2), (3) (see the text to notes 13-14) and s 66K (see the text to notes 17-32).

12 Water Industry Act 1991 s 66J(1) (as added: see note 3).

13 Water Industry Act 1991 s 66J(2)(a) (as added: see note 3).

14 Water Industry Act 1991 s 66J(2)(b) (as added: see note 3). As to the meaning of 'supply of water in bulk' see PARA 138 note 11. The Secretary of State may by regulations specify further circumstances in which s 66J(1) does not apply: s 66J(3) (as so added). The function of making such regulations is exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales: s 66J(9)(a) (as so added); Government of Wales Act 2006 Sch 11 para 32.

The Water Industry Act 1991 s 66J(1) does not apply where: (1) the water is introduced under an agreement with the water undertaker; (2) the water is introduced into the supply system of a water undertaker ('E') by another water undertaker ('F') under any enactment requiring that a supply of water in bulk be made by F to E; or (3) the water is introduced by a secondary water undertaker into a primary water undertaker's supply system pursuant to s 66C (wholesale water supply by secondary undertaker: see PARA 343); Water Supply (Exceptions from Supply System Prohibitions) Regulations 2005, SI 2005/3075, reg 4(1). Head (1) above does not apply in so far as the water is introduced by any person for the purpose of supplying water to any premises of a customer of that person: reg 4(2). 'Enactment' includes subordinate legislation within the meaning of the Interpretation Act 1978 s 21 (see PARA 21 note 36) but excludes subordinate legislation made by 'E', where head (2) above applies: Water Supply (Exceptions from Supply System Prohibitions) Regulations 2005, SI 2005/3075, reg 2.

15 Water Industry Act 1991 s 66J(4) (as added: see note 3). The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000 or, on conviction on indictment, a fine: s 66J(6) (as so added). For the purposes of s 210 (offences by bodies corporate: see PARA 185), the penalty on conviction on indictment of such an offence is deemed to include imprisonment (in addition to or instead of a fine) for a term not exceeding two years: s 66J(7) (as so added). No proceedings for such an offence may be instituted except by the Secretary of State or by the Water Services Regulation Authority (s 66J(8) (as so added)); but the function of the Secretary of State in instituting proceedings is exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales (see s 66J(9)(b) (as so added)).

16 Water Industry Act 1991 s 66J(5) (as added: see note 3).

17 See the Water Industry Act 1991 s 66L(7)(a) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32. Accordingly, s 66L(1)-(5) (see the text to notes 33-53) and s 66K apply in relation to an order made by the Welsh Ministers by virtue of s 66L(7) as they apply in relation to an order made by the Secretary of State: see s 66L(8) (as so added).

18 A statutory instrument containing an order made by the Secretary of State under the Water Industry Act 1991 s 66K(1) is subject to annulment in pursuance of a resolution of either House of Parliament: see s 66L(6) (as added: see note 3). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the equivalent procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. Such orders, being of local effect, are not recorded in this work.

19 Water Industry Act 1991 s 66K(1)(a) (as added: see note 3).

20 Water Industry Act 1991 s 66K(1)(b) (as added: see note 3).

21 Water Industry Act 1991 s 66K(1)(c) (as added: see note 3). Conditions included in an exemption by virtue of s 66K(1)(c) may, in particular, require any person carrying on any activity in pursuance of the exemption: (1) to comply with any direction given by the Secretary of State or, where appropriate, the Welsh Ministers, or the Water Services Regulation Authority as to such matters as are specified in the exemption or are of a description so specified (s 66K(7)(a) (as so added)); (2) except in so far as the Secretary of State or the Welsh Ministers, or the Authority consents to his doing or not doing them, not to do or to do such things as are specified in the exemption or are of a description so specified (s 66K(7)(b) (as so added)); and (3) to refer for determination by the Secretary of State or the Welsh Ministers, or the Authority such questions arising under the exemption as are specified in the exemption or are of a description so specified (s 66K(7)(c) (as so added)).

22 The notice must be given by serving a copy of it on the Water Services Regulation Authority (Water Industry Act 1991 s 66K(3)(a) (as added: see note 3)); and by publishing it in such manner as the Secretary of State or the Welsh Ministers consider appropriate for bringing it to the attention of those likely to be affected by the proposed order (s 66K(3)(b) (as so added)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

23 Water Industry Act 1991 s 66K(2)(a) (as added: see note 3).

24 Water Industry Act 1991 s 66K(2)(b) (as added: see note 3).

25 Water Industry Act 1991 s 66K(2)(c) (as added: see note 3).

26 Water Industry Act 1991 s 66K(2) (as added: see note 3).

27 Water Industry Act 1991 s 66K(6)(a) (as added: see note 3).

28 Water Industry Act 1991 s 66K(6)(b) (as added: see note 3).

29 Water Industry Act 1991 s 66K(4)(a) (as added: see note 3).

30 Water Industry Act 1991 s 66K(4)(b) (as added: see note 3).

31 Water Industry Act 1991 s 66K(5)(a) (as added: see note 3).

32 Water Industry Act 1991 s 66K(5)(b) (as added: see note 3).

33 A statutory instrument containing an order made by the Secretary of State under the Water Industry Act 1991 s 66L(1) or (2) is subject to annulment in pursuance of a resolution of either House of Parliament: see s 66L(6) (as so added). The power to make an order under s 66L(1) or (2) (see the text to notes 39-41) is exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales: see s 66L(7)(a) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32. Accordingly, the Water Industry Act 1991 s 66L(1)-(5) and s 66K (see the text to notes 17-32) apply in relation to such an order made by the Welsh Ministers as they apply in relation to an order made or direction given by the Secretary of State: s 66L(8) (as so added); Government of Wales Act 2006 Sch 11 para 32. Such orders, being of local effect, are not recorded in this work.

34 le granted under the Water Industry Act 1991 s 66K(1): see the text to notes 17-21.

35 Water Industry Act 1991 s 66L(1)(a) (as added: see note 3).

36 Water Industry Act 1991 s 66L(1)(b) (as added: see note 3).

37 Water Industry Act 1991 s 66L(1)(c) (as added: see note 3).

38 See note 33.

39 le an order under the Water Industry Act 1991 s 66K(1): see the text to notes 17-21.

40 Water Industry Act 1991 s 66L(2)(a) (as added: see note 3).

41 Water Industry Act 1991 s 66L(2)(b) (as added: see note 3).

42 The power to give a direction under the Water Industry Act 1991 s 66L(3) is exercisable by the Welsh Ministers (and not by the Secretary of State) in relation to any supply system of a water undertaker whose area is wholly or mainly in Wales: s 66L(7)(b) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32. Accordingly, the Water Industry Act 1991 s 66L(1)-(5) (see the text to notes 33-53) and s 66K (see the text to

notes 17-32) apply in relation to such a direction given by the Welsh Ministers as they apply in relation to an order made or direction given by the Secretary of State: see s 66L(8) (as so added).

43     le under the Water Industry Act 1991 s 66K(1): see the text to notes 17-21.

44     Water Industry Act 1991 s 66L(3)(a) (as added: see note 3).

45     Water Industry Act 1991 s 66L(3)(b) (as added: see note 3).

46     Water Industry Act 1991 s 66L(3)(c) (as added: see note 3).

47     le an order under the Water Industry Act 1991 s 66L(2): see the text to notes 39-41.

48     Water Industry Act 1991 s 66L(4)(a) (as added: see note 3). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

49     The notice must be given: (1) where the Secretary of State or the Welsh Ministers are proposing to make an order under heads (ii) or (iii) in the text, by serving a copy of it on the person to whom the exemption was granted (Water Industry Act 1991 s 66L(5)(a) (as added: see note 3)); (2) where the Secretary of State or the Welsh Ministers are proposing to make an order under s 66L(2) (see the text to notes 39-41), by publishing it in such manner as the Secretary of State or the Welsh Ministers consider appropriate for bringing it to the attention of persons of the class of persons to whom the exemption was granted (s 66L(5)(b) (as so added)); and (3) where the Secretary of State or the Welsh Ministers are proposing to give a direction under head (B) or (c) in the text, by serving a copy of it on the person from whom the Secretary of State or the Welsh Ministers propose to withdraw the exemption (s 66L(5)(c) (as so added)).

50     Water Industry Act 1991 s 66L(4)(b)(i) (as added: see note 3).

51     Water Industry Act 1991 s 66L(4)(b)(ii) (as added: see note 3).

52     Water Industry Act 1991 s 66L(4)(b)(iii) (as added: see note 3).

53     Water Industry Act 1991 s 66L(4) (as added: see note 3).

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## ***F. OTHER SUPPLIES***

### **347. Supplies for non-domestic purposes.**

The following procedure<sup>1</sup> applies:

- 721 (1) where the owner<sup>2</sup> or occupier<sup>3</sup> of any premises in the area of a water undertaker<sup>4</sup> requests the undertaker to provide a supply of water to those premises and:
- 65
78. (a) the premises are premises which do not consist in the whole or any part of a building<sup>5</sup>; or
79. (b) the requested supply is for purposes other than domestic purposes<sup>6</sup>; and also
- 66
- 722 (2) where:
- 67
80. (a) a water undertaker is requested to provide a supply of water to premises which are not in the undertaker's area by the owner or occupier of the premises<sup>7</sup>;
81. (b) the premises are household premises<sup>8</sup> or the total quantity of water estimated to be supplied to the premises annually<sup>9</sup> is less than the specified quantity<sup>10</sup>; and
82. (c) either head (1) (a) or (b) above applies<sup>11</sup>.
- 68

In such cases, it is the duty of the water undertaker, in accordance with such terms and conditions as may be determined<sup>12</sup>, to take any such steps as may be so determined to enable the undertaker to provide the requested supply<sup>13</sup>, and, having taken any such steps, to provide that supply<sup>14</sup>. A water undertaker is not, however, required by these provisions to provide a new supply<sup>15</sup> to any premises, or to take any steps to enable it to provide such a supply, if the provision of that supply or the taking of those steps would:

- 723 (i) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works<sup>16</sup>; or
- 724 (ii) otherwise put at risk the ability of the undertaker to meet any of the existing or probable future obligations mentioned in head (i) above<sup>17</sup>.

Nor is a water undertaker required by these provisions to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if there is a contravention<sup>18</sup> in relation to the water fittings<sup>19</sup> used, or to be used, in connection with the supply of water to, or the use of water in, those premises, of such of the requirements of regulations<sup>20</sup> as are prescribed for these purposes<sup>21</sup>.

Where a request has been made by any person<sup>22</sup> to a water undertaker for these purposes<sup>23</sup>, and the steps which the undertaker is required to take by virtue of that request include steps for the purpose of obtaining any necessary authority for, or agreement to, any exercise by the undertaker of any of its powers or the carrying out by the undertaker of any works<sup>24</sup>, the failure of the undertaker to acquire the necessary authority or agreement does not affect any liability of that person, under any term or condition in accordance with which those steps are taken, to reimburse the undertaker in respect of some or all of the expenses incurred by the undertaker in taking those steps<sup>25</sup>.

Nothing in these provisions imposes any duty on a water undertaker to provide a supply of water to any premises during any period in which it is reasonable for the supply of water to those premises to be cut off or reduced for the purposes of the carrying out of any necessary works<sup>26</sup>. Except so far as otherwise provided by the terms and conditions determined in relation to any supply, the duties of a water undertaker under these provisions have effect subject to the disconnection provisions<sup>27</sup> and the power<sup>28</sup> of the water undertaker to prevent damage and to take steps to prevent contamination and waste<sup>29</sup>. Further, the duty of a water undertaker under the above provisions to provide a supply of water to any premises ceases to apply if: (A) a notice<sup>30</sup> specifying the time after which a supply of water to the premises by the undertaker will no longer be required in consequence of the premises being supplied by a licensed water supplier<sup>31</sup> has been served on the undertaker by the owner or occupier of the premises<sup>32</sup>; and (B) that time has passed<sup>33</sup>.

Any terms or conditions or other matter falling to be determined for the purposes of a request for a supply under these provisions must be determined by agreement between the person requesting the supply and the water undertaker<sup>34</sup>, or in default of agreement by the Water Services Regulation Authority according to what appears to it to be reasonable<sup>35</sup>. The Authority must also determine any dispute arising between any person and a water undertaker<sup>36</sup> as to whether the requested supply is one that the water undertaker is required to give<sup>37</sup>. The Authority may, however, instead of making a determination itself, refer any such matter submitted to it to the arbitration of such person as the Authority may appoint<sup>38</sup>. For the purposes of any determination by the Authority or by any person appointed by it, it is for the water undertaker to show that it should not be required to comply with a request for a supply<sup>39</sup>.

The charges in respect of a supply provided in compliance with such a request are not to be determined by the Authority or a person appointed by it, except in so far as, at the time of the request<sup>40</sup>, no provision is in force by virtue of a charges scheme<sup>41</sup> in respect of supplies of the applicable description<sup>42</sup>. In so far as such charges do fall to be determined, they are to be determined having regard to the desirability of the undertaker's recovering the expenses of complying with its obligations to provide the supply and securing a reasonable return on its capital<sup>43</sup>. The determination of any matter by the Authority or a person appointed by it is without prejudice to the water undertaker's statutory powers to impose conditions of supply after individual or corporate insolvency<sup>44</sup>.

The duty of a water undertaker to supply water under these provisions at the request of any person, and any terms and conditions determined by the Water Services Regulation Authority or a person appointed by the Authority in default of agreement between the undertaker and that person, have effect as if contained in such an agreement<sup>45</sup>.

1     le the procedure in Water Industry Act 1991 s 55. Note that although the marginal note in the Act reads 'supplies for non-domestic purposes,' this procedure applies both to supplies for non-domestic purposes, and supplies for any purposes to premises other than a building (eg a boat). Particular provision is also made with regard to non-domestic supplies in the London area: see the Metropolitan Water Board (Charges) Act 1907, the Metropolitan Water Board (Charges) Act 1921; and PARA 416; and **LONDON GOVERNMENT**.

2     As to the meaning of 'owner' see PARA 22 note 9.

3     As to the meaning of 'occupier' see PARA 339 note 8.

- 4 As to the meaning of 'water undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318.
- 5 Water Industry Act 1991 s 55(1)(a).
- 6 Water Industry Act 1991 s 55(1)(b). As to the meaning of 'domestic purposes' see PARA 334. The supply of water pursuant to an agreement made between a water undertaker and a customer is capable of falling within s 55(1), the contract reflecting the customer's request and the water undertaker's response to it: *DWR Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd* [2007] EWCA Civ 285, [2007] 14 EG 105 (CS), [2007] All ER (D) 515 (Mar).
- 7 Water Industry Act 1991 s 55(1A)(a) (s 55(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 16).
- 8 le as defined in the Water Industry Act 1991 s 17C: see PARA 152.
- 9 le for the purposes of the Water Industry Act 1991 s 17D(2): see PARA 152.
- 10 Water Industry Act 1991 s 55(1A)(b) (as added: see note 7). The specified quantity is that specified in s 17D(2): see PARA 152.
- 11 Water Industry Act 1991 s 55(1A)(c) (as added: see note 7).
- 12 le determined under the Water Industry Act 1991 s 56: see the text to notes 34-44.
- 13 Water Industry Act 1991 s 55(2)(a).
- 14 Water Industry Act 1991 s 55(2)(b).
- 15 It is submitted that a new supply includes an existing supply which the recipient wishes to increase in quantity. The determined terms and conditions may contain a quantity restriction.
- 16 Water Industry Act 1991 s 55(3)(a).
- 17 Water Industry Act 1991 s 55(3)(b).
- 18 As to the meaning of 'contravention' see PARA 20 note 5.
- 19 As to the meaning of 'water fittings' see PARA 134 note 6.
- 20 le regulations under the Water Industry Act 1991 s 74: see PARA 366.
- 21 See the Water Industry Act 1991 s 55(4). 'Prescribed' means prescribed by regulations: Water Industry Act 1991 s 219(1). As to the Secretary of State see PARA 15 note 1. At the date at which this volume states the law no such regulations had been made.
- 22 As to the meaning of 'person' see PARA 13 note 29.
- 23 Water Industry Act 1991 s 55(5)(a).
- 24 Water Industry Act 1991 s 55(5)(b).
- 25 Water Industry Act 1991 s 55(5). As to the recovery of expenses see PARA 131 note 6.
- 26 Water Industry Act 1991 s 55(6). As to the meaning of 'necessary works' see PARA 339 note 2.
- 27 le subject to the Water Industry Act 1991 ss 60-63: see PARAS 355-360.
- 28 le under the Water Industry Act 1991 s 75: see PARA 365.
- 29 See the Water Industry Act 1991 s 55(8).
- 30 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 31 As to the meaning of 'licensed water supplier' see PARA 152.
- 32 Water Industry Act 1991 ss 55(8), 63AB(1)(a) (s 55(8) amended the Water Act 2003 s 101(1), Sch 8 paras 2, 16(1), (3); Water Industry Act 1991 ss 63AA, 63AB added by the Water Act 2003 Sch 8 paras 2, 17).

33 Water Industry Act 1991 ss 55(8), 63AB(1)(b) (s 55(8) as amended, s 63AB as added: see note 32). Where the charges for the water supplied by the undertaker are, under Pt V Ch I (ss 142-150B) (see PARA 419 et seq), fixed in relation to the premises by reference to volume, the time specified in the notice must fall at least two working days after the notice is served: s 63AB(2) (as so added). 'Two working days' means a period of 48 hours calculated after disregarding any time falling on a Saturday or Sunday, or Christmas Day, Good Friday or any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321): Water Industry Act 1991 s 63AA(3) (as added: see note 32). As to the meaning of references to the fixing of charges by reference to volume see PARA 337 note 11.

34 Water Industry Act 1991 s 56(1)(a).

35 Water Industry Act 1991 s 56(1)(b) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

36 Ie any dispute arising by virtue of the Water Industry Act 1991 s 55(3) or (4): see the text to notes 15-21.

37 Water Industry Act 1991 s 56(2) (amended by the Water Act 2003 s 36(2)).

38 Water Industry Act 1991 s 56(3) (amended by the Water Act 2003 s 36(2)). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

39 Water Industry Act 1991 s 56(4) (amended by the Water Act 2003 s 36(2)).

40 This means that the position is to be determined as at the date when the request for supplies is first made: see *DWR Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd* [2007] EWCA Civ 285, [2007] 14 EG 105 (CS), [2007] All ER (D) 515 (Mar).

41 Ie a charges scheme under the Water Industry Act 1991 s 143: see PARA 421.

42 Water Industry Act 1991 s 56(5)(a) (amended by the Water Act 2003 s 36(2)). To the extent that this provision excludes any charges from a determination, those charges are to be fixed from time to time by a charges scheme under s 143 (see PARA 421) but not otherwise: s 56(6).

43 See the Water Industry Act 1991 s 56(5)(b).

44 See the Water Industry Act 1991 s 56(7). As to the conditions which may be so imposed see the Insolvency Act 1986 ss 233, 372; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 113; **COMPANY AND CORPORATE INSOLVENCY** vol 7(3) (2004 Reissue) PARA 140.

45 Water Industry Act 1991 s 55(7).

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### **348. Duty to provide a supply of water etc for fire-fighting.**

It is the duty of a water undertaker<sup>1</sup> to allow any person<sup>2</sup> to take water for extinguishing fires from any of its water mains or other pipes<sup>3</sup> on which a fire-hydrant is fixed<sup>4</sup>. At the request of the fire and rescue authority<sup>5</sup> concerned, every water undertaker must fix fire-hydrants<sup>6</sup> on its water mains (other than trunk mains<sup>7</sup>) at such places as are most convenient for affording a supply of water for extinguishing any fire which may break out within the area of the undertaker<sup>8</sup>. It is also the duty of every water undertaker: (1) to keep every fire-hydrant fixed on any of its water mains or other pipes in good working order and to replace any such hydrant when necessary for that purpose<sup>9</sup>; and (2) to ensure that a fire and rescue authority has been supplied by the undertaker with all such keys as the authority may require for the fire-hydrants fixed on the undertaker's mains or other pipes<sup>10</sup>. Where a fire-hydrant is removed, other than at the request of the fire and rescue authority concerned, by a water undertaker in the course of carrying out works in relation to any of its water mains or other pipes, the cost of replacing the fire-hydrant must be borne by the undertaker<sup>11</sup>.

The expenses incurred by a water undertaker in complying with these obligations to provide fire-hydrants, to keep them in working order and replace them when necessary, and to supply keys are to be borne by the fire and rescue authority concerned<sup>12</sup>; but where a fire-hydrant is damaged as the result of any use made of it with the authority of a water undertaker, other than use for the purposes of fire-fighting or for any other purposes of a fire and rescue authority, the fire and rescue authority is not liable for the cost of repairing or replacing the hydrant<sup>13</sup>.

The obligations of a water undertaker under these provisions are enforceable<sup>14</sup> by the Secretary of State, or in relation to Wales, by the Welsh Ministers<sup>15</sup>. In addition, where a water undertaker is in breach of any of these obligations, it is guilty of an offence<sup>16</sup>. It is, however, a defence, in any proceedings against any water undertaker for such an offence, for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence<sup>17</sup>; and nothing in these provisions requires a water undertaker to do anything which it is unable to do by reason of the carrying out of any necessary works<sup>18</sup>.

A fire and rescue authority must take all reasonable measures for securing that an adequate supply of water will be available for the authority's use in the event of fire<sup>19</sup>, and, for these purposes, may enter into an agreement with a water undertaker<sup>20</sup>. A water undertaker must enter into any such agreement reasonably proposed by a fire and rescue authority<sup>21</sup>. If a fire and rescue authority requests a water undertaker to provide a supply and pressure of water for the purposes of extinguishing a fire that is greater than the undertaker would otherwise provide, the undertaker must take all necessary steps in order to do so<sup>22</sup>; and if, without reasonable excuse, a water undertaker fails to take any such step which it is obliged to take, it is guilty of an offence<sup>23</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meanings of 'water main' and 'pipe' see PARA 138 note 11.



4 Water Industry Act 1991 s 57(1). A water undertaker may not charge a fire and rescue authority for water used for fire fighting and other emergency purposes: see s 147; and PARA 420. As to fire and rescue authorities see **FIRE SERVICES**.

5 A person who proposes to carry out works for the purpose of supplying water to any part of the area of a fire and rescue authority must give at least six weeks' notice in writing to the authority: Fire and Rescue Services Act 2004 s 43(1). A person who proposes to carry out works affecting a fire hydrant must give at least seven days' notice in writing to the fire and rescue authority in whose area the hydrant is situated: s 43(2). If it is not practicable for a person to give notice as required by s 43(1) or (2), he is to be regarded as having given the notice so required if he gives notice as soon as practicable: s 43(3). A person commits an offence if, without reasonable excuse, he fails to give notice as required by s 43(1) or (2): s 43(4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 43(5). As to the meaning of 'writing' see PARA 22 note 1. As to the standard scale see PARA 141 note 18.

6 A person commits an offence if he uses a fire-hydrant otherwise than: (1) for the purposes of fire-fighting or for any other purposes of a fire and rescue authority; or (2) for any purpose authorised by the water undertaker or other person to whom the hydrant belongs: Fire and Rescue Services Act 2004 s 42(6). A person also commits an offence if he damages or obstructs a fire-hydrant, otherwise than in consequence of use for the purposes mentioned in s 42(6): s 42(7). A person guilty of an offence under s 42(6) or (7) is liable on summary conviction to a fine not exceeding level 2 on the standard scale: s 42(8).

7 As to the meaning of 'trunk main' see PARA 138 note 11.

8 Water Industry Act 1991 s 57(2) (s 57(2), (4), (5) amended by the Fire and Rescue Services Act 2004 s 53(1), Sch 1 paras 75, 76(1)-(3)). A water undertaker must cause the location of every fire-hydrant provided by it to be clearly indicated by a notice or distinguishing mark (Fire and Rescue Services Act 2004 s 42(1)), and may place such a notice or mark on a wall or fence adjoining a highway or public place (s 42(2)). The expenses incurred by a water undertaker under s 42(1) in relation to a fire-hydrant are to be borne by the fire and rescue authority in whose area the hydrant is located: s 42(3). The Secretary of State may make regulations providing for uniformity in fire-hydrants provided by water undertakers and in the notices or marks indicating their location: s 42(4). An obligation of a water undertaker under s 42(1), or regulations under s 42(4), is enforceable by the Secretary of State under the Water Industry Act 1991 s 18 (see PARA 163): Fire and Rescue Services Act 2004 s 42(5). As to the Secretary of State see PARA 15 note 1. At the date at which this volume states the law no such regulations had been made.

9 Water Industry Act 1991 s 57(3). As to the duty of a water undertaker to maintain a constant supply and pressure in pipes on which hydrants are fixed see s 65; and PARA 353.

10 Water Industry Act 1991 s 57(4) (as amended: see note 8).

11 Water Industry Act 1991 s 57(4A) (added by the Water Act 2003 s 84(1)).

12 Water Industry Act 1991 s 57(5) (as amended: see note 8). This provision does not apply in relation to expenses incurred in compliance, in relation to a specially requested fire-hydrant, with the obligations set out in heads (1)-(2) in the text: see s 58(3); and PARA 349. As to the recovery of expenses see PARA 131 note 6.

13 Water Industry Act 1991 s 57(5A) (added by the Fire and Rescue Services Act 2004 Sch 1 paras 75, 76(1), (4)).

14 Ie under the Water Industry Act 1991 s 18: see PARA 163.

15 Water Industry Act 1991 s 57(7). The functions of the Secretary of State under the Water Industry Act 1991 s 57, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

16 Water Industry Act 1991 s 57(8). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum or, on conviction on indictment, a fine: s 57(8)(a), (b). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

17 Water Industry Act 1991 s 57(9).

18 Water Industry Act 1991 s 57(6). As to the meaning of 'necessary works' see PARA 339 note 2.

19 Fire and Rescue Services Act 2004 s 38(1).

20 See the Fire and Rescue Services Act 2004 s 39(1). An agreement under s 39(1) may include terms as to payment to be made to the undertaker, subject to the Water Industry Act 1991 s 147 (charging for emergency use of water: see PARA 420): Fire and Rescue Services Act 2004 s 38(2).

21 See the Fire and Rescue Services Act 2004 s 39(3). An obligation of a water undertaker under an agreement under s 39(1) (see the text to note 20), or under s 39(3), is enforceable by the Secretary of State under the Water Industry Act 1991 s 18 (see PARA 163): Fire and Rescue Services Act 2004 s 39(4).

22 Fire and Rescue Services Act 2004 s 40(1). For the purposes of complying with this obligation a water undertaker may shut off the water from the mains and pipes in any area: s 40(2). No authority or person is liable to any penalty or claim arising because of anything done by a water undertaker in complying with this obligation: s 40(3).

23 Fire and Rescue Services Act 2004 s 40(4). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: see s 40(5).

## UPDATE

### 348 Duty to provide a supply of water etc for fire-fighting

NOTES 9, 12, 13--For a hydrant to be in good working order it must be kept in such condition that it is fit for purposes of fire-fighting, does not present risk of contamination to water supply and is not a source of danger to members of the public or potential users: *Veolia Water Central Ltd (formerly Three Valleys Water plc) v London Fire and Emergency Planning Authority* [2009] EWHC 3109 (QB), [2010] All ER (D) 167 (Feb) (water authority entitled to charge actual costs of carrying out repairs plus amount that represented element of overheads attributable).

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### **349. Specially requested fire-hydrants.**

A water undertaker<sup>1</sup> must, at the request of the owner<sup>2</sup> or occupier<sup>3</sup> of any factory<sup>4</sup> or place of business, fix a fire-hydrant, to be used for extinguishing fires and not other purposes, at such place on any suitable water main or other pipe<sup>5</sup> of the undertaker as is as near as conveniently possible to that factory or place of business<sup>6</sup>. Any expenses incurred by a water undertaker in complying with this obligation<sup>7</sup>, or in complying, in relation to a specially requested fire-hydrant<sup>8</sup>, with its obligations to keep it in working order, to replace it when necessary, and to supply keys<sup>9</sup>, are to be borne by the owner or occupier of the factory or place of business in question, according to whether the person who made the original request for the hydrant did so in his capacity as owner or occupier<sup>10</sup>, and are not to be borne by the fire and rescue authority<sup>11</sup>. Where, however, a specially requested fire-hydrant is removed (other than at the request of the owner or occupier of the factory or place of business in question) by a water undertaker in the course of carrying out works in relation to any of its water mains or other pipes, the cost of replacing the fire-hydrant must be borne by the undertaker<sup>12</sup>.

Where a water undertaker is in breach of any of these obligations, it is guilty of an offence<sup>13</sup>. It is, however, a defence, in any proceedings against any water undertaker for such an offence, for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence<sup>14</sup>; and nothing in these provisions requires a water undertaker to do anything which it is unable to do by reason of the carrying out of any necessary works<sup>15</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4. As to a water undertakers duties in respect of fire-hydrants generally see PARA 348.

2 As to the meaning of 'owner' see PARA 22 note 9.

3 As to the meaning of 'occupier' see PARA 339 note 8.

4 'Factory' has the same meaning as in the Factories Act 1961 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 318 et seq): Water Industry Act 1991 s 58(6).

5 A water main or other pipe is suitable for these purposes, in relation to a factory or place of business, if it is situated in a street which is in or near to that factory or place of business, and it is of sufficient dimensions to carry a hydrant and it is not a trunk main: Water Industry Act 1991 s 58(2). As to the meanings of 'water main', 'pipe' and 'trunk main' see PARA 138 note 11. As to the meaning of 'street' see PARA 308 note 19. As to the duty of a water undertaker to maintain a constant supply and pressure in pipes on which hydrants are fixed see s 65; and PARA 353.

6 Water Industry Act 1991 s 58(1). This obligation is enforceable under s 18 (see PARA 163) by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see s 57(7) (applied by s 58(5)). The functions of the Secretary of State under the Water Industry Act 1991 s 57, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7 Water Industry Act 1991 s 58(4)(a). As to the recovery of expenses see PARA 131 note 6.

8 'Specially requested fire-hydrant' means a fire-hydrant which is fixed on a water main or other pipe of a water undertaker and was fixed on that main or pipe (whether before or after it became such a main or pipe under the Water Act 1989) in pursuance of a request made by the owner or occupier of a factory or place of business: Water Industry Act 1991 s 58(6).

9 le the duties under the Water Industry Act 1991 s 57(3)-(4) (see PARA 348): s 58(4)(b).

10 Water Industry Act 1991 s 58(4).

11 See the Water Industry Act 1991 s 58(3), disapplying s 57(5) (expenses borne by fire and rescue authority: see PARA 348).

12 Water Industry Act 1991 s 58(4A) (added by the Water Act 2003 s 84(2)).

13 Water Industry Act 1991 s 57(8) (applied by s 58(5)). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum or, on conviction on indictment, a fine: s 57(8) (as so applied). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

14 Water Industry Act 1991 s 57(9) (applied by s 58(5)).

15 Water Industry Act 1991 s 57(6) (applied by s 58(5)). As to the meaning of 'necessary works' see PARA 339 note 2.

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### 350. Supplies for other public purposes.

A water undertaker<sup>1</sup> must, at the request of a sewerage undertaker<sup>2</sup>, highway authority<sup>3</sup> or local authority<sup>4</sup>, provide from such of its pipes<sup>5</sup> as are of an appropriate capacity<sup>6</sup>, a supply of water for cleansing sewers and drains<sup>7</sup>, for cleansing and watering highways<sup>8</sup>, or for supplying any public pumps, baths or wash-houses<sup>9</sup>. A supply provided by a water undertaker under these provisions must be provided upon such terms and conditions as may be reasonable<sup>10</sup>. However, nothing in these provisions requires a water undertaker to do anything which it is unable to do by reason of the carrying out of any necessary works<sup>11</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

3 'Highway authority' has the same meaning as in the Highways Act 1980 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq): Water Industry Act 1991 s 219(1).

4 As to the meaning of 'local authority' see PARA 118 note 17.

5 As to the meaning of 'pipe' see PARA 138 note 11.

6 A water main or other pipe of a water undertaker is treated as of an appropriate capacity for these purposes if, and only if, it has a fire-hydrant fixed on it: Water Industry Act 1991 s 59(3). As to the meaning of 'water main' see PARA 138 note 11. As to the provision of fire-hydrants see PARAS 348, 349.

7 As to the meanings of 'sewer' and 'drain' see PARA 138 note 11.

8 'Highway' has the same meaning as in the Highways Act 1980 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 7): Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1).

9 Water Industry Act 1991 s 59(1). These obligations are enforceable by the Water Services Regulation Authority under s 18 (see PARA 163): s 59(5) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

10 Water Industry Act 1991 s 59(2). A water undertaker supplying water may supply water to any public baths, washhouse, swimming bath or bathing place, either without charge or on such other favourable terms as it thinks fit: see the Public Health Act 1936 s 229 (amended by the Gas Act 1995 ss 16(1), 17(5), Sch 4 para 3, Sch 6; and by virtue of the Water Act 1989 Sch 25 paras 1(1), 2(ii)).

11 Water Industry Act 1991 s 59(4). As to the meaning of 'necessary works' see PARA 339 note 2.

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### **351. Supplies for which water undertakers are not primarily responsible.**

If three or more seamen<sup>1</sup> employed in a United Kingdom ship<sup>2</sup> consider that the water provided for the seamen employed in that ship is not in accordance with the safety regulations containing requirements as to the water to be provided on ships<sup>3</sup>, whether because of bad quality, unfitness for use or deficiency in quantity, they may complain to the master who must investigate the complaint<sup>4</sup>. Water found to be unfit for use or not of the required quality must be replaced within a reasonable time<sup>5</sup>.

Under contracts of tenancy for agricultural holdings, landlords are generally responsible for the repair and replacement of water supply systems which supply water to the tenants<sup>6</sup>.

Where animals are carried by rail or sea, steps must be taken to ensure that they have a proper supply of water<sup>7</sup>.

A local authority, or any person with its consent and subject to any conditions it may impose, may erect and maintain, in proper and convenient situations in streets and public places, drinking fountains for the public and troughs for watering horses or cattle<sup>8</sup>.

1 'Seaman' includes every person, except masters and pilots, employed or engaged in any capacity on board any ship; and 'ship' includes every description of vessel used in navigation: Merchant Shipping Act 1995 s 313(1).

2 'United Kingdom ship' means a ship registered in the United Kingdom under the Merchant Shipping Act 1995 Pt II (ss 8-23): s 1(3). As to the meaning of 'United Kingdom' see PARA 22 note 5.

3 I.e. safety regulations under the Merchant Shipping Act 1995 s 85: s 313(1).

4 See the Merchant Shipping Act 1995 s 44(1); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 487.

5 See the Merchant Shipping Act 1995 s 44(4); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 487. Responsibility in this case rests with the master or owner of the ship and not with water undertakers.

6 See **AGRICULTURAL LAND** vol 1 (2008) PARA 333.

7 See **ANIMALS** vol 2 (2008) PARAS 868-869. The duties there noted fall primarily upon the persons concerned with the conveyance of the animals and not upon water undertakers.

8 See the Public Health Act 1925 s 14; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 560.

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## **G. MEANS OF SUPPLY**

### **352. Supply by means of separate service pipes.**

A water undertaker<sup>1</sup> may require the provision of a separate service pipe<sup>2</sup> to any premises which consist in a house<sup>3</sup> or any other building or part of a building (if that part is separately occupied) and are already supplied with water by the undertaker but do not have a separate service pipe<sup>4</sup>. Where, however, the supply of water to two or more houses is provided wholly or partly by the same service pipe, the water undertaker may not require the provision of separate service pipes to those houses until<sup>5</sup>:

- 725 (1) the service pipe, in so far as it belongs to a person<sup>6</sup> other than the undertaker, becomes so defective as to require renewal or is no longer sufficient to meet the requirements of those houses<sup>7</sup>;
- 726 (2) a payment in respect of the supply of water to any of those houses remains unpaid after the end of the period for which it is due<sup>8</sup>;
- 727 (3) the houses are, by structural alterations to one or more of them, converted into a larger number of houses<sup>9</sup>;
- 728 (4) the owner<sup>10</sup> or occupier<sup>11</sup> of any of those houses has interfered with, or allowed another person to interfere with, the existing service pipe and thereby caused the supply of water to any house to be interfered with<sup>12</sup>; or
- 729 (5) the undertaker has reasonable grounds for believing that such interference as is mentioned in head (4) above is likely to take place<sup>13</sup>.

Any dispute between a water undertaker and any other person as to whether any such condition has been complied with may be referred to the Water Services Regulation Authority<sup>14</sup> for determination<sup>15</sup> by either party to the dispute<sup>16</sup>.

If, in the case of any such premises as are described above, the water undertaker which provides a supply of water to those premises serves notice<sup>17</sup> on the consumer<sup>18</sup> requiring the provision of a separate service pipe, that consumer must, within three months<sup>19</sup> after the service of the notice, lay so much of the required pipe as the undertaker is not under a duty<sup>20</sup> to lay<sup>21</sup>. If a person on whom such a notice has been served fails to comply with it, the water undertaker may itself carry out the works which that person was required to carry out<sup>22</sup>, and recover the expenses reasonably incurred by the undertaker in doing so from that person<sup>23</sup>.

The consumer on whom such a notice is served is presumed, without prejudice to his power to make further demands and requests:

- 730 (a) in so far as those premises were provided before the service of the notice with a supply of water for domestic purposes<sup>24</sup>, to have made a demand<sup>25</sup> that such a supply is provided by means of the separate service pipe<sup>26</sup>; and
- 731 (b) in so far as those premises were provided before the service of the notice with a supply of water for other purposes, to have requested the undertaker to provide the same supply by means of that pipe as was provided before the service of the notice<sup>27</sup>.

On providing a supply of water to those premises by means of the separate service pipe, the undertaker may cut off any supply replaced by that supply and may make such disconnection of pipes<sup>28</sup> by which the replaced supply was provided as it thinks fit<sup>29</sup>.

- 1 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 2 As to the meaning of 'service pipe' see PARA 179 note 8.
- 3 As to the meaning of 'house' see PARA 133 note 5.
- 4 Water Industry Act 1991 s 64(1) (amended by the Competition and Service (Utilities) Act 1992 Sch 1 para 21(a), Sch 2).
- 5 Water Industry Act 1991 s 64(2) (amended by the Competition and Service (Utilities) Act 1992 Sch 1 para 21(b)).
- 6 As to the meaning of 'person' see PARA 13 note 29.
- 7 Water Industry Act 1991 s 64(2)(a).
- 8 Water Industry Act 1991 s 64(2)(b).
- 9 Water Industry Act 1991 s 64(2)(c).
- 10 As to the meaning of 'owner' see PARA 22 note 9.
- 11 As to the meaning of 'occupier' see PARA 339 note 8.
- 12 Water Industry Act 1991 s 64(2)(d).
- 13 Water Industry Act 1991 s 64(2)(e).
- 14 As to the Water Services Regulation Authority see PARA 109.
- 15 Ie under the Water Industry Act 1991 s 30A: see PARA 131.
- 16 Water Industry Act 1991 s 64(2A) (added by the Competition and Service (Utilities) Act 1992 s 35(1), (6); and amended by the Water Act 2003 s 36(2)).
- 17 The notice must set out the undertaker's power under the Water Industry Act 1991 s 64(4) (see the text to notes 22-23): see s 64(3). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 18 As to the meaning of 'consumer' see PARA 122 note 35.
- 19 As to the meaning of 'month' see PARA 23 note 10.
- 20 The Water Industry Act 1991 ss 45-51 (see PARAS 335-337) apply as if that consumer had by a connection notice required the undertaker to connect the separate service pipe to those premises with the undertaker's water main: s 64(3)(b). As to the meaning of 'connection notice' see PARA 335 note 6. As to the meaning of 'water main' see PARA 138 note 11.
- 21 Water Industry Act 1991 s 64(3)(a).
- 22 Water Industry Act 1991 s 64(4)(a). As to powers of entry relating to such works see s 170; and PARA 480.
- 23 Water Industry Act 1991 s 64(4)(b). As to the recovery of expenses see PARA 131 note 6. Without prejudice to the power of a water undertaker to impose conditions under s 47 (see PARA 337) by virtue of s 64(3)(b) (see note 20), or to the power conferred by virtue of s 64(3)(d) (see the text to note 29), any works carried out by a water undertaker by virtue of the provisions of s 64(3)(b) or (4) are necessary works for the purposes of Pt III Ch II (ss 40-66): s 64(5). As to the meaning of 'necessary works' see PARA 339 note 2.
- 24 As to the meaning of 'domestic purposes' see PARA 334.
- 25 Ie for the purposes of the Water Industry Act 1991 s 52: see PARA 339.



- 26 Water Industry Act 1991 s 64(3)(c)(i).
- 27 Water Industry Act 1991 s 64(3)(c)(ii).
- 28 As to the meaning of 'pipe' see PARA 138 note 11.
- 29 Water Industry Act 1991 s 64(3)(d). See also note 23.

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### **353. Duties as respects constancy and pressure of supply.**

It is the duty of a water undertaker<sup>1</sup> to cause the water in such of its water mains and other pipes<sup>2</sup> on which fire-hydrants are fixed<sup>3</sup>, or which are used for providing supplies of water for domestic purposes<sup>4</sup>, to be laid on constantly and at such a pressure as will cause the water to reach the topmost storey of every building within the undertaker's area<sup>5</sup>. This duty does not, however, require a water undertaker to provide a supply of water at a height greater than that to which it will flow by gravitation through its water mains from the service reservoir or tank from which that supply is taken<sup>6</sup>; and for these purposes the undertaker is entitled to choose the service reservoir or tank from which any supply is to be taken<sup>7</sup>. Nor does anything in these provisions impose a duty on any water undertaker to maintain the constancy or pressure of any supply of water during any period in which it is reasonable for that supply to be cut off or reduced for the purposes of the carrying out of any necessary works<sup>8</sup>.

The Secretary of State<sup>9</sup> or, in relation to Wales, the Welsh Ministers<sup>10</sup> may by order<sup>11</sup> modify the application of the above provisions in relation to any water undertaker<sup>12</sup>, on an application made by the Water Services Regulation Authority<sup>13</sup> or by the water undertaker in relation to which the order is made<sup>14</sup>. Such an order may require the payment of compensation by a water undertaker to persons affected by the order<sup>15</sup>, and make different provision for different cases, including different provision in relation to different persons, circumstances or localities<sup>16</sup>. At the request of any person, and on payment by that person of such charge, if any, as the applicant may reasonably require, the applicant for such an order must furnish that person with a copy of the draft order submitted<sup>17</sup> to the Secretary of State or the Welsh Ministers<sup>18</sup>. On an application for such an order, the Secretary of State or the Welsh Ministers may make the order either in the terms of the submitted draft order, or in those terms as modified<sup>19</sup> in such manner as the Secretary of State or the Welsh Ministers think fit, or may refuse to make an order<sup>20</sup>. However, the Secretary of State or the Welsh Ministers must not make such a modification of a draft order as he or they consider is likely adversely to affect any persons unless satisfied that the applicant for the order has given and published such additional notices, in such manner, as the Secretary of State or the Welsh Ministers may have required<sup>21</sup>. Before making any order on the application, the Secretary of State or the Welsh Ministers may, if he or they consider it appropriate to do so, hold a local inquiry<sup>22</sup>.

The obligations of a water undertaker under these provisions are enforceable<sup>23</sup> by the Water Services Regulation Authority<sup>24</sup>. Additionally, where a water undertaker is in breach of a duty under these provisions, it is guilty of an offence<sup>25</sup>. In any proceedings against any water undertaker for such an offence, it is a defence for that undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence<sup>26</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meanings of 'water main' and 'pipe' see PARA 138 note 11.

3 As to the provision of fire-hydrants see PARAS 348-349.

4 As to the meaning of 'domestic purposes' see PARA 334.

5 Water Industry Act 1991 s 65(1). As to water undertakers' areas see PARA 318. A water undertaker must maintain, in a communication pipe serving premises supplied with water, a minimum water pressure of seven

metres static head: Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 10(1). If in a period of 28 days the pressure in the communication pipe serving a customer's premises falls below seven metres static head on two occasions each lasting one hour or longer, the undertaker must, except in the circumstances described in reg 10(3), pay the customer £25: reg 10(2). Regulation 10(2) does not apply if the pressure falls below seven metres static head in connection with the carrying out of necessary works or because of drought: reg 10(3). No application by the customer for the payment is necessary unless the undertaker could not practicably have identified the customer as having been affected: reg 10(4). However, the undertaker need not pay the customer under reg 10(2) where (1) the undertaker has already made a payment under these provisions to the customer in respect of another such failure in the same financial year (reg 10(5)(a)); (2) if the undertaker could not practicably have identified the customer as having been affected, and the customer does not claim (orally or in writing) a payment under these provisions within the three months following the date of the second relevant occasion on which the pressure fell below seven metres static head for an hour or more (reg 10(5)(b)); or (3) it was impracticable to maintain the pressure referred to in reg 10(1) because of industrial action by employees of the undertaker, or the act or default of a person who is not an officer, employee or agent of the undertaker or a person acting on behalf of the undertaker or an agent of the undertaker (reg 10(5)(c)). 'Communication pipe' means: (a) the part of a service pipe between a water undertaker's water main and the boundary of the street in which the water main is laid; or (b) if the premises supplied with water abut on the part of the street in which the water main is laid, and the service pipe enters those premises otherwise than through the outer wall of a building abutting on the street and has a stopcock in those premises as near to the boundary of the street as reasonably practicable, the part of the service pipe between the water main and that stopcock: reg 10(6). As to the meaning of 'customer' see PARA 327 note 10. As to the effect of the making and acceptance of payments under the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, and the determination of disputes relating thereto see PARA 327. As to the meaning of 'necessary works' see PARA 339 note 2. As to the meaning of 'financial year' see PARA 111 note 2. As to the meaning of 'writing' see PARA 22 note 1. As to the meaning of 'month' see PARA 23 note 10. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'service pipe' see PARA 179 note 8. As to the meaning of 'street' see PARA 308 note 19. As to the meaning of 'stopcock' see PARA 138 note 11.

6 Water Industry Act 1991 s 65(2).

7 Water Industry Act 1991 s 65(3).

8 Water Industry Act 1991 s 65(4).

9 As to the Secretary of State see PARA 15 note 1.

10 The functions of the Secretary of State under the Water Industry Act 1991 s 65 and Sch 5 were transferred to the National Assembly for Wales in relation to any water undertaker whose area is wholly or mainly in Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

11 The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Water Industry Act 1991 s 65(7). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the equivalent procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. Such orders being local in nature are not recorded in this work.

12 Water Industry Act 1991 s 65(5).

13 As to the Water Services Regulation Authority see PARA 109.

14 See the Water Industry Act 1991 s 65(6) (amended by the Water Act 2003 s 36(2)). Where the Water Services Regulation Authority or a water undertaker applies for an order, the applicant must submit a draft of the order applied for to the Secretary of State or, where appropriate, the Welsh Ministers and publish a notice with respect to the application, at least once in each of two successive weeks, in one or more newspapers circulating in the locality which would be affected by the provision proposed to be made by the order: Sch 5 para 1(1)(a), (b) (Sch 5 para 1 amended by the Water Act 2003 s 36(2)). The notice must state the general effect of the order applied for, specify a place where a copy of the draft order and of any relevant map or plan may be inspected by any person free of charge at all reasonable times during the period of 28 days beginning with the date of the first publication of the notice, and state that any person may, within that period, by notice to the Secretary of State or the Welsh Ministers object to the making of the order: Sch 5 para 1(2). Not later than the date on which the notice is first published, the applicant must serve a copy of the notice on every

affected local authority and every affected water undertaker; and for these purposes a local authority or a water undertaker which is not the applicant is affected by an application for an order if its area includes the whole or any part of the locality which would be affected by the provision proposed to be made by the order: Sch 5 para 1(1)(c), (3). The applicant must also publish in the London Gazette a notice which states that the draft order has been submitted to the Secretary of State or the Welsh Ministers, and the names of every local authority on which a notice is required to be served; and which specifies a place where a copy of the draft order and of any relevant map or plan may be inspected and gives the name of every newspaper in which the required notice was published and the date of an issue containing the notice: Sch 5 para 1(1)(d). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to the meaning of 'local authority' see PARA 118 note 17.

15 Water Industry Act 1991 s 65(8)(a).

16 Water Industry Act 1991 s 65(8)(b). The order may also contain such supplemental, consequential and transitional provision as the Secretary of State or the Welsh Ministers consider appropriate: s 65(8)(c).

17 Ie under the Water Industry Act 1991 Sch 5 para 1: see note 14.

18 Water Industry Act 1991 Sch 5 para 2.

19 As to the meaning of 'modified' see PARA 141 note 20.

20 Water Industry Act 1991 Sch 5 para 3(1).

21 Water Industry Act 1991 Sch 5 para 3(2).

22 Water Industry Act 1991 Sch 5 para 4. The provisions of the Local Government Act 1972 s 250(2)-(5) (powers in relation to local inquiries: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) apply to local inquiries under any provision of the Water Industry Act 1991 as they apply to inquiries under that section: see the Water Industry Act 1991 s 215(2).

23 Ie under the Water Industry Act 1991 s 18: see PARA 163.

24 Water Industry Act 1991 s 65(9) (amended by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 22; Water Act 2003 s 36(2)).

25 Water Industry Act 1991 s 65(10). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum (s 65(10)(a)) or, on indictment, a fine (s 65(10)(b)). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

26 Water Industry Act 1991 s 65(11).

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### **354. Requirements by undertaker for maintaining pressure.**

A water undertaker<sup>1</sup> may require that any premises consisting in:

- 732 (1) any building or part of a building the supply of water to which need not, in accordance with provision in or made under the Water Industry Act 1991, be constantly laid on under pressure<sup>2</sup>; or
- 733 (2) any relevant house<sup>3</sup> to which water is required to be delivered at a height greater than a point 10.5 metres below the draw-off level of the service reservoir or tank from which a supply of water is being provided by the undertaker to those premises<sup>4</sup>,

must be provided with a cistern which has a float-operated valve and is fitted on the pipe<sup>5</sup> by means of which water is supplied to those premises<sup>6</sup>. In addition, in the case of a house such as is mentioned in head (2) above, the water undertaker may require that the cistern the provision of which is so required is to be capable of holding sufficient water to provide an adequate supply to the house for a period of 24 hours<sup>7</sup>.

If, where a water undertaker provides a supply of water to any premises, the consumer<sup>8</sup>, after having been required to do so by notice<sup>9</sup> served on him by the undertaker, fails before the end of the period specified in the notice<sup>10</sup> to provide a cistern in accordance with a requirement under these provisions<sup>11</sup> or to put any such cistern and its float-operated valve into good repair<sup>12</sup>, the water undertaker may itself provide a cistern or carry out any repairs necessary to prevent waste of water<sup>13</sup>, and may recover the expenses reasonably incurred in doing so from the owner<sup>14</sup> of the premises in question<sup>15</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 Water Industry Act 1991 s 66(1)(a). As to the requirement to lay on supplies under pressure see PARA 353.

3 'Relevant house' means any house other than one in relation to which the following two conditions are satisfied: (1) the erection of the house was commenced before 1 September 1989; and (2) no such requirement as is mentioned in the Water Industry Act 1991 s 66(1) or (2) (see heads (1)-(2) in the text and the text to note 7) could have been imposed in relation to the house under any enactment having effect immediately before 1 September 1989 in relation to the pre-transfer supplier: s 66(6). A 'pre-transfer supplier', in relation to a house, means the person who was supplying water to that house immediately before 1 September 1989: s 66(6). As to the meaning of 'house' see PARA 133 note 5. As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'person' see PARA 13 note 29.

4 Water Industry Act 1991 s 66(1)(b).

5 As to the meaning of 'pipe' see PARA 138 note 11.

6 Water Industry Act 1991 s 66(1). Note that if the supply is for non-domestic purposes, the water undertaker may have imposed a similar condition as a term of giving the supply: see PARA 347.

7 Water Industry Act 1991 s 66(2).

8 As to the meaning of 'consumer' see PARA 122 note 35.

9 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

10 The period specified in the notice must be a period of not less than 28 days beginning with the day after service of the notice: Water Industry Act 1991 s 66(4).

11 Water Industry Act 1991 s 66(3)(a).

12 Water Industry Act 1991 s 66(3)(b).

13 Water Industry Act 1991 s 66(3). As to the power of entry to carry out these works see s 170; and PARA 480.

14 As to the meaning of 'owner' see PARA 22 note 9. Note that such expenses are recoverable from the owner, although the requirement is to serve the notice on the consumer, who may not be the same person as the owner. As to the recovery of expenses see PARA 131 note 6.

15 Water Industry Act 1991 s 66(5).

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### **(iii) Disconnections**

#### **355. Disconnections for the carrying out of necessary works.**

A water undertaker<sup>1</sup> may:

- 734 (1) disconnect<sup>2</sup> a service pipe<sup>3</sup> which, for the purposes of providing a supply of water to any premises, is connected with any water main<sup>4</sup> of that undertaker<sup>5</sup>; or
- 735 (2) otherwise cut off a supply of water to any premises<sup>6</sup>,

if it is reasonable for the disconnection to be made, or the supply to be cut off or reduced, for the purposes of the carrying out of any necessary works<sup>7</sup>. Except in an emergency or in the case of a reduction which is immaterial, the power of a water undertaker to cut off or reduce a supply is exercisable in relation to any premises only after the undertaker has served reasonable notice<sup>8</sup> on the consumer<sup>9</sup> of the proposal for the carrying out of the necessary works<sup>10</sup>.

Where a water undertaker exercises this power to make any disconnection or to cut off or reduce a supply of water to any premises for the purposes of carrying out any necessary works, it owes a duty to the consumer to secure: (a) that those works are carried out with reasonable dispatch<sup>11</sup>; and (b) that any supply of water to those premises for domestic purposes<sup>12</sup> is interrupted for more than 24 hours for the purposes of the carrying out of those works only if an emergency supply has been made available (whether or not in pipes<sup>13</sup>) within a reasonable distance of the premises<sup>14</sup>. Any breach of this duty by a water undertaker which causes any person<sup>15</sup> to whom it is owed to sustain loss or damage<sup>16</sup> is actionable at the suit of that person<sup>17</sup>.

Where a water undertaker exercises its power under the above provisions of disconnection for the carrying out of necessary works<sup>18</sup>, if the undertaker is required to serve a notice, the undertaker must: (i) specify in the notice the earliest date and time after which the undertaker reasonably expects that the supply will be interrupted or cut off<sup>19</sup> and the latest date and time by which the undertaker reasonably expects that the supply will be restored<sup>20</sup>; and (ii) if the water is to be cut off for more than four hours, give at least 48 hours' notice before the supply is interrupted or cut off<sup>21</sup>. If, because of an emergency, a water undertaker interrupts or cuts off the supply of water to the premises of a customer<sup>22</sup> and is excused from the requirement to serve a notice<sup>23</sup>, the undertaker must, as soon as is reasonably practicable, take all reasonable steps to notify each affected customer that the supply has been interrupted or cut off<sup>24</sup>, where an alternative supply can be obtained<sup>25</sup>, of the time by which it is proposed the supply should be restored<sup>26</sup>, and of the telephone number of an office from which further information may be obtained<sup>27</sup>.

If the undertaker fails to comply with head (ii) above, it must pay<sup>28</sup> each customer whose supply of water was disconnected or cut off, if the supply is to domestic premises, £20<sup>29</sup> and, if the supply is to premises of any other kind, £50<sup>30</sup>. However, the undertaker need not pay the customer: (A) if it was impracticable to give notice by the time required because of industrial action by employees of the undertaker<sup>31</sup> or the act or default of a person who is neither an officer, employee or agent of the undertaker<sup>32</sup>, nor a person acting on behalf of the undertaker or of an agent of the undertaker<sup>33</sup>; or (B) if the undertaker could not practicably have identified the customer as having been affected<sup>34</sup>, and the customer does not claim (orally or in writing<sup>35</sup>)

a payment under these provisions within the three months<sup>36</sup> following the date on which the supply was cut off<sup>37</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 There is no statutory definition of 'disconnect' or 'cut off'. In practice the disconnection or cut off is made by either turning off a stopcock or physically severing the pipe. As to powers of entry to disconnect a pipe or cut off a supply see the Water Industry Act 1991 s 170; and PARA 480. As to disconnections for non-payment of charges see s 61; and PARA 357. As to disconnections at a customer's request see s 62; and PARA 359. As to the general duties of undertakers with respect to disconnections see s 63; and PARA 360.

3 As to the meaning of 'service pipe' see PARA 179 note 8.

4 As to the meaning of 'water main' see PARA 138 note 11. As to references to the connection of a service pipe with a water main see PARA 335 note 9.

5 Water Industry Act 1991 s 60(1)(a).

6 Water Industry Act 1991 s 60(1)(b). The power of a water undertaker under these provisions to cut off a supply of water includes power to reduce a supply of water: s 60(2). A supply would be reduced by reducing the pressure. As to pressure generally see PARAS 353-354.

7 Water Industry Act 1991 s 60(1). As to the meaning of 'necessary works' see PARA 339 note 2.

8 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. As to such notice see the text to notes 18-21.

9 As to the meaning of 'consumer' see PARA 122 note 35.

10 Water Industry Act 1991 s 60(3).

11 Water Industry Act 1991 s 60(4)(a).

12 As to the meaning of 'domestic purposes' see PARA 334.

13 As to the meaning of 'pipe' see PARA 138 note 11.

14 Water Industry Act 1991 s 60(4)(b).

15 As to the meaning of 'person' see PARA 13 note 29.

16 As to the meaning of 'damage' see PARA 129 note 7.

17 Water Industry Act 1991 s 60(5). If the supply is for domestic purposes, or if the supply is for non-domestic purposes and no special terms and conditions apply relating to compensation whilst works are carried out, the water undertaker is only liable to pay compensation if the works are not carried out with 'reasonable dispatch' (which is not defined). If the supply is for non-domestic purposes, the terms on which the supply is given should be examined to see if there is any additional ground on which compensation for such disruption can be claimed. As to determination of the terms and conditions on which a non-domestic supply may be made see PARA 347. As to the sums payable when the supply is not duly restored see PARA 356.

18 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(1).

19 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(2)(a)(i).

20 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(2)(a)(ii).

21 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(2)(b).

22 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(3)(a). As to the meaning of 'customer' see PARA 327 note 10.



- 23 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(3)(b).
- 24 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(4)(a).
- 25 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(4)(b).
- 26 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(4)(c).
- 27 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(4)(d).
- 28 No application by the customer for the payment is necessary unless the undertaker could not practicably have identified the customer as having been affected: Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(6). As to the making of payments, the effect of the making and acceptance of payments under the regulations, and the determination of disputes relating thereto see PARA 327.
- 29 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(5)(a). 'Domestic premises' means premises used wholly or partly as a dwelling or intended for that use: reg 4(1).
- 30 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(5)(b).
- 31 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(7)(a)(i).
- 32 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(7)(a)(ii)(aa).
- 33 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(7)(a)(ii)(bb).
- 34 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(7)(b)(i).
- 35 As to the meaning of 'writing' see PARA 22 note 1.
- 36 As to the meaning of 'month' see PARA 23 note 10.
- 37 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 8(7)(b)(ii).

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### **356. Customer's entitlement to payment or credit where supply not duly restored.**

The following provisions apply if a water undertaker<sup>1</sup> interrupts or cuts off the supply of water to premises in the exercise of its power<sup>2</sup> to make disconnections for the carrying out of necessary works<sup>3</sup>. However, these provisions do not apply if the undertaker interrupts or cuts off the supply because of drought<sup>4</sup>.

Where these provisions apply, the undertaker must restore the supply: (1) by the time and date specified in the notice<sup>5</sup>, if the undertaker has served a notice stating when the supply is to be restored<sup>6</sup>; (2) within 48 hours after it first became aware that the supply was interrupted or cut off, if the supply was interrupted or cut off in an emergency because of a leak or burst in a strategic main<sup>7</sup>; or (3) within 12 hours after it first became aware that the supply was interrupted or cut off, if the supply was interrupted or cut off in an emergency, but not because of a leak or burst in a strategic main<sup>8</sup>.

If the undertaker fails to restore the supply by the time by which the undertaker should, under heads (1) to (3), have done so, the undertaker must pay the customer<sup>9</sup>: (a) where the supply is to domestic premises, £20<sup>10</sup>; (b) where the supply is to premises of any other kind, £50<sup>11</sup>; and (c) for each subsequent full period of 24 hours during which the supply has not been restored, where the supply is to domestic premises, £10<sup>12</sup>, and, where the supply is to premises of any other kind, £25<sup>13</sup>. The undertaker need not pay the customer:

- 736 (i) if (or, as the case may be, so long as) the undertaker was prevented from restoring the supply by: (A) severe weather<sup>14</sup>; (B) industrial action by employees of the undertaker<sup>15</sup>; or (C) the act or default of a person who is not either an officer, employee or agent of the undertaker<sup>16</sup>, or a person acting on behalf of the undertaker or of an agent of the undertaker<sup>17</sup>;
- 737 (ii) in a case described in head (2) or (3) above, if the circumstances are so exceptional that it is unreasonable to expect the supply to be restored within the relevant period<sup>18</sup>; or
- 738 (iii) if the undertaker could not practicably have identified the customer as having been affected<sup>19</sup>, and the customer does not claim (orally or in writing<sup>20</sup>) a payment under these provisions within the three months<sup>21</sup> following the date on which the supply was cut off<sup>22</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 ie its power under the Water Industry Act 1991 s 60: see PARA 355.

3 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(1).

4 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(2).

5 As to the notice see PARA 355.

6 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(3)(a).

7 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(3)(b). 'Strategic main' means a main that conveys water in bulk to centres of population that have no other supply that can fully meet normal demand: reg 9(7).

8 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(3)(c).

9 No application by the customer for the payment is necessary unless the undertaker could not practicably have identified the customer as having been affected: Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(5). As to the meaning of 'customer' see PARA 327 note 10. As to the making of payments, the effect of the making and acceptance of payments, and the determination of disputes relating thereto see PARA 327.

10 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(4)(a). As to the meaning of 'domestic premises' see PARA 355 note 29.

11 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(4)(b).

12 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(4)(c)(i).

13 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(4)(c)(ii).

14 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(a)(i).

15 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(a)(ii).

16 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(a)(iii)(aa).

17 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(a)(iii)(bb).

18 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(b).

19 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(c)(i).

20 As to the meaning of 'writing' see PARA 22 note 1.

21 As to the meaning of 'month' see PARA 23 note 10.

22 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 9(6)(c)(ii).

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### **357. Disconnections for non-payment of charges.**

Subject to the statutory exceptions<sup>1</sup>, a water undertaker<sup>2</sup> may disconnect<sup>3</sup> a service pipe which is connected with any water main<sup>4</sup> of that undertaker for the purposes of providing a supply of water to any premises, or may otherwise cut off a supply of water to any premises, if the occupier<sup>5</sup> of the premises is liable (whether in his capacity as occupier or under any agreement with the undertaker) to pay charges due to the undertaker in respect of the supply of water to those premises<sup>6</sup>, and has failed to make the payment before the end of the period of seven days beginning with the day after he is served with notice<sup>7</sup> requiring him to do so<sup>8</sup>.

Where a water undertaker has served notice requiring the payment of charges on a person as mentioned above<sup>9</sup>, and within that period of seven days that person serves a counter-notice on the undertaker disputing his liability to pay the charges in question<sup>10</sup>, the undertaker may not exercise its power of disconnection in pursuance of that notice in relation to any premises except at a time when that person is the occupier of the premises and those charges are enforceable against him in a specified manner<sup>11</sup>. Charges are enforceable against a person in a specified manner if:

- 739 (1) the undertaker is able to enforce a judgment against that person for the payment of the charges<sup>12</sup>; or
- 740 (2) that person is in breach of an agreement entered into, since the service of his counter-notice, for the purpose of avoiding or settling proceedings by the undertaker for the recovery of the charges<sup>13</sup>.

A water undertaker which exercises its power under these provisions to disconnect any pipe<sup>14</sup> or otherwise to cut off any supply of water may recover, from the person in respect of whose liability the power is exercised, any expenses reasonably incurred by the undertaker in making the disconnection or in otherwise cutting off the supply<sup>15</sup>.

Where a water undertaker has power under these provisions to disconnect any pipe to any premises, or otherwise to cut off any supply to any premises<sup>16</sup>, and a supply of water is provided to those premises and to other premises wholly or partly by the same service pipe<sup>17</sup>, the undertaker may exercise that power so as to cut off the supply to those other premises if and only if the same person is the occupier of the premises in relation to which the charges are due and of the other premises<sup>18</sup>.

1 The power conferred by the Water Industry Act 1991 s 61(1) is not exercisable in relation to any premises specified in Sch 4A (see PARA 358): s 61(1A) (added by the Water Industry Act 1999 s 1(1)).

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 There is no statutory definition of 'disconnect' or 'cut off'. In practice the disconnection or cut off is made by either turning off a stopcock or physically severing the pipe. The closure of a valve in a prepayment device because of lack of credit is a disconnection within the meaning of the Water Industry Act 1991 s 61: see *R v Director General of Water Services, ex p Oldham Metropolitan Borough Council* (1998) 96 LGR 396, 31 HLR 224. As to the prohibition on the use of such devices in relation to certain premises see the Water Industry Act 1991 s 63A; and PARA 361. As to powers of entry to disconnect a pipe or cut off a supply see s 170; and PARA 480. As to disconnections at a customer's request see s 62; and PARA 359. As to the general duties of undertakers with respect to disconnections see s 63; and PARA 360.

4 As to the meaning of 'service pipe' see PARA 179 note 8. As to the meaning of 'water main' see PARA 138 note 11. As to references to the connection of a service pipe with a water main see PARA 335 note 9.

5 As to the meaning of 'occupier' see PARA 339 note 8.

6 Water Industry Act 1991 s 61(1)(a). As to charges see PARA 419 et seq.

7 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

8 Water Industry Act 1991 s 61(1)(b).

9 Water Industry Act 1991 s 61(2)(a). As to the meaning of 'person' see PARA 13 note 29.

10 Water Industry Act 1991 s 61(2)(b).

11 Water Industry Act 1991 s 61(2).

12 Water Industry Act 1991 s 61(3)(a).

13 Water Industry Act 1991 s 61(3)(b).

14 As to the meaning of 'pipe' see PARA 138 note 11.

15 Water Industry Act 1991 s 61(4). As to the recovery of expenses see PARA 131 note 6.

16 Water Industry Act 1991 s 61(5)(a).

17 Water Industry Act 1991 s 61(5)(b).

18 Water Industry Act 1991 s 61(5). The supply to the other premises could be temporarily disconnected to enable the supply to the premises in respect of which the charges are outstanding to be disconnected, under the power to disconnect in order to carry out necessary works under s 60: see PARA 355.

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### **358. Premises which are not to be disconnected for non-payment of charges.**

The power to disconnect for non-payment of charges<sup>1</sup> is not exercisable in relation to any of the following premises<sup>2</sup>:

- 741 (1) any dwelling<sup>3</sup> which is occupied by a person as his only or principal home<sup>4</sup>;
- 742 (2) any house in multiple occupation<sup>5</sup> which does not constitute a dwelling within the meaning of head (1) above and in which any person has his only or principal home<sup>6</sup>;
- 743 (3) accommodation for the elderly<sup>7</sup> in which a person has his only or principal home<sup>8</sup>;
- 744 (4) a hospital<sup>9</sup>;
- 745 (5) premises used for the provision of medical services by a registered medical practitioner<sup>10</sup>;
- 746 (6) premises used for the provision of dental services by a person<sup>11</sup> who is permitted<sup>12</sup> to practise dentistry<sup>13</sup>;
- 747 (7) premises not falling within head (5) or (6) above which are used for the provision<sup>14</sup> of primary medical services or primary dental services<sup>15</sup>;
- 748 (8) a care home<sup>16</sup> or independent hospital<sup>17</sup>;
- 749 (9) a children's home<sup>18</sup>;
- 750 (10) a school<sup>19</sup>;
- 751 (11) premises used by an institution within the further education sector or an institution within the higher education sector<sup>20</sup> for, or in connection with, the provision of education<sup>21</sup>;
- 752 (12) premises in England<sup>22</sup> which are used for the provision of childcare by a person who is registered<sup>23</sup> in respect of the premises<sup>24</sup>; or premises in Wales<sup>25</sup> which are used for the provision of day care for children by a person who is registered<sup>26</sup> in respect of the premises<sup>27</sup>;
- 753 (13) a prison<sup>28</sup> or removal centre<sup>29</sup>;
- 754 (14) premises occupied for the purposes of a police force<sup>30</sup>;
- 755 (15) premises occupied for the purposes of a fire and rescue authority<sup>31</sup>;
- 756 (16) premises occupied for the purposes of the provision of an ambulance service by a National Health Service trust<sup>32</sup> or by an NHS foundation trust<sup>33</sup>.

1 le the power conferred by the Water Industry Act 1991 s 61(1): see PARA 357.

2 See the Water Industry Act 1991 s 61(1A) (added by the Water Industry Act 1999 s 1(1)).

3 'Dwelling' means: (1) a private dwelling-house (which may be a building or part of a building); (2) a caravan within the meaning of the Caravan Sites and Control of Development Act 1960 Pt I (ss 1-32) (disregarding the amendment made by the Caravan Sites Act 1968 s 13(2) (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1033)); or (3) a boat or similar structure designed or adapted for use as a place of permanent habitation: Water Industry Act 1991 Sch 4A para 1(2) (Sch 4A added by the Water Industry Act 1999 s 1(2), Sch 1).

4 Water Industry Act 1991 Sch 4A para 1(1) (as added: see note 3). It is only a person's principal home that is protected by these provisions; second homes are still liable to disconnection: see HC Official Report, SC A (Water Industry Bill) col 5, 15 December 1998.

5 'House in multiple occupation' means a house in multiple occupation as defined by the Housing Act 2004 ss 254-259, as they have effect for the purposes of Pt 1 (ss 1-54) of that Act (that is, without the exclusions contained in Sch 14 to that Act) (see **HOUSING** vol 22 (2006 Reissue) PARA 461): Water Industry Act 1991 Sch 4A para 2(2) (as added (see note 3); and subsequently substituted by the Housing Act 2004 s 265(1), Sch 15 para 36).

6 Water Industry Act 1991 Sch 4A para 2(1) (as added: see note 3).

7 'Accommodation for the elderly' means residential accommodation to which the Water Industry Act 1991 Sch 4A para 3(3) or (4) applies, but which is not a dwelling within the meaning of head (1) in the text or a house in multiple occupation within the meaning of head (2) in the text: Sch 4A para 3(2) (as added: see note 3). Schedule 4A para 3(3) applies to residential accommodation: (1) which is particularly suitable, having regard to its location, size, design, heating systems and other features, for occupation by elderly persons; (2) which it is the practice of the landlord to let for occupation by persons aged 60 or more; and (3) where the services of a warden are provided: Sch 4A para 3(3) (as so added). Schedule 4A para 3(4) applies to any building or part of a building designed or adapted for use as residential accommodation for elderly persons: Sch 4A para 3(4) (as so added).

8 Water Industry Act 1991 Sch 4A para 3(1) (as added: see note 3).

9 Water Industry Act 1991 Sch 4A para 4 (as added: see note 3). 'Hospital' means a hospital within the meaning of the Public Health (Control of Disease) Act 1984 s 11 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 894): Water Industry Act 1991 Sch 4A para 4 (as so added).

10 Water Industry Act 1991 Sch 4A para 5 (as added: see note 3). As to the meaning of 'registered medical practitioner' see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) para 4.

11 As to the meaning of 'person' see PARA 13 note 29.

12 Ie under the Dentists Act 1984.

13 Water Industry Act 1991 Sch 4A para 6 (as added: see note 3). As to the practice of dentistry see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 403 et seq.

14 Ie under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006.

15 Water Industry Act 1991 Sch 4A para 7 (substituted by the Health and Social Care (Community Health and Standards) Act 2003 s 184, Sch 11 para 58; and amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 137, 139(a)). As to primary medical services see **HEALTH SERVICES** vol 54 (2008) PARA 241 et seq. As to primary dental services see **HEALTH SERVICES** vol 54 (2008) PARA 277 et seq.

16 'Care home' means: (1) a care home within the meaning of the Care Standards Act 2000 (see **SOCIAL SERVICES AND COMMUNITY CARE**); (2) a building or part of a building in which residential accommodation is provided under the National Assistance Act 1948 s 21 (see **SOCIAL SERVICES AND COMMUNITY CARE** vol 44(2) (Reissue) PARAS 1029-1030): Water Industry Act 1991 Sch 4A para 8(2) (Sch 4A as added (see note 3); Sch 4A paras 8, 9 substituted by the Care Standards Act 2000 s 116, Sch 4 para 18).

17 Water Industry Act 1991 Sch 4A para 8(1) (as added and substituted: see note 16). 'Independent hospital' means an independent hospital within the meaning of the Care Standards Act 2000 (see **HEALTH SERVICES** vol 54 (2008) PARA 748): Water Industry Act 1991 Sch 4A para 8(2) (as so added and substituted).

18 Water Industry Act 1991 Sch 4A para 9 (as added and substituted: see note 16). 'Children's home' means a children's home within the meaning of the Care Standards Act 2000 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 983): see Water Industry Act 1991 Sch 4A para 9 (as so added and substituted).

19 Water Industry Act 1991 Sch 4A para 10 (as added: see note 3). 'School' means a school within the meaning of the Education Act 1996 (see **EDUCATION** vol 15(1) (2006 Reissue) PARA 81): Water Industry Act 1991 Sch 4A para 10 (as so added).

20 The references to an institution within the further education sector or within the higher education sector are to be construed in accordance with the Further and Higher Education Act 1992 s 91 (see **EDUCATION** vol 15(2) (2006 Reissue) PARAS 579, 646): Water Industry Act 1991 Sch 4A para 11(2) (as added: see note 3).

21 Water Industry Act 1991 Sch 4A para 11(1) (as added: see note 3).

22 As to the meaning of 'England' see PARA 19 note 8.

23 le (otherwise than as a childminder) under the Childcare Act 2006 Pt 3 (ss 31-98): see **CHILDREN AND YOUNG PERSONS** vol 5(3) ( 2008 Reissue) PARA 1105 et seq.

24 Water Industry Act 1991 Sch 4A para 12(1) (Sch 4A as added (see note 3); Sch 4A para 12 substituted by the Childcare Act 2006 s 103(1), Sch 2 para 19).

25 As to the meaning of 'Wales' see PARA 16 note 2.

26 le under the Children Act 1989 Pt XA (ss 79A-79X): see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1070 et seq.

27 Water Industry Act 1991 Sch 4A para 12(2) (as added and substituted: see note 24).

28 'Prison' means: (1) any prison, young offender institution or remand centre which is under the general superintendence of, or is provided by, the Secretary of State under the Prison Act 1952, including a contracted out prison within the meaning of the Criminal Justice Act 1991 Pt IV (ss 76-92) (see **PRISONS** vol 36(2) (Reissue) PARA 532 et seq); (2) any secure training centre within the meaning of the Prison Act 1952 s 43(1)(d) (see **PRISONS** vol 36(2) (Reissue) PARA 657); or (3) a naval, military or air force prison: Water Industry Act 1991 Sch 4A para 13(2) (as added; see note 3). As from a day to be appointed head (1) above is amended to read: any prison or young offender institution which is under the general superintendence of, or is provided by, the Secretary of State under the Prison Act 1952, including a contracted out prison within the meaning of the Criminal Justice Act 1991 Pt IV (ss 76-92): Water Industry Act 1991 Sch 4A para 13(2)(a) (as so added; and prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II para 114). At the date at which this volume states the law no such day had been appointed.

29 Water Industry Act 1991 Sch 4A para 13(1) (as added (see note 3); amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(p)). 'Removal centre' means any premises which are used solely for detaining persons under the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002, but which are not a part of a prison: Water Industry Act 1991 Sch 4A para 13(3) (as so added; and amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(p), SI 2003/1016). As to removal centres see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 157.

30 Water Industry Act 1991 Sch 4A para 14 (as added: see note 3). 'Police force' means a force maintained by a police authority: Police Act 1996 s 101(1); definition applied by the Interpretation Act 1978 s 5, Sch 1 (amended by the Police Act 1996 s 103, Sch 7 para 32). As to police authorities see **POLICE** vol 36(1) (2007 Reissue) PARA 139.

31 Water Industry Act 1991 Sch 4A para 15 (as added (see note 3); amended by the Fire and Rescue Services Act 2004 s 53(1), Sch 1 paras 75, 78). As to fire and rescue authorities see **FIRE SERVICES**.

32 le a National Health Service trust established under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006: see **HEALTH SERVICES** vol 54 (2008) PARA 155 et seq.

33 Water Industry Act 1991 Sch 4A para 16 (as added (see note 3); and amended by the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 89, 90, National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 paras 137, 193(b)). As to NHS foundation trusts see **HEALTH SERVICES** vol 54 (2008) PARA 174 et seq.



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### **359. Disconnections at customer's request.**

A water undertaker<sup>1</sup> may disconnect<sup>2</sup> a service pipe which for the purposes of providing a supply of water to any premises is connected with any water main<sup>3</sup> of that undertaker<sup>4</sup>, or otherwise cut off a supply of water to any premises<sup>5</sup>, if notice<sup>6</sup> specifying the time after which a supply of water to those premises will no longer be required has been served on the undertaker by a consumer<sup>7</sup> and that time has passed<sup>8</sup>. No person<sup>9</sup> is liable to a water undertaker for any expenses incurred by the undertaker in exercising this power of disconnection<sup>10</sup>. A person who wishes the supply of water to his premises to be discontinued is, however, still liable for charges for supplies fixed by reference to volume unless the appropriate notice is given to the water undertaker<sup>11</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 There is no statutory definition of 'disconnect'. In practice the disconnection is made by either turning off a stopcock or physically severing the pipe. As to powers of entry to disconnect a pipe or cut off a supply see the Water Industry Act 1991 s 170; and PARA 480. As to the general duties of undertakers with respect to disconnections see s 63; and PARA 360.

3 As to the meaning of 'water main' see PARA 138 note 11. As to the meaning of 'service pipe' see PARA 179 note 8. As to references to the connection of a service pipe with a water main see PARA 335 note 9.

4 Water Industry Act 1991 s 62(1)(a).

5 Water Industry Act 1991 s 62(1)(b).

6 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

7 As to the meaning of 'consumer' see PARA 122 note 35.

8 Water Industry Act 1991 s 62(1).

9 As to the meaning of 'person' see PARA 13 note 29.

10 Water Industry Act 1991 s 62(2).

11 See the Water Industry Act 1991 s 144(3); and PARA 422. An occupier who has served a notice under s 62 is not otherwise still liable for charges, except in pursuance of a subsequent demand for a supply, despite the fact that he continues to be the occupier of the premises in question: see s 144(5), (6); and PARA 422.

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### **360. General duties of undertakers with respect to disconnections.**

Where a water undertaker<sup>1</sup> disconnects a service pipe<sup>2</sup> to any inhabited house<sup>3</sup>, or otherwise cuts off a supply of water to such a house<sup>4</sup>, and does not restore the supply to that house before the end of 24 hours beginning with the time when it is cut off<sup>5</sup>, the undertaker must, not later than 48 hours after that time, serve notice<sup>6</sup> that it has cut off that supply on the local authority<sup>7</sup> in whose area the house is situated<sup>8</sup>. A water undertaker which fails without reasonable excuse to serve such a notice is guilty of an offence<sup>9</sup>.

A water undertaker is also guilty of an offence<sup>10</sup> if:

- 757 (1) it disconnects a service pipe to any premises, or otherwise cuts off a supply of water to any premises, in a case in which it has no statutory power<sup>11</sup> to do so<sup>12</sup>; or
- 758 (2) in disconnecting any such pipe or cutting off any such supply it fails, without reasonable excuse, to comply with any requirement of the provisions in pursuance of which it disconnects the pipe or cuts off the supply<sup>13</sup>.

A water undertaker may be restrained if it threatens improperly to cut off the water supply<sup>14</sup> or if, having done so, it prevents reconnection being made<sup>15</sup>; and an undertaker will be liable for any damage resulting from an ineffective disconnection<sup>16</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'service pipe' see PARA 179 note 8.

3 As to the meaning of 'house' see PARA 133 note 5. As to houses etc which may not be disconnected for non-payment of charges see PARA 358.

4 Water Industry Act 1991 s 63(1)(a).

5 Water Industry Act 1991 s 63(1)(b).

6 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

7 As to the meaning of 'local authority' see PARA 118 note 17.

8 Water Industry Act 1991 s 63(1).

9 Water Industry Act 1991 s 63(2). The penalty for an offence under s 63 is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 63(4). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

10 As to the penalty for such an offence see note 9.

11 ie under the Water Industry Act 1991 ss 60-62 (see PARAS 355-359), s 75 (see PARA 365) or any other enactment: see s 63(3)(a). As to the meaning of 'enactment' see PARA 14 note 31.

12 Water Industry Act 1991 s 63(3)(a).

13 Water Industry Act 1991 s 63(3)(b).

14 *Hayward v East London Waterworks Co* (1884) 28 ChD 138.

- 15 *Gale v Rhymney and Aber Valleys Gas and Water Co* (1903) 67 JP 430, CA.
- 16 *Watson v Sutton District Water Co* [1940] 3 All ER 502, CA.

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### **361. Prohibition of use of limiting devices.**

A water undertaker<sup>1</sup> is guilty of an offence if it uses a limiting device<sup>2</sup> in relation to any specified premises<sup>3</sup> with the intention of enforcing payment of charges which are or may become due to the undertaker in respect of the supply of water to the premises<sup>4</sup>. An undertaker does not, however, commit an offence under these provisions by disconnecting a service pipe<sup>5</sup> to any premises or otherwise cutting off a supply of water to the premises<sup>6</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 A 'limiting device', in relation to any premises, means any device or apparatus which: (1) is fitted to any pipe by which water is supplied to the premises or a part of the premises, whether that pipe belongs to the undertaker or to any other person; and (2) is designed to restrict the use which may be made of water supplied to the premises by the undertaker: Water Industry Act 1991 s 63A(2) (s 63A added by the Water Industry Act 1999 s 2). As to the meaning of 'pipe' see PARA 138 note 11. As to the meaning of 'person' see PARA 13 note 29.

3 Ie any premises specified in the Water Industry Act 1991 Sch 4A: see PARA 358.

4 Water Industry Act 1991 s 63A(1) (as added: see note 2). An undertaker guilty of such an offence is liable, on summary conviction, to a fine not exceeding level 3 on the standard scale: s 63A(4) (as so added). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185. As to charges generally see PARA 419 et seq.

5 As to the meaning of 'service pipe' see PARA 179 note 8.

6 Water Industry Act 1991 s 63A(3) (as added: see note 2). Note, however, that the power to disconnect for non-payment of charges (see PARA 357) is not exercisable in respect of the specified premises: see PARA 358. As to powers of disconnection see PARAS 355-360.

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### **362. Closure of mains.**

There appears to be no statutory procedure<sup>1</sup> by which a water main<sup>2</sup> may be closed by a water undertaker<sup>3</sup>, in contrast with the provision made for the closure of a public sewer by a sewerage undertaker<sup>4</sup>. A water main can, it seems, only be closed with the agreement of customers taking a supply from it<sup>5</sup>.

1 The powers to alter pipes conferred by the Water Industry Act 1991 ss 158, 159 (see PARAS 462-463) include removal, but the wording of those provisions envisages that the main removed will be replaced by a similar main. In certain circumstances the undertaker is under a duty to move pipes (see PARA 489), but again it appears that a replacement is to be provided.

2 As to the meaning of 'water main' see PARA 138 note 11.

3 As to the meaning of 'water undertaker' see PARA 137 note 4.

4 See the Water Industry Act 1991 s 116; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1036.

5 As to the right of customers to have their service pipes connected with such a main see PARA 335. The more distant the main, the longer the length of service pipe which the customer will be responsible for maintaining. As to the water mains which must be shown on maps of waterworks see PARA 179. As to the meaning of 'service pipe' see PARA 179 note 8.

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#### **(iv) Quality and Sufficiency of Supplies**

##### ***A. WASTE, CONTAMINATION AND MISUSE***

##### **363. Supply to other persons without undertakers' consent.**

Under the current water supply legislation it is not expressly stated to be a criminal offence for an owner or occupier of premises supplied with water to supply that water to another person<sup>1</sup>; but such a supply from one person to another may be regarded as a misuse<sup>2</sup> of water<sup>3</sup>.

<sup>1</sup> There was such a criminal offence under the earlier legislation: see the Water Act 1945 Sch 3 Pt XIII s 65 (repealed).

<sup>2</sup> See further *Great Northern Rly Co v Bradford Corpn* (1918) 83 JP 33, where a railway company receiving a supply at one station was not entitled to use it at another. An occupier may be liable for the wrongful acts of his workmen: *West Middlesex Waterworks Co v Suwerkrop* (1829) 4 C & P 87.

<sup>3</sup> It may, therefore, constitute a criminal offence under the Water Industry Act 1991 s 73(1)(c) (see PARA 364) and a misuse under s 75(1)(d) (see PARA 365).

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### **364. Offences of contaminating, wasting and misusing water etc.**

If any person<sup>1</sup> who is the owner<sup>2</sup> or occupier<sup>3</sup> of any premises to which a supply of water is provided by a water undertaker<sup>4</sup> or licensed water supplier<sup>5</sup> intentionally or negligently causes or suffers any water fitting<sup>6</sup> for which he is responsible<sup>7</sup> to be or remain so out of order, so in need of repair or so constructed or adapted, or to be so used, that:

- 759 (1) water in a water main or other pipe<sup>8</sup> of a water undertaker, or in a pipe connected with such a water main or pipe, is or is likely to be contaminated by the return<sup>9</sup> of any substance from those premises to that main or pipe<sup>10</sup>;
- 760 (2) water that has been supplied by the undertaker or supplier to those premises is, or is likely to be, contaminated before it is used<sup>11</sup>; or
- 761 (3) water so supplied is, or is likely to be, wasted or, having regard to the purposes for which it is supplied, misused<sup>12</sup> or unduly consumed<sup>13</sup>,

that person is guilty of an offence<sup>14</sup>.

In any proceedings under the above provisions it is a defence to prove:

- 762 (a) that the contamination or likely contamination, or the wastage, misuse or undue consumption, was caused, wholly or mainly, by the installation, alteration, repair or connection of the water fitting on or after 1 July 1999<sup>15</sup>;
- 763 (b) that the works were carried out by or under the direction of an approved contractor<sup>16</sup>; and
- 764 (c) that the contractor certified to the person who commissioned those works that the water fitting complied with the requirements of the relevant regulations<sup>17</sup>.

Any person who uses any water supplied to any premises by a water undertaker for a purpose other than one for which it is supplied to those premises is, unless the other purpose is the extinguishment of a fire, guilty of an offence<sup>18</sup>. Where a person has committed such an offence, the water undertaker in question is entitled to recover from that person such amount as may be reasonable in respect of any water wasted, misused or improperly consumed in consequence of the commission of the offence<sup>19</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'owner' see PARA 22 note 9.

3 As to the meaning of 'occupier' see PARA 339 note 8.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to the meaning of 'licensed water supplier' see PARA 152.

6 As to the meaning of 'water fittings' see PARA 134 note 6.

7 For these purposes, the owner or occupier of any premises is regarded as responsible for every water fitting on the premises which is not a water fitting which a person other than the owner or, as the case may be, occupier is liable to maintain: Water Industry Act 1991 s 73(4). In the absence of evidence to the contrary, fittings which the undertakers are liable to maintain include any let for hire by the undertakers and marked as being their property: see PARA 464.

8 As to the meanings of 'water main' and 'pipe' see PARA 138 note 11.

9 If there is a heavy use of water elsewhere on the same system of water mains (eg when water is used for fire-fighting) the pressure in the main may drop, and this may result in water being returned from premises supplied into the water main. Water in the premises may be contaminated if the relevant regulations are not complied with: see PARA 367. Hosepipe connectors cause a particular problem in practice as they are fitted and refitted so that it is difficult to ascertain whether they were lawfully installed at the time the regulations came into force.

10 Water Industry Act 1991 s 73(1)(a).

11 Water Industry Act 1991 s 73(1)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 22(b)).

12 As to misuse of water see also PARA 363, PARA 365 et seq. There is no express control on the use of hosepipes and sprinklers in the legislation; the 'misuse' provisions in the Water Industry Act 1991 s 73(1)(c) need to be looked at in conjunction with the definition of 'domestic purposes' in s 218 (see PARA 334). The use of water drawn from a tap inside a house, without the use of a hosepipe, for gardening purposes connected with the occupation of that house, is a domestic use of water; use of water drawn from an inside tap using a hosepipe or from an external tap regardless of whether or not a hosepipe is used is not a domestic use of water: see s 218(2)(b); and PARA 334. A water undertaker may impose conditions under ss 55-56 when water is used for other than domestic purposes: see PARA 347. There is no consistent approach amongst water undertakers in the conditions imposed for the use of water for gardening purposes. Some water undertakers may require a meter to be installed before water is used for 'non-domestic' gardening purposes, others may require a licence to be held before such use is allowed; some water undertakers differentiate between handheld hosepipes and sprinklers in setting out their requirements.

13 Water Industry Act 1991 s 73(1)(c).

14 Water Industry Act 1991 s 73(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 22(a)). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see s 73(1). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

15 Water Industry Act 1991 s 73(1A)(a) (s 73(1A) added by SI 1999/1148).

16 Water Industry Act 1991 s 73(1A)(b) (as added: see note 15). An approved contractor is one within the meaning of the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148: Water Industry Act 1991 s 73(1A)(b) (as so added). 'Approved contractor' means a person who: (1) has been approved by the water undertaker for the area where a water fitting is installed or used; or (2) has been certified as an approved contractor by an organisation specified in writing by the regulator: Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 1(2). As to the meaning of 'writing' see PARA 22 note 1. 'Regulator' means: (a) in relation to any water undertakers whose area of appointment is wholly or mainly in Wales and their area of appointment, the Welsh Ministers; (b) in relation to all other water undertakers and their area of appointment, the Secretary of State: reg 1(2); Government of Wales Act 2006 Sch 11 para 32. As to water undertakers' areas see PARA 318. As to the Secretary of State see PARA 15 note 1. Functions under the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

17 Water Industry Act 1991 s 73(1A)(b) (as added: see note 15). The relevant regulations are the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148: see the Water Industry Act 1991 s 73(1A)(c) (as so added); and PARA 367.

18 Water Industry Act 1991 s 73(2). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 73(2). Under the earlier legislation there was an express offence of supplying water to other persons without the undertaker's consent: see PARA 363. This provision is not contained in the consolidation legislation; it was removed after concern expressed during the debate on the 1989 Water Bill that a person supplying water to a neighbour whose supply had been disconnected because of non-payment of water charges was liable to a fine. However such a supply would still appear to be an offence under the Water Industry Act 1991 s 73(2). As to the restrictions on disconnections for non-payment of charges see PARA 358.



19 Water Industry Act 1991 s 73(3). See further *Evans v Gornall* (1892) 8 TLR 602, DC, where water already used for domestic purposes was properly re-used for flushing a water closet; *Cambridge University and Town Waterworks Co v Hancock* (1910) 74 JP 477, DC, where an offence was committed by a dairyman using water supplied for domestic purposes to wash a yard and milk float; *Great Northern Ry Co v Bradford Corp* (1918) 83 JP 33, where a railway company receiving a supply at one station was not entitled to use it at another. An occupier may be liable for the wrongful acts of his workmen: *West Middlesex Waterworks Co v Suwerkrop* (1829) 4 C & P 87. Water authorised to be taken from standpipes for domestic purposes, washing cars and extinguishing fires must not be used for trade purposes: *Andrews v Witts and Holly* (1901) 84 LT 124, DC. As to an undertaker's power to require remedial work to be carried out, and power to carry out such work by default, see the Water Industry Act 1991 s 75; and PARA 365.

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**365. Power to prevent damage and to take steps to prevent contamination, waste etc.**

Without prejudice to any power conferred on water undertakers<sup>1</sup> by regulations<sup>2</sup>, where a water undertaker which provides a supply of water to any premises has reason for believing that:

- 765 (1) damage<sup>3</sup> to persons<sup>4</sup> or property is being, or is likely to be, caused by any damage to, or defect in, any water fitting<sup>5</sup> used in connection with the supply of water to those premises which is not a service pipe<sup>6</sup> belonging to the undertaker<sup>7</sup>;
- 766 (2) water in a water main or other pipe<sup>8</sup> of the undertaker is being, or is likely to be, contaminated by the return of any substance from those premises to that main or pipe<sup>9</sup>;
- 767 (3) water which is in any pipe connected with any such main or other pipe or which has been supplied by the undertaker to those premises is being, or is likely to be, contaminated before it is used<sup>10</sup>; or
- 768 (4) water which has been or is to be so supplied is being, or is likely to be, wasted or, having regard to the purposes for which it is supplied, misused or unduly consumed<sup>11</sup>,

the water undertaker may: (a) in an emergency<sup>12</sup> disconnect the service pipe or otherwise cut off the supply of water to those premises<sup>13</sup>; and (b) in any other case serve notice<sup>14</sup> on the consumer<sup>15</sup> requiring him to take such steps as are specified in the notice as necessary to secure that the damage, contamination, waste, misuse or undue consumption ceases, or, as the case may be, does not occur<sup>16</sup>.

Similarly, without prejudice to any power conferred on water undertakers by such regulations, where a water undertaker whose supply system<sup>17</sup> is used for the purpose of a licensed water supplier<sup>18</sup> making a supply of water to any premises has reason for believing:

- 769 (i) that damage to persons or property is being or is likely to be caused by any damage to, or defect in, any water fitting used in connection with the supply of water to those premises which is not a service pipe belonging to the water undertaker<sup>19</sup>;
- 770 (ii) that water in a water main or other pipe of the undertaker is being or is likely to be contaminated by the return of any substance from those premises to that pipe or main<sup>20</sup>;
- 771 (iii) that water which is in any pipe connected with any such main or other pipe or which has been supplied by the supplier to those premises is being or is likely to be contaminated before it is used<sup>21</sup>; or
- 772 (iv) that water which has been or is to be so supplied is being or is likely to be wasted or, having regard to the purposes for which it is supplied, misused or unduly consumed<sup>22</sup>,

the undertaker may exercise the emergency disconnection and other powers set out above<sup>23</sup> in relation to those premises<sup>24</sup>.

Where a water undertaker, in exercise of the power of emergency disconnection conferred by head (a) above, disconnects a service pipe to any premises or otherwise cuts off any supply of water to any premises, the undertaker must, as soon as reasonably practicable after the supply is disconnected or cut off, serve a notice on the consumer specifying the steps which that person is required to take before the undertaker will restore the supply<sup>25</sup>. A water undertaker which fails without reasonable excuse to serve such a notice is guilty of an offence<sup>26</sup>.

Where a water undertaker has served a notice for the purposes of head (b) above, and the case becomes an emergency<sup>27</sup> or the premises appear to be unoccupied and the steps specified in the notice are not taken before the end of the specified period<sup>28</sup>, the water undertaker may disconnect the service pipe to those premises or otherwise cut off the supply of water to those premises<sup>29</sup>. In any other case, where any steps specified in the notice served for those purposes have not been taken by the end of the specified period, the water undertaker has power to take those steps itself<sup>30</sup>, and to recover any expenses reasonably incurred by the undertaker in taking those steps from the person on whom the notice was served<sup>31</sup>.

Where any steps are taken by virtue of these provisions and it is shown that in the circumstances of the case those steps were not necessary<sup>32</sup>, the water undertaker in question is not entitled to recover any expenses incurred by it in taking those steps<sup>33</sup>, and is liable to pay to any other person who took any of those steps an amount equal to any expenses reasonably incurred by that person in any of them<sup>34</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 le by regulations under the Water Industry Act 1991 s 74: see PARAS 366-367.

3 As to the meaning of 'damage' see PARA 129 note 7.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'water fittings' see PARA 134 note 6.

6 As to the meaning of 'service pipe' see PARA 179 note 8.

7 Water Industry Act 1991 s 75(1)(a).

8 As to the meanings of 'water main' and 'pipe' see PARA 138 note 11.

9 Water Industry Act 1991 s 75(1)(b). As to the return of water see PARA 364 note 9.

10 Water Industry Act 1991 s 75(1)(c).

11 Water Industry Act 1991 s 75(1)(d).

12 There is no statutory definition of 'emergency' in this context. In practice, the amount of waste etc needs to be considered in deciding whether a case amounts to an emergency.

13 Water Industry Act 1991 s 75(2)(a). As to disconnections generally see PARAS 355-360.

14 The notice must: (1) specify the period, not being less than the period of seven days beginning with the day after the service of the notice, within which the steps specified in the notice are to be taken (Water Industry Act 1991 s 75(6)(a)); and (2) set out the powers of the undertaker under s 75(7)-(9) (see the text to notes 27-31) (s 75(6)(b)). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

15 As to the meaning of 'consumer' see PARA 122 note 35. Where the power conferred by the Water Industry Act 1991 s 75(2) on a water undertaker is exercisable by virtue of s 75(1A) (see the text to notes 17-24), (1) the references to the consumer in s 75(2), (3) (see the text to note 25), in relation to a supply of water to any premises, are to be taken to be references to the person in respect of whom the supply is made; and (2) the undertaker must serve on the licensed water supplier providing the supply a copy of any notice under s 75 which is served on the person mentioned in head (1) above: s 75(11) (s 75(1A), (11), (12) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 24).

16 Water Industry Act 1991 s 75(2)(b).

17 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 75(12) (as added: see note 15).

18 As to the meaning of 'licensed water supplier' see PARA 152.

19 Water Industry Act 1991 s 75(1A)(a) (as added: see note 15).

20 Water Industry Act 1991 s 75(1A)(b) (as added: see note 15).

21 Water Industry Act 1991 s 75(1A)(c) (as added: see note 15).

22 Water Industry Act 1991 s 75(1A)(d) (as added: see note 15).

23 Ie the power conferred by the Water Industry Act 1991 s 75(2): see the text to notes 12-16.

24 Water Industry Act 1991 s 75(1A) (as added: see note 15).

25 Water Industry Act 1991 s 75(3). The steps so specified must be the steps necessary to secure that, as the case may be: (1) the damage, contamination, waste, misuse or undue consumption (s 75(4)(a)); or (2) the likelihood of damage, contamination, waste, misuse or undue consumption (s 75(4)(b)), would not recur if the supply were restored (s 75(4)). See also note 15.

26 Water Industry Act 1991 s 75(5). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see s 75(5). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

27 Water Industry Act 1991 s 75(7)(a).

28 Water Industry Act 1991 s 75(7)(b).

29 Water Industry Act 1991 s 75(7). Where a water undertaker exercises this power, it must serve a notice in accordance with s 75(3), (4), and is guilty of an offence and liable to a fine under s 75(5) (see the text to note 26) if it fails to do so: see s 75(8).

30 Water Industry Act 1991 s 75(9)(a). Any steps taken by a water undertaker by virtue of this provision are necessary works for the purposes of Pt III Ch II (ss 40-66): s 75(9). As to the meaning of 'necessary works' see PARA 339 note 2.

31 Water Industry Act 1991 s 75(9)(b). As to the recovery of expenses see PARA 131 note 6.

32 Ie not necessary as mentioned in the Water Industry Act 1991 s 75(2) (see the text to notes 12-16) or (4) (see note 25).

33 Water Industry Act 1991 s 75(10)(a).

34 Water Industry Act 1991 s 75(10)(b).

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### **366. Power to make regulations for preventing waste, misuse or contamination.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may by regulations<sup>3</sup> make such provision as he or they consider appropriate for any of the following purposes:

- 773 (1) for securing that water in a water main<sup>4</sup> or other pipe<sup>5</sup> of a water undertaker is not contaminated, and that its quality and suitability for particular purposes is not prejudiced, by the return of any substance from any premises to that main or pipe<sup>6</sup>;
- 774 (2) for securing that water which is in any pipe connected<sup>7</sup> with any such main or other pipe or which has been supplied to any premises by a water undertaker or licensed water supplier is not contaminated, and that its quality and suitability for particular purposes is not prejudiced, before it is used<sup>8</sup>;
- 775 (3) for preventing the waste, undue consumption and misuse of any water at any time after it has left the pipes of a water undertaker for the purpose of being supplied by that undertaker or a licensed water supplier to any premises<sup>9</sup>; and
- 776 (4) for securing that water fittings<sup>10</sup> installed and used by persons<sup>11</sup> to whom water is, or is to be, supplied by a water undertaker or licensed water supplier are safe<sup>12</sup> and do not cause or contribute to the erroneous measurement of any water or the reverberation of any pipes<sup>13</sup>.

Without prejudice to the generality of this power to make regulations, such regulations may, for any of the above purposes, make provision in relation to any such water fittings as may be prescribed<sup>14</sup>:

- 777 (a) for forbidding the installation, connection or use of the fittings if they have not been approved under the regulations or if they contravene<sup>15</sup> the regulations<sup>16</sup>;
- 778 (b) for requiring the fittings, for the purposes of provision made by virtue of head (a) above, to be of such a size, nature, strength or workmanship, to be made of such materials or in such a manner or to conform to such standards as may be prescribed by or approved under the regulations<sup>17</sup>;
- 779 (c) for imposing such other requirements as may be prescribed with respect to the installation, arrangement, connection, testing, disconnection, alteration, and repair of the fittings and with respect to the materials used in their manufacture<sup>18</sup>;
- 780 (d) for the giving, refusal and revocation, by prescribed persons, of approvals required for the purposes of the regulations<sup>19</sup>; and
- 781 (e) for such approvals to be capable of being made subject to such conditions as may be prescribed and for the modification and revocation of any such condition<sup>20</sup>.

The regulations may also:

- 782 (i) impose separate or concurrent duties with respect to the enforcement of the regulations on water undertakers, local authorities<sup>21</sup> and such other persons as may be prescribed<sup>22</sup>;

- 783 (ii) confer powers on a water undertaker or local authority to carry out works and take other steps in prescribed circumstances for remedying any contravention of the regulations<sup>23</sup>, and provide for the recovery by a water undertaker or local authority of expenses reasonably incurred in the exercise of any such power<sup>24</sup>;
- 784 (iii) repeal or modify the statutory provisions relating to offences of contaminating, wasting and misusing water<sup>25</sup>, and the power<sup>26</sup> to prevent damage and to take steps to prevent contamination and waste<sup>27</sup>;
- 785 (iv) provide for a contravention of the regulations to constitute a summary offence<sup>28</sup>;
- 786 (v) require prescribed charges to be paid to persons carrying out functions<sup>29</sup> under the regulations<sup>30</sup>;
- 787 (vi) enable the Secretary of State or, as the case may be, the Welsh Ministers to authorise such relaxations of and departures from such of the requirements of the regulations as may be prescribed, to make any such authorisation subject to such conditions as may be prescribed and to modify or revoke any such authorisation or condition<sup>31</sup>; and enable the Secretary of State or the Welsh Ministers to authorise a water undertaker or local authority (either instead of, or concurrently with, the Secretary of State or the Welsh Ministers) to exercise any power so conferred on the Secretary of State or the Welsh Ministers<sup>32</sup>; and
- 788 (vii) require disputes arising under the regulations to be referred to arbitration and for determinations under the regulations to be subject to such rights of appeal as may be prescribed<sup>33</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 74, so far as exercisable in relation to any water undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water supplier), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'water undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. As to the regulations made see the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148; and PARA 367.

4 As to the meaning of 'water main' see PARA 138 note 11.

5 As to the meaning of 'pipe' see PARA 138 note 11. As to pipes which vest in a water undertaker see PARA 464. Generally this is a reference to the length of service pipe belonging to the water undertaker (sometimes known as the communication pipe).

6 Water Industry Act 1991 s 74(1)(a). As to waste and contamination see also PARAS 364-365.

7 For the conditions which may be imposed on a connection see PARA 337 (supply for domestic purposes) and PARA 347 (supply for other purposes). Such conditions may, and usually do, include a condition that the requirements as to waste prevention are met: see the Water Industry Act 1991 ss 47(2)(g), 55(4); and PARAS 337, 347.

8 Water Industry Act 1991 s 74(1)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 23(a)).

9 Water Industry Act 1991 s 74(1)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 23(b)).

10 As to the meaning of 'water fittings' see PARA 134 note 6.

11 As to the meaning of 'person' see PARA 13 note 29.

12 'Safe' in relation to any such fittings means that there is no risk, or no risk apart from one reduced to a minimum, that any of the following will, whether immediately or after a definite or indefinite period, cause the

death of, or any personal injury to, any person whatsoever, ie: (1) the fittings; (2) their keeping or use; (3) the assembly of any of them which are, or are to be, supplied unassembled; (4) any emission or leakage from the fittings or, as a result of their keeping or use, from anything else; or (5) reliance on the accuracy of any measurement, calculation or other reading made by or by means of the fittings; and references to their keeping or use are references to their keeping or use by the persons by whom, and in all or any of the ways or circumstances in which, they might reasonably be expected to be kept or used and their keeping or use either alone or in conjunction with other goods in conjunction with which they might reasonably be expected to be kept or used: see the Consumer Protection Act 1987 s 19(1), (2); definition applied by the Water Industry Act 1991 s 74(8).

13 Water Industry Act 1991 s 74(1)(d) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 23(c)).

14 'Prescribed' means prescribed by the regulations: see the Water Industry Act 1991 s 219(1).

15 As to the meaning of 'contravene' see PARA 20 note 5.

16 Water Industry Act 1991 s 74(2)(a).

17 Water Industry Act 1991 s 74(2)(b).

18 Water Industry Act 1991 s 74(2)(c).

19 Water Industry Act 1991 s 74(2)(d).

20 Water Industry Act 1991 s 74(2)(e).

21 As to the meaning of 'local authority' see PARA 118 note 17.

22 Water Industry Act 1991 s 74(3)(a).

23 Water Industry Act 1991 s 74(3)(b).

24 Water Industry Act 1991 s 74(3)(c).

25 Ie the provisions of the Water Industry Act 1991 s 73: see PARA 364.

26 Ie under the Water Industry Act 1991 s 75: see PARA 365.

27 Water Industry Act 1991 s 74(3)(d).

28 Water Industry Act 1991 s 74(3)(e). Such an offence is to be punishable on summary conviction by a fine not exceeding level 5 on the standard scale or such smaller sum as may be prescribed: see s 74(3)(e). As to the standard scale see PARA 141 note 18.

29 As to the meaning of 'functions' in relation to a water undertaker see PARA 133 note 5.

30 Water Industry Act 1991 s 74(3)(f).

31 Water Industry Act 1991 s 74(3)(g).

32 Water Industry Act 1991 s 74(3)(h).

33 Water Industry Act 1991 s 74(3)(i).

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### **367. Prescribed requirements for preventing waste, misuse or contamination.**

The Water Supply (Water Fittings) Regulations 1999<sup>1</sup> apply, subject to certain exceptions<sup>2</sup>, to any water fitting<sup>3</sup> installed or used, or to be installed or used, in premises to which water is or is to be supplied by a water undertaker<sup>4</sup> or licensed water supplier<sup>5</sup>. They do not, however, apply to a water fitting installed or used, or to be installed or used, in connection with water supplied for purposes other than domestic or food production purposes<sup>6</sup>, provided that:

- 789 (1) the water is metered<sup>7</sup>;
- 790 (2) the supply of the water is for a period not exceeding one month, or, with the written consent of the water undertaker whose supply system is used for the purposes of that supply, three months<sup>8</sup>; and
- 791 (3) no water can return through the meter to any pipe vested in a water undertaker or licensed water supplier<sup>9</sup>.

Nor, except for the purposes of prevention of cross connection to unwholesome water<sup>10</sup>, do they apply to water fittings which are not connected or to be connected to water supplied by a water undertaker or licensed water supplier<sup>11</sup>. Further, nothing in the regulations requires any person<sup>12</sup> to remove, replace, alter, disconnect or cease to use any water fitting which was lawfully installed or used, or capable of being used, before 1 July 1999<sup>13</sup>.

No person may install a water fitting to convey or receive water supplied by a water undertaker or licensed water supplier, or alter, disconnect or use such a water fitting, or cause or permit such a water fitting to be installed, altered, disconnected or used, in contravention<sup>14</sup> of the following provisions<sup>15</sup>. No water fitting must be installed, connected, arranged or used:

- 792 (a) in such a manner that it causes or is likely to cause waste, misuse, undue consumption or contamination of water supplied by a water undertaker or licensed water supplier, or the erroneous measurement of water supplied by a water undertaker or licensed water supplier<sup>16</sup>;
- 793 (b) which by reason of being damaged, worn or otherwise faulty, causes or is likely to cause waste, misuse, undue consumption or contamination of water supplied by a water undertaker or licensed water supplier, or the erroneous measurement of water supplied by a water undertaker or licensed water supplier<sup>17</sup>.

Every water fitting must be of an appropriate quality and standard<sup>18</sup>, and be suitable for the circumstances in which it is used<sup>19</sup>; and must be installed, connected, altered, repaired or disconnected in a workmanlike manner<sup>20</sup>.

Any person who proposes to install a water fitting in connection with any of the specified operations<sup>21</sup> must give notice to the water undertaker that he proposes to begin work<sup>22</sup>, must not begin that work without the consent of that undertaker (which must not be withheld unreasonably<sup>23</sup>), and must comply with any conditions to which the undertaker's consent is subject<sup>24</sup>.



Where a water fitting is installed, altered, connected or disconnected by an approved contractor, the contractor must upon completion of the work furnish a signed certificate stating whether the water fitting complies with the prescribed requirements<sup>25</sup> to the person who commissioned the work<sup>26</sup>. In the case of a fitting for which notice is required<sup>27</sup>, the contractor must send a copy of the certificate to the water undertaker<sup>28</sup>.

A person who:

- 794 (i) contravenes any of the specified provisions<sup>29</sup>;
- 795 (ii) commences a specified operation<sup>30</sup> without giving the required notice<sup>31</sup> or without the required consent<sup>32</sup>; or
- 796 (iii) carries out a specified operation<sup>33</sup> in breach of a condition imposed<sup>34</sup> in relation to it<sup>35</sup>,

is guilty of an offence<sup>36</sup>. In any proceedings against an owner<sup>37</sup> or occupier for such an offence which is based on the installation, alteration, repair, connection or disconnection of a water fitting, it is, however, a defence to prove that the work in question was carried out by or under the direction of an approved contractor and that the contractor certified to the person who commissioned that work that the water fitting complied with the requirements of the regulations<sup>38</sup>.

Any person designated in writing for the statutory purposes<sup>39</sup> may carry out such inspections, measurements and tests on premises entered by that person or on water fittings or other articles found on any such premises, and take away such samples of water or of any land<sup>40</sup>, and such water fittings and other articles, as that person may consider necessary for the purposes for which those premises were entered<sup>41</sup>.

A water undertaker must enforce these requirements in relation to the area for which it holds<sup>42</sup> an appointment<sup>43</sup>; and this duty is enforceable<sup>44</sup> by the regulator, or with the consent of or in accordance with a general authorisation given by the regulator, by the Water Services Regulation Authority<sup>45</sup>.

Any dispute between a water undertaker and a person who has installed or proposes to install a water fitting:

- 797 (A) as to whether the water undertaker has unreasonably withheld consent, or attached<sup>46</sup> unreasonable conditions<sup>47</sup>; or
- 798 (B) as to whether the water undertaker has unreasonably refused to apply to the regulator for a relaxation of the requirements of the regulations<sup>48</sup>,

must be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or, in default of agreement, by the regulator<sup>49</sup>.

1    I.e. the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148. The regulations revoke byelaws made under the Water Act 1945 s 17 (repealed with savings) previously having effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 Sch 2 para 3 and the Water Industry Act 1991 s 75(6): see the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 14, Sch 3.

2    I.e. subject to the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(2)-(4): see the text to notes 6-13.

3    As to the meaning of 'water fittings' see PARA 134 note 6.

4    As to the meaning of 'water undertaker' see PARA 137 note 4.

5    Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(1) (regs 2, 3 amended by SI 2005/2035). As to the meaning of 'licensed water supplier' see PARA 152.

6 As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44.

7 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(2)(a). As to metering see PARA 424 et seq.

8 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(2)(b) (as amended: see note 5). As to the meaning of 'month' see PARA 23 note 10.

9 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(2)(c) (as amended: see note 5).

10 le for the purposes of the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148 Sch 2 para 14.

11 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(3) (as amended: see note 5).

12 As to the meaning of 'person' see PARA 13 note 29.

13 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 2(4).

14 As to the meaning of 'contravention' see PARA 20 note 5.

15 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 3(1) (as amended: see note 5).

16 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 3(2) (as amended: see note 5).

17 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 3(3) (as amended: see note 5).

18 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 4(1)(a). For these purposes, a water fitting is of an appropriate quality or standard only if: (1) it bears an appropriate CE marking in accordance with EC Council Directive 89/106 (OJ L40, 11.02.89, p 12) on the approximation of laws, regulations and administrative provisions of the member states relating to construction products; (2) it conforms to an appropriate harmonised standard or European technical approval; (3) it conforms to an appropriate British Standard or some other national specification of an EEA state which provides an equivalent level of protection and performance; or (4) it conforms to a specification approved by the regulator: regs 1(2), 4(2). 'EEA state' means a state which is a contracting party to the EEA Agreement; and 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183): Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 1(2). 'Harmonised standard' means a standard established as mentioned in EC Council Directive 89/106 (OJ L40, 11.02.89, p 12) by the European Standards Organisation on the basis of a mandate given by the Commission of the European Community and published by the Commission in the Official Journal of the European Community: Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 1(2). 'European technical approval' means a favourable technical assessment of the fitness for use of a construction product for an intended use, issued for the purposes of EC Council Directive 89/106 (OJ L40, 11.02.89, p 12) by a body authorised by an EEA state to issue European technical approvals for those purposes and notified by that state to the European Commission: Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 1(2). As to the meaning of 'regulator' see PARA 364 note 16.

Every water fitting must comply with the prescribed requirements as they apply to that fitting: see reg 4(3). As to the prescribed requirements see Sch 2 (amended by SI 1999/1506; SI 2005/2035). Where any requirement of the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, Sch 2 relates to a water system, every water fitting which forms part of that system must be fitted or, as the case may be, altered or replaced so as to comply with that requirement: reg 4(4). Where a water undertaker considers that any requirement of Sch 2 would be inappropriate in relation to a particular case, the undertaker may apply to the regulator to authorise a relaxation of that requirement: reg 11(1). The water undertaker must give notice of any proposed relaxation in such manner and to such persons as the regulator may direct: reg 11(2). The regulator may grant the authorisation applied for with such modifications and subject to such conditions as he thinks fit (reg 11(3)), but may not grant such an authorisation before the expiration of one month from the giving of the notice, and must take into consideration any objection which may have been received by him (reg 11(4)). A water undertaker to whom an authorisation is so granted in a particular case may relax the requirements of Sch 2 in that case in accordance with the terms of that authorisation: reg 11(5). As to the meaning of 'notice' see PARA 22 note 1.

Before approving a specification under reg 4 or under Sch 2, the regulator must consult: (a) every water undertaker; (b) every licensed water supplier; (c) such trade associations as he considers appropriate; and (d) such organisations appearing to him to be concerned with the interests of water users as he considers appropriate: reg 12(1) (amended by SI 2005/2035). Where the regulator approves such a specification, he must give notice of the approval to all persons who were so consulted and must publish it in such manner as he considers appropriate: Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 12(2). Regulation 12 applies to the revocation or modification of an approval as it applies to the giving of that approval: reg 12(4). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

19 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 4(1)(b).

20 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 4(5). For these purposes, a water fitting is installed, connected, altered, repaired or disconnected in a workmanlike manner only if the work is carried out so as to conform: (1) to an appropriate British Standard, a European technical approval or some other national specification of an EEA state which provides an equivalent level of protection and performance; (2) to a specification approved by the regulator; or (3) to a method of installation approved by the water undertaker: reg 4(6). Where the water undertaker approves a method of installation under reg 4, the undertaker must give notice of the approval to the regulator and must publish it in such manner as the undertaker considers appropriate: reg 12(3). Regulation 12 applies to the revocation or modification of an approval as it applies to the giving of that approval: reg 12(4). As to the approval of a specification by the regulator see note 18.

21 The specified operations are: (1) the erection of a building or other structure, not being a pond or swimming pool; (2) the extension or alteration of a water system on any premises other than a house; (3) a material change of use of any premises; (4) the installation of (a) a bath having a capacity, as measured to the centre line of overflow, of more than 230 litres; (b) a bidet with an ascending spray or flexible hose; (c) a single shower unit (which may consist of one or more shower heads within a single unit), not being a drench shower installed for reasons of safety or health, connected directly or indirectly to a supply pipe which is of a type specified by the regulator; (d) a pump or booster drawing more than 12 litres per minute, connected directly or indirectly to a supply pipe; (e) a unit which incorporates reverse osmosis; (f) a water treatment unit which produces a waste water discharge or which requires the use of water for regeneration or cleaning; (g) a reduced pressure zone valve assembly or other mechanical device for protection against a fluid which is in fluid category 4 or 5; (h) a garden watering system unless designed to be operated by hand; or (i) any water system laid outside a building and either less than 750mm or more than 1350mm below ground level; (5) the construction of a pond or swimming pool with a capacity greater than 10,000 litres which is designed to be replenished by automatic means and is to be filled with water supplied by a water undertaker or licensed water supplier: reg 5(1), Table (amended by SI 2005/2035). As to the meaning of 'house' see PARA 133 note 5. The Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1) does not apply to the installation by an approved contractor of a water fitting falling within Table paras 2, 4(b) or 4(g) (see heads (2), (4)(b), (g) above): reg 5(2). As to the meaning of 'approved contractor' see PARA 364 note 16.

'Fluid category' means a category of fluid described in the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, Sch 1: reg 1(2). 'Material change of use' means a change in the purpose for which, or the circumstances in which, premises are used, such that after that change the premises are used (where previously they were not so used) (i) as a dwelling; (ii) as an institution; (iii) as a public building; or (iv) for the purposes of the storage or use of substances which if mixed with water result in a fluid which is classified as either fluid category 4 or 5: reg 1(2). 'Supply pipe' means so much of any service pipe as is not vested in the water undertaker: reg 1(2). As to the meaning of 'service pipe' see PARA 179 note 8. 'Substance' includes micro-organisms and any natural or artificial substance or other matter, whether it is in solid or liquid form or in the form of a gas or vapour: Water Industry Act 1991 s 219(1); Interpretation Act 1978 s 11. The definition of 'substance' is the same in the Water Resources Act 1991: see s 221(1).

22 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1)(a). The notice must include or be accompanied by: (1) the name and address of the person giving the notice, and (if different) the name and address of the person on whom notice may be served under reg 5(4) (see note 23); (2) a description of the proposed work or material change of use; and (3) particulars of the location of the premises to which the proposal relates, and the use or intended use of those premises; (4) except in the case of a fitting falling within reg 5(1), Table para 4(a), (c), (h) or Table para 5 (see note 21 heads (4)(a), (c), (h), (5)), a plan of those parts of the premises to which the proposal relates, and a diagram showing the pipework and fitting to be installed; and (5) where the work is to be carried out by an approved contractor, the name of the contractor: reg 5(3) (amended by SI 1999/1506).

23 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1)(b). The water undertaker may withhold consent so required, or grant it subject to conditions, by a notice given before the expiry of the period of ten working days commencing with the day on which notice under reg 5(1) was given: reg 5(4). If no notice is given by the water undertaker within that period, the consent so required is deemed to have been granted unconditionally: reg 5(5).

24 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1)(c).

25 It complies with the requirements of the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148.

26 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 6(1).

27 It is under the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1): see the text to notes 21-24.

- 28 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 6(2) (amended by SI 1999/1506).
- 29 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 7(1)(a). The specified provisions are those of reg 3(1), (2) or (3) (see the text to notes 14-17) or reg 6(1) or (2) (see the text to notes 25-28).
- 30 Is an operation listed in the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1) Table: see note 21.
- 31 Is the notice required by the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5: see the text to note 22.
- 32 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 7(1)(b). The required consent is that required by reg 5: see the text to notes 23-24.
- 33 Is an operation listed in the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(1) Table: see note 21.
- 34 Is under the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5(4): see note 23.
- 35 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 7(1)(c).
- 36 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 7(1). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see reg 7(1). As to the standard scale see PARA 141 note 18.
- 37 As to the meaning of 'owner' see PARA 22 note 9.
- 38 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 7(2).
- 39 Is designated for the purposes of the Water Industry Act 1991 s 74(4) (see PARA 368) or s 170(3) (see PARA 480) by a water undertaker, or for the purposes of s 84(2) (see PARA 408) by any local authority: Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 9(a), (b). As to the meaning of 'local authority' see PARA 118 note 17. As to the meaning of 'writing' see PARA 22 note 1.
- 40 As to the meaning of 'land' see PARA 14 note 21.
- 41 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 9.
- 42 Is under the Water Industry Act 1991 Pt II (ss 6-36): see PARA 137 et seq.
- 43 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 10(1) (amended by SI 1999/1506).
- 44 Is under the Water Industry Act 1991 s 18: see PARA 163.
- 45 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 10(2) (amended by SI 2005/2035). As to the Water Services Regulation Authority see PARA 109.
- 46 Is under the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5: see the text to notes 23-24.
- 47 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 13(a).
- 48 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 13(b).
- 49 Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 13. The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

## UPDATE

### 367 Prescribed requirements for preventing waste, misuse or contamination

TEXT AND NOTE 16--'Likely' in SI 1999/1148 reg 3(2) means a real possibility, a possibility which cannot sensibly be ignored having regard to the nature and gravity of the feared harm to public health: *Wallis v Bristol Water plc* [2009] All ER (D) 96 (Dec), DC.



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### **368. Powers of entry with respect to water fittings and waste or misuse of water.**

Without prejudice to certain other statutory provisions<sup>1</sup>, any person<sup>2</sup> designated in writing<sup>3</sup> for the purposes mentioned below in such manner as may be prescribed<sup>4</sup> may:

- 799 (1) enter any premises for the purpose of:
- 69
83. (a) ascertaining whether any provision contained in or made or having effect under the Water Industry Act 1991 with respect to any water fittings<sup>5</sup> or with respect to the waste or misuse of water is being or has been contravened<sup>6</sup>;
84. (b) determining whether, and if so in what manner, any power or duty conferred or imposed on any person by regulations<sup>7</sup> should be exercised or performed<sup>8</sup>; or
85. (c) exercising any such power or performing any such duty<sup>9</sup>; or
- 70
- 800 (2) carry out such inspections, measurements and tests on premises entered by that person or on water fittings or other articles found on any such premises, and take away such samples of water or of any land and such water fittings and other articles, as that person has been authorised<sup>10</sup> to carry out or take away<sup>11</sup>.

1 le without prejudice to the Water Industry Act 1991 s 84 (see PARA 408) and s 170 (see PARA 480).

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see Water Industry Act 1991 ss 74(1), 219(1). As to the provision made see the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 9; and PARA 367.

5 As to the meaning of 'water fittings' see PARA 134 note 6.

6 Water Industry Act 1991 s 74(4)(a)(i). As to the meaning of 'contravene' see PARA 20 note 5.

7 le regulations under the Water Industry Act 1991 s 74: see PARAS 366-367.

8 Water Industry Act 1991 s 74(4)(a)(ii).

9 Water Industry Act 1991 s 74(4)(a)(iii).

10 le in accordance with regulations under the Water Industry Act 1991 s 74: see PARA 366. As to such provision see the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148 reg 9; and PARA 367.

11 Water Industry Act 1991 s 74(4)(b). Schedule 6 Pt II (paras 6-13) (see PARAS 482-485) applies to the rights and powers conferred by s 74(4): s 74(5).

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### 369. Contamination of water sources.

A person<sup>1</sup> is guilty of an offence<sup>2</sup> if he is guilty of any act or neglect<sup>3</sup> by which the water in any waterworks<sup>4</sup> which is used, or likely to be used, for human consumption or domestic purposes<sup>5</sup>, or for manufacturing food or drink for human consumption<sup>6</sup>, is polluted or likely to be polluted<sup>7</sup>. Nothing in this provision is, however, to be construed as restricting or prohibiting: (1) any method of cultivation of land<sup>8</sup> which is in accordance with the principles of good husbandry<sup>9</sup>; or (2) the reasonable use of oil or tar on any highway maintainable at the public expense<sup>10</sup>, so long as the highway authority<sup>11</sup> takes all reasonable steps for preventing the oil or tar, or any liquid or matter resulting from its use, from polluting the water in any such waterworks<sup>12</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 A person who is guilty of such an offence is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to a further fine not exceeding £50 for every day during which the offence is continued after conviction (Water Industry Act 1991 s 72(4)(a)); (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both (s 72(4)(b)). As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

3 As to what may be construed as neglect see generally **NEGLIGENCE**; and as to escapes of substances see **NUISANCE** vol 78 (2010) PARAS 141, 150.

4 'Waterworks' includes any spring, well, adit, borehole, service reservoir or tank; and any main or other pipe or conduit of a water undertaker; and any pipe or conduit of a licensed water supplier: Water Industry Act 1991 s 72(5) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 21). As to the meaning of 'pipe' see PARA 138 note 11. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

5 Water Industry Act 1991 s 72(1)(a). As to the meaning of 'domestic purposes' see PARA 334.

6 Water Industry Act 1991 s 72(1)(b).

7 Water Industry Act 1991 s 72(1). As to the right of entry of persons authorised by water undertakers to enforce this provision see s 170; and PARA 480. Section 72 may not be modified under the powers to modify provisions of the Water Industry Act 1991 so as to give effect to international obligations: see s 92(2); and PARA 317.

8 As to the meaning of 'land' see PARA 14 note 21.

9 Water Industry Act 1991 s 72(2). As to the rules of good husbandry see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 903.

10 As to the meaning of 'highway' see PARA 350 note 8. As to highways maintainable at the public expense see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 248.

11 As to the meaning of 'highway authority' see PARA 350 note 3.

12 Water Industry Act 1991 s 72(3).

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### 370. Waste from water sources.

A person<sup>1</sup> is guilty of an offence<sup>2</sup> if: (1) he causes or allows any underground water to run to waste from any well, borehole or other work<sup>3</sup>; or (2) he abstracts from any well, borehole or other work water in excess of his reasonable requirements<sup>4</sup>. However, where underground water interferes, or threatens to interfere, with the carrying out or operation of any underground works, whether waterworks or not, it is not an offence under these provisions to cause or allow the water to run to waste so far as may be necessary for enabling the works to be carried out or operated, if no other method of disposing of the water is reasonably practicable<sup>5</sup>. Also, a person is not guilty of an offence by virtue of head (1) above in respect of anything done for the purpose of testing the extent or quality of the supply<sup>6</sup>, or of cleaning, sterilising, examining or repairing the well, borehole or other work in question<sup>7</sup>.

On the conviction of a person under these provisions, the court may order that the well, borehole or other work to which the offence relates is to be effectively sealed<sup>8</sup>, or may make such other order as appears to the court to be necessary to prevent waste of water<sup>9</sup>. If any person fails to comply with such an order, then, without prejudice to any penalty for contempt of court<sup>10</sup>, the court may, on the application of the Environment Agency<sup>11</sup>, authorise the Agency to take such steps as may be necessary to execute the order<sup>12</sup>.

Any person designated for the purpose by the Environment Agency has, on producing some duly authenticated document showing his authority, a right at all reasonable times: (a) to enter any premises for the purpose of ascertaining whether there is, or has been, any contravention<sup>13</sup> of these provisions on or in connection with the premises<sup>14</sup>; (b) to enter any premises for the purpose of executing any order of the court under these provisions which the Agency has been authorised to execute in those premises<sup>15</sup>.

Apart from the operation of the controls on the abstraction and impounding of water<sup>16</sup> and of other provisions for the protection of water resources<sup>17</sup>, express provision for the protection of wells is sometimes found in local Acts<sup>18</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 A person who is guilty of an offence under the Water Industry Act 1991 s 71 is liable, on summary conviction, to a fine not exceeding level 3 on the standard scale: s 71(4). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

3 Water Industry Act 1991 s 71(1)(a).

4 Water Industry Act 1991 s 71(1)(b).

5 Water Industry Act 1991 s 71(3).

6 Water Industry Act 1991 s 71(2)(a).

7 Water Industry Act 1991 s 71(2)(b).

8 Water Industry Act 1991 s 71(5)(a).

9 Water Industry Act 1991 s 71(5)(b).

10 As to contempt of court see **CONTEMPT OF COURT**.



11 As to the Environment Agency see PARA 17.

12 Water Industry Act 1991 s 71(6) (amended by the Environment Act 1995 s 120(1), Sch 22 para 101(1)). Any expenses incurred in taking any such steps are recoverable summarily as a civil debt from the person convicted: Water Industry Act 1991 s 71(6). As to the summary recovery of civil debts see **MAGISTRATES** vol 29(2) (Reissue) PARA 826.

13 As to the meaning of 'contravention' see PARA 20 note 5.

14 Water Industry Act 1991 s 71(7)(a). The Water Industry Act 1991 Sch 6 Pt I (paras 1-5) (see PARAS 482-484) applies to the rights of entry under s 71(7): see s 71(8).

15 Water Industry Act 1991 s 71(7)(b) (amended by the Environment Act 1995 Sch 22 para 101(2)). See also note 14.

16 Ie the provisions of the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq.

17 Ie the provisions of the Water Resources Act 1991 Pt III (ss 82-104): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 289 et seq.

18 See eg the Staffordshire Potteries Water Board Act 1937 s 16. These provisions may limit the amount of abstraction from an underground source, and sometimes provide that where an owner of a well within a certain distance (often about 2 miles) from a water undertaker's well proves that the amount of water obtainable from his well has been affected by the undertaker's pumping, the undertaker must give a supply of water to make good the diminution, or alternatively deepen the owner's well or compensate him in money: see eg the Warrington Corporation Water Act 1938 s 25(2), (5). Such provisions may also protect the undertaker's wells or resources either by preventing the water being pumped from the area in the vicinity of the wells, or by restricting the rights of landowners within a certain distance from the undertaker's wells to sink or enlarge new wells or to install septic tanks: see eg s 28 (repealed). These powers are not normally now granted, being supplanted by the licensing powers in the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq. As to local legislation see generally PARA 14.

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## **B. WATER QUALITY**

### **(A) IN GENERAL**

#### **371. European Community legislation.**

The Drinking Water Directive<sup>1</sup> is concerned with the quality of water intended for human consumption<sup>2</sup>, with the objective of protecting human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean<sup>3</sup>. The Directive does not apply to natural mineral waters<sup>4</sup> or waters which are medicinal products<sup>5</sup>, and member states may provide for other exemptions<sup>6</sup>. Without prejudice to their obligations under other Community provisions, member states must take the measures necessary to ensure that water intended for human consumption is wholesome and clean. For the purposes of the minimum requirements of the Drinking Water Directive, water intended for human consumption is wholesome and clean if it:

801 (1) is free from any micro-organisms and parasites and from any substances which, in numbers or concentrations, constitute a potential danger to human health; and

802 (2) meets the minimum requirements set out in Parts A and B of Annex I to the Directive;

and if member states take all other measures<sup>7</sup> necessary to ensure that water intended for human consumption complies with the requirements of the Directive<sup>8</sup>. Member states must ensure that the measures taken to implement the Directive in no circumstances have the effect of allowing, directly or indirectly, either any deterioration of the present quality of water intended for human consumption so far as that is relevant for the protection of human health, or any increase in the pollution of waters used for the production of drinking water<sup>9</sup>.

Regulations have been made for the purpose of implementing the Drinking Water Directive and these are discussed below<sup>10</sup>.

The Water Framework Directive<sup>11</sup> requires member states to identify and monitor bodies of water which are used for the abstraction of drinking water; to ensure that after treatment the resulting water will meet the requirements of the Drinking Water Directive; and to ensure the necessary protection for the bodies of water identified with the aim of avoiding deterioration in their quality in order to reduce the level of purification treatment required in the production of drinking water<sup>12</sup>.

1 le EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) on the quality of water intended for human consumption.

2 EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 1(1). 'Water intended for human consumption' means: (1) all water either in its original state or after treatment, intended for drinking, cooking, food preparation or other domestic purposes, regardless of its origin and whether it is supplied from a distribution network, from a tanker, or in bottles or containers; (2) all water used in any food-production undertaking for the manufacture, processing, preservation or marketing of products or substances intended for human consumption

unless the competent national authorities are satisfied that the quality of the water cannot affect the wholesomeness of the foodstuff in its finished form: see art 2(1).

3 See EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 1(2).

4 Such waters are regulated by EC Council Directive 80/777 (OJ L229, 30.8.80, p 1) on the approximation of the laws of the member states relating to the exploitation and marketing of natural mineral waters. See further PARA 447.

5 See EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 3(1).

6 See EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 3(2), (3).

7 In accordance with the relevant provisions of EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) arts 5-8 and 10 and in accordance with the EC Treaty. EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 5 is concerned with quality standards and the setting of values for specified parameters; art 6 is concerned with the point of compliance; art 7 is concerned with monitoring; art 8 is concerned with remedial action and restrictions in use; and art 10 is concerned with quality assurance of treatment, equipment and materials. As to possible derogations see art 9.

8 See EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 4(1).

9 See EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 4(2).

10 See PARA 376 et seq.

11 In European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01). See further PARA 7.

12 See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 7. See further PARA 198 et seq.

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### **372. The Drinking Water Inspectorate.**

The Drinking Water Inspectorate<sup>1</sup> consists of persons appointed by the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup>, to act on his or their behalf in relation to some or all of:

- 803 (1) the powers and duties conferred or imposed on him or them in respect of the wholesomeness of water supplies<sup>4</sup>, the offence of supplying water unfit for human consumption<sup>5</sup>, local authority functions in relation to water supplies and quality<sup>6</sup> and private supplies<sup>7</sup>; and
- 804 (2) such other powers and duties in relation to the quality and sufficiency of water supplied using a water undertaker's supply system<sup>8</sup> as are conferred or imposed on him or them by or under any other enactments<sup>9</sup>.

The inspectorate must carry out such investigations and make such reports as the Secretary of State or, as the case may be, the Welsh Ministers may require it to carry out for the purpose of: (a) ascertaining whether any duty or other requirement as to water quality imposed on that undertaker or a licensed water supplier<sup>10</sup> or imposed on a relevant person<sup>11</sup> is being, has been or is likely to be contravened<sup>12</sup>; or (b) advising the Secretary of State or the Welsh Ministers as to whether, and if so in what manner, any of the powers of the Secretary of State or the Welsh Ministers in relation to such a contravention, or any of the powers which are conferred on him or them by or under the specified statutory provisions relating to water quality<sup>13</sup> (including the powers to make regulations) should be exercised<sup>14</sup>.

A water undertaker, licensed water supplier or other relevant person must give the inspectorate all such assistance, and provide all such information, as it may reasonably require for the purpose of carrying out any investigations<sup>15</sup>; and a failure to do so is an offence<sup>16</sup>. The inspectorate has powers to enter premises, to carry out inspections, measurements and tests, to take samples, and to require the supply of records<sup>17</sup>.

1 As to the Drinking Water Inspectorate see PARA 126. Information as to the Inspectorate and its work is available on the Inspectorate's website at [www.dwi.gov.uk](http://www.dwi.gov.uk).

2 As to the Secretary of State see PARA 15 note 1.

3 As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4 I.e. the powers and duties conferred or imposed under the Water Industry Act 1991 ss 67-69; see PARAS 373-375.

5 I.e. the powers and duties conferred or imposed under the Water Industry Act 1991 s 70; see PARA 388.

6 I.e. the powers and duties conferred or imposed under the Water Industry Act 1991 ss 77-79; see PARAS 395-397.

7 See the Water Industry Act 1991 s 86(1)(a); and PARA 126. The powers and duties in respect of local authorities functions in relation to private supplies referred to are those conferred or imposed under ss 80-82: see PARAS 404-406.

8 As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

9 See the Water Industry Act 1991 s 86(1)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (2)); and PARA 126. As to the meaning of 'enactment' see PARA 14 note 31.

10 le by or under any of the Water Industry Act 1991 ss 68, 69 (see PARAS 374-375) and s 79 (see PARA 397). As to the meaning of 'licensed water supplier' see PARA 152.

11 le by or under the Water Industry Act 1991 s 70: see PARA 388. As to the meaning of 'relevant person' see PARA 388 note 3.

12 See the Water Industry Act 1991 s 86(2)(a)(i), (b) (s 86(2)(a)(i) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (3)); and PARA 126. As to the meaning of 'contravene' see PARA 20 note 5.

13 le by or under the Water Industry Act 1991 ss 67-69 (see PARAS 373-375), s 70 (see PARA 388), ss 77-79 (see PARAS 395-397), ss 80-82 (see PARAS 404-406).

14 See the Water Industry Act 1991 s 86(2)(a)(ii), (b); and PARA 126. The Drinking Water Inspectorate may recommend to the Secretary of State or the Welsh Ministers that a prosecution be brought for an alleged offence under s 70 (see PARA 388). The Inspectorate's prosecution policy is available on the Inspectorate's website at [www.dwi.gov.uk](http://www.dwi.gov.uk).

15 See the Water Industry Act 1991 s 86(3) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (4)); and PARA 126.

16 See the Water Industry Act 1991 s 86(6) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 27(1), (6)); and PARA 126.

17 See the Water Industry Act 1991 s 86(4); and PARA 126.

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### **373. Standards of wholesomeness.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may by regulations<sup>3</sup> make provision that water supplied to any premises is, or is not, to be regarded as wholesome<sup>4</sup> for the purposes of the statutory provisions relating to quality and sufficiency of supplies<sup>5</sup> if it satisfies or, as the case may be, fails to satisfy such requirements as may be prescribed by the regulations<sup>6</sup>. Such regulations may, for the purpose of determining the wholesomeness of any water:

- 805 (1) prescribe general requirements as to the purposes for which the water is to be suitable<sup>7</sup>;
- 806 (2) prescribe specific requirements as to the substances<sup>8</sup> that are to be present in or absent from the water and as to the concentrations of substances which are, or are required to be, present in the water<sup>9</sup>;
- 807 (3) prescribe specific requirements as to other characteristics of the water<sup>10</sup>;
- 808 (4) provide that the question whether prescribed requirements are satisfied may be determined by reference to such samples as may be prescribed<sup>11</sup>;
- 809 (5) enable the Secretary of State or the Welsh Ministers to authorise such relaxations of and departures from the prescribed requirements, or from any of them, as may be prescribed, to make any such authorisation subject to such conditions as may be prescribed and to modify<sup>12</sup> or revoke any such authorisation or condition<sup>13</sup>; and
- 810 (6) enable the Secretary of State or the Welsh Ministers to authorise a local authority<sup>14</sup>, either instead of or concurrently with the Secretary of State or the Welsh Ministers, to exercise in relation to a private supply<sup>15</sup> any power conferred on the Secretary of State or Welsh Ministers by regulations made by virtue of head (5) above<sup>16</sup>.

Such regulations may impose more stringent requirements than those required under the Drinking Water Directive<sup>17</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 67 were transferred to the National Assembly for Wales as follows: (1) for the making of regulations concerning water supplied using the supply system of a water undertaker, the function was transferred in relation to the supply system of any water undertaker whose area is wholly or mainly in Wales; (2) for the making of regulations concerning water supplied other than using the supply system of a water undertaker, the function was transferred in relation to Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003, s 100(2)(e)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'water undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. The following regulations have been made: the Private Water Supplies Regulations 1991, SI 1991/2790 (see PARAS 377, 379, 407); and the Water Supply (Water Quality)

Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911 (see PARAS 376, 378, 380-387, 389-390).

4 'Wholesome' and cognate expressions are to be construed subject to the provisions of any regulations made under the Water Industry Act 1991 s 67: s 93(1).

5 le for the purposes of the Water Industry Act 1991 Pt III Ch III (ss 67-86A).

6 Water Industry Act 1991 ss 67(1), 219(1).

7 Water Industry Act 1991 s 67(2)(a).

8 As to the meaning of 'substance' see PARA 367 note 21.

9 Water Industry Act 1991 s 67(2)(b). As to fluoridation of supplies see PARA 410 et seq.

10 Water Industry Act 1991 s 67(2)(c).

11 Water Industry Act 1991 s 67(2)(d).

12 As to the meaning of 'modify' see PARA 141 note 20.

13 Water Industry Act 1991 s 67(2)(e).

14 As to the meaning of 'local authority' see PARA 118 note 17.

15 'Private supply' means, subject to the Water Industry Act 1991 s 93(2) below, a supply of water provided otherwise than by a water undertaker or by a licensed water supplier in accordance with Pt II Ch 1A (ss 17A-17R: see PARA 152 et seq) (including a supply provided for the purposes of the bottling of water), and cognate expressions must be construed accordingly: s 93(1) (definition amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 28). For the purposes of any reference to a private supply, or to supplying water by means of a private supply, water must be treated as supplied to any premises not only where it is supplied from outside those premises, but also where it is abstracted, for the purpose of being used or consumed on those premises, from a source which is situated on the premises themselves; and for these purposes water must be treated as used on any premises where it is bottled on those premises for use or consumption elsewhere: Water Industry Act 1991 s 93(2). As to the sale and supply of bottled water see further PARA 447 et seq. As to the meaning of 'licensed water supplier' see PARA 152.

16 Water Industry Act 1991 s 67(2)(f).

17 The Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, are made for the purpose of implementing, in England and Wales respectively, the objective set out in EC Council Directive 98/83 (OJ L 330, 05.12.98, p 32) (the Drinking Water Directive) art 1(2) (see PARA 371), namely, to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean. As to the litigation concerning an alleged failure to implement the former 'Drinking Water Directive' (ie EC Council Directive 80/778 (OJ L229, 30.08.80, p 11) (repealed)) see *R v Secretary of State for the Environment, ex p Friends of the Earth* [1996] 1 CMLR 117, CA. As to the general principle that domestic legislation may impose obligations more stringent than the minimum obligations sought to be imposed by a Directive see PARA 8. See also Case C-2/97 *Società Italiana Petroli SpA (IP) v Borsana Srl* [1998] ECR I-8597, ECJ; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 340.

## UPDATE

### 373 Standards of wholesomeness

NOTES--The Water Industry Act 1991 s 67 and such regulations as have been made under s 67 apply for the purposes of the Building Regulations 2000, SI 2000/2531, Sch 1 Pt G (see **BUILDING** vol 4(2) (2002 Reissue) PARA 308) as they apply for the purposes of the Water Industry Act 1991 Pt 3 (ss 67-87A): SI 2000/2531 reg 2(2C) (added by SI 2009/1219; SI 2009/2465).

NOTE 3--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, 2010/1384).





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### **374. Duties of water undertakers and licensed water suppliers with respect to water quality.**

It is the duty of a water undertaker<sup>1</sup>, where its supply system<sup>2</sup> is used for the purpose of supplying water to any premises for domestic or food production purposes<sup>3</sup>:

811 (1) to ensure that any water so supplied is wholesome<sup>4</sup> at the time of supply<sup>5</sup>; and

812 (2) so far as reasonably practicable, to ensure, in relation to each source or combination of sources from which water is so supplied, that there is, in general, no deterioration in the quality of the water which is supplied from time to time from that source or combination of sources<sup>6</sup>;

and these provisions<sup>7</sup> and the provisions relating to the making of regulations for preserving water quality<sup>8</sup> apply, in relation to the duty of an undertaker, whether or not the water supplied using the undertaker's supply system is supplied by the undertaker<sup>9</sup>.

It is the duty of a licensed water supplier<sup>10</sup>:

813 (a) when supplying water to any premises for domestic or food production purposes, in accordance with its retail authorisation<sup>11</sup>, to ensure that the water is wholesome at the time of supply<sup>12</sup>; and

814 (b) so far as reasonably practicable, to ensure, in relation to each source or combination of sources from which that supplier supplies water to premises for domestic or food production purposes, in accordance with its retail authorisation, that there is, in general, no deterioration in the quality of the water which is supplied from time to time from that source or combination of sources<sup>13</sup>.

These provisions apply in relation to water which is supplied by a water undertaker whether or not the water is water which the undertaker is required to supply by virtue of any provision of the Water Industry Act 1991<sup>14</sup>. The duties of a water undertaker and licensed water supplier under these provisions are enforceable<sup>15</sup> by the Secretary of State<sup>16</sup> or, in relation to Wales, by the Welsh Ministers<sup>17</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

3 Water Industry Act 1991 s 68(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (2)(a)). As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44.

4 As to the meaning of 'wholesome' see PARA 373 note 4.

5 Water Industry Act 1991 s 68(1)(a) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (2)(b)). For these purposes and the purposes of the Water Industry Act 1991 s 69 (see PARA 375) and subject to s 68(3), where a water undertaker's supply system is used for the purpose of supplying water to any premises,

any water so supplied to any premises must not be regarded as unwholesome at the time of supply where it has ceased to be wholesome only after leaving the undertaker's pipes: s 68(2) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (4)). For the purposes of the Water Industry Act 1991 s 68(1), however, where a water undertaker's supply system is used for the purpose of supplying water to any premises, and the water so supplied would not otherwise be regarded as unwholesome at the time of supply, that water must be regarded as unwholesome at that time if: (1) it has ceased to be wholesome after leaving the undertaker's pipes but while in a pipe which is subject to water pressure from a water main or which would be so subject but for the closing of some valve; and (2) it has so ceased in consequence of the failure of the undertaker, before the water is supplied, to ensure that such steps are taken as may be prescribed for the purpose of securing the elimination, or reduction to a minimum, of any prescribed risk that the water would cease to be wholesome after leaving the undertaker's pipes: s 68(3) (amended by the Water Act 2003 s 101(1), Sch 8, paras 2, 18(1), (5)). As to the meanings of 'pipe' and 'water main' see PARA 138 note 11. As to vesting of pipes in the undertaker see PARA 464. 'Prescribed' means prescribed by regulations: see Water Industry Act 1991 s 219(1). As to the power to make regulations for the purpose of securing compliance with s 68, see s 69; and PARA 375.

6 Water Industry Act 1991 s 68(1)(b) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (2)(c)).

7 le the Water Industry Act 1991 s 68.

8 le the Water Industry Act 1991 s 69: see PARA 375.

9 Water Industry Act 1991 s 68(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (2)(d)). As to the offence of supplying water unfit for human consumption see the Water Industry Act 1991 s 70; and PARA 388.

10 As to the meaning of 'licensed water supplier' see PARA 152.

11 As to the meaning of 'retail authorisation' see PARA 152; definition applied by the Water Industry Act 1991 s 68(1A) (s 68(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (3)).

12 Water Industry Act 1991 s 68(1A)(a) (as added: see note 11). For these purposes, where water supplied by a licensed water supplier to any premises would not otherwise be regarded as unwholesome at the time of supply, that water must be regarded as unwholesome at that time if: (1) it has ceased to be wholesome after leaving the relevant pipes but while in a pipe which is subject to water pressure from a water main or which would be so subject but for the closing of some valve; and (2) it has so ceased in consequence of the failure of the supplier, before supplying the water, to ensure that such steps are taken as may be prescribed for the purpose of securing the elimination, or reduction to a minimum, of any prescribed risk that the water would cease to be wholesome after leaving the relevant pipes: s 68(3A) (s 68(3A), (3B) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (6)). In the Water Industry Act 1991 s 68(3A), 'relevant pipes' means the pipes of the water undertaker whose supply system is used for the purpose of the supply made by the licensed water supplier: s 68(3B) (as so added).

13 Water Industry Act 1991 s 68(1A)(b) (as added: see note 11).

14 Water Industry Act 1991 s 68(4).

15 le under the Water Industry Act 1991 s 18: see PARA 163.

16 As to the Secretary of State see PARA 15 note 1.

17 Water Industry Act 1991 s 68(5) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 18(1), (7)). The functions of the Secretary of State under the Water Industry Act 1991 s 68 were transferred to the National Assembly for Wales in relation to (1) any water undertaker whose area is wholly or mainly in Wales; and (2) any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003, s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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### **375. Power to make regulations for preserving water quality.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may by regulations<sup>3</sup> require a water undertaker or a licensed water supplier to ensure that such steps are taken as may be prescribed<sup>4</sup> for the purpose of securing compliance with their duties<sup>5</sup> as to water quality<sup>6</sup>. Such regulations may impose an obligation on a water undertaker or licensed water supplier:

- 815 (1) to ensure that all such steps are taken as may be prescribed for monitoring and recording whether the water used for relevant supplies<sup>7</sup> to premises for domestic or food production purposes<sup>8</sup> is wholesome at the time of supply<sup>9</sup>;
- 816 (2) to ensure that all such steps are taken as may be prescribed for monitoring and recording the quality of the water from any source, or combination of sources, which is used or is proposed to be used for making relevant supplies to any premises for domestic or food production purposes<sup>10</sup>;
- 817 (3) to ensure that a source which is used or proposed to be used for making relevant supplies for domestic or food production purposes is not so used until prescribed requirements for establishing the quality of water which may be supplied from that source have been complied with<sup>11</sup>;
- 818 (4) to ensure that records<sup>12</sup> are kept of the localities within which all the premises receiving relevant supplies for domestic or food production purposes are normally supplied from the same source or combination of sources<sup>13</sup>;
- 819 (5) to ensure that prescribed requirements are complied with with respect to the analysis<sup>14</sup> of water samples or with respect to internal reporting or organisational arrangements<sup>15</sup>.

The Secretary of State or, where appropriate, the Welsh Ministers may by regulations make provision imposing obligations on water undertakers or licensed water suppliers with respect to the use for the purposes of or in connection with making relevant supplies of such processes and substances<sup>16</sup>, and of products that contain or are made with such substances or materials, as the Secretary of State or the Welsh Ministers consider might affect the quality of any water<sup>17</sup>. Such regulations may:

- 820 (a) require water undertakers or licensed water suppliers to ensure that processes, substances and products which have not been approved under the regulations or which contravene<sup>18</sup> the regulations are not used for the purposes of or in connection with relevant supplies<sup>19</sup>;
- 821 (b) for the purposes of provision made by virtue of head (a) above, require water undertakers and licensed water suppliers to ensure that processes, substances and products used for the purposes of or in connection with relevant supplies conform to such standards as may be prescribed by or approved under the regulations<sup>20</sup>;
- 822 (c) impose such other requirements as may be prescribed with respect to the use for the purposes of or in connection with relevant supplies of prescribed processes, substances and products<sup>21</sup>;
- 823 (d) provide for the giving, refusal and revocation by prescribed persons<sup>22</sup> of approvals required for the purposes of the regulations, for such approvals to be

- capable of being made subject to such conditions as may be prescribed, and for the modification and revocation of any such condition<sup>23</sup>;
- 824 (e) impose obligations to furnish prescribed persons with information<sup>24</sup> reasonably required by such persons for the purpose of carrying out functions under the regulations<sup>25</sup>;
- 825 (f) provide for contravention of the regulations to constitute a criminal offence<sup>26</sup>; and
- 826 (g) require prescribed charges to be paid to persons carrying out functions under the regulations<sup>27</sup>.

The Secretary of State or, where appropriate, the Welsh Ministers may by regulations<sup>28</sup>:

- 827 (i) require a water undertaker to publish information about the quality of water supplied for domestic or food production purposes to any premises using that undertaker's supply system<sup>29</sup>;
- 828 (ii) require a licensed water supplier to publish information about the quality of water supplied for domestic or food production purposes to any premises by that supplier<sup>30</sup>;
- 829 (iii) require any such undertaker or supplier to provide information to prescribed persons about the quality of water supplied as referred to in head (i) or head (ii) above, as the case may be<sup>31</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 69 were transferred to the National Assembly for Wales in relation to (1) any water undertaker whose area is wholly or mainly in Wales; and (2) any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003, s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. The following regulations have been made: the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911: see PARAS 376, 378, 380-387, 389-390.

4 'Prescribed' means prescribed by regulations: see the Water Industry Act 1991 s 219(1).

5 Ie under the Water Industry Act 1991 s 68: see PARA 374.

6 Water Industry Act 1991 s 69(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (2)).

7 'Relevant supplies' means: (1) in the case of an obligation imposed on a water undertaker, supplies of water made by the undertaker in carrying out its functions or made by a licensed water supplier using the undertaker's supply system; and (2) in the case of an obligation imposed on a licensed water supplier, supplies of water made by that supplier using a water undertaker's supply system: Water Industry Act 1991 s 69(7) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (8)). As to the meaning of 'functions' see PARA 133 note 5.

8 As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44.

9 Water Industry Act 1991 s 69(2)(a) (s 69(2) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (3), Sch 9 Pt 3). As to the meaning of 'wholesome' see PARA 373 note 4. As to when water is treated as wholesome at the time of supply see PARA 373 notes 5, 12.

10 Water Industry Act 1991 s 69(2)(b) (as amended: see note 9).

- 11 Water Industry Act 1991 s 69(2)(c) (as amended: see note 9).
- 12 As to the meaning of 'records' see PARA 117 note 13.
- 13 Water Industry Act 1991 s 69(2)(d) (as amended: see note 9).
- 14 'Analyse', in relation to any sample of land, water or effluent, includes subjecting the sample to a test of any description; and cognate expressions must be construed accordingly: Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1). As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'effluent' see PARA 262 note 31.
- 15 Water Industry Act 1991 s 69(2)(e) (as amended: see note 9).
- 16 As to the meaning of 'substance' see PARA 367 note 21.
- 17 Water Industry Act 1991 s 69(3) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (4)).
- 18 As to the meaning of 'contravene' see PARA 20 note 5.
- 19 Water Industry Act 1991 s 69(4)(a) (s 69(4) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (5)).
- 20 Water Industry Act 1991 s 69(4)(b) (as amended: see note 19).
- 21 Water Industry Act 1991 s 69(4)(c) (as amended: see note 19).
- 22 As to the meaning of 'person' see PARA 13 note 29.
- 23 Water Industry Act 1991 s 69(4)(d). As to the meaning of 'modification' see PARA 141 note 20.
- 24 As to the meaning of 'information' see PARA 117 note 13.
- 25 Water Industry Act 1991 s 69(4)(e).
- 26 See the Water Industry Act 1991 s 69(4)(f). Such an offence may be: (1) a summary offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale or such smaller sum as may be prescribed (s 69(4)(f)(i)); or (2) an offence triable either way and punishable on summary conviction by a fine not exceeding the statutory maximum or, on conviction on indictment, by a fine (s 69(4)(f)(ii)). As to the standard scale see PARA 141 note 18. As to the statutory maximum see PARA 169 note 20.
- 27 Water Industry Act 1991 s 69(4)(g).
- 28 Such regulations: (1) must prescribe both the information which is to be published or provided in pursuance of the regulations and the manner and circumstances in which it is to be published or provided (Water Industry Act 1991 s 69(6)(a)); (2) may require the provision of information by a water undertaker or licensed water supplier to any person to be free of charge or may authorise it to be subject to the payment by that person to the undertaker or supplier of a prescribed charge (s 69(6)(b) (s 69(6)(b), (c) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (7))); and (3) may impose such other conditions on the provision of information by a water undertaker or licensed water supplier to any person as may be prescribed (Water Industry Act 1991 s 69(6)(c) (as so amended)).
- 29 Water Industry Act 1991 s 69(5)(a) (s 69(5) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (6), Sch 9 Pt 3).
- 30 Water Industry Act 1991 s 69(5)(aa) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 19(1), (6)(b)).
- 31 Water Industry Act 1991 s 69(5)(b) (as amended: see note 29).

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## (B) PRESCRIBED STANDARDS OF WHOLESOMENESS

### **376. Wholesomeness of supplies by water undertakers.**

Before the beginning of each year<sup>1</sup> in which it intends to supply water for the prescribed purposes<sup>2</sup>, a water undertaker must designate the names and areas within its area of supply that are to be its water supply zones<sup>3</sup> for that year<sup>4</sup>. A water supply zone may not comprise an area whose population immediately before the beginning of the year in question is estimated by the water undertaker to exceed 100,000<sup>5</sup>. A water undertaker may not vary such a designation after the beginning of the year in relation to which the designation has effect<sup>6</sup>. The water quality within a water supply zone must be approximately uniform<sup>7</sup>.

Water supplied for such domestic purposes as consist in or include, cooking, drinking, food preparation or washing, or supplied to premises in which food is produced, is, subject to certain exceptions<sup>8</sup>, to be regarded as wholesome<sup>9</sup> if the following requirements are satisfied<sup>10</sup>. Those requirements are:

- 830 (1) that the water does not contain any micro-organism (other than a specified parameter<sup>11</sup>) or parasite or any substance (other than a specified parameter) at a concentration or value which would constitute a potential danger to human health<sup>12</sup>;
- 831 (2) that the water does not contain any substance (whether or not a parameter) at a concentration or value which, in conjunction with any other substance it contains (whether or not a parameter) would constitute a potential danger to human health<sup>13</sup>;
- 832 (3) that the water does not contain concentrations or values of the specified parameters<sup>14</sup> in excess of or, as the case may be, less than, the prescribed concentrations or values<sup>15</sup>;
- 833 (4) that the water satisfies the prescribed formula<sup>16</sup> for nitrate concentrations<sup>17</sup>.

The point at which the requirements of heads (1) to (4) above, in so far as they relate to the specified parameters<sup>18</sup>, are to be complied with is:

- 834 (a) in the case of water supplied from a tanker, the point at which the water emerges from the tanker<sup>19</sup>;
- 835 (b) in the case of water supplied in bottles or containers, the point at which the water first emerges from any bottle or container collected from a local distribution point<sup>20</sup>;
- 836 (c) in any other case, the consumer's tap<sup>21</sup>.

Water transferred from a service reservoir<sup>22</sup> for supply for these purposes is not be regarded as unwholesome<sup>23</sup> because the maximum concentration for the coliform bacteria parameter is exceeded if, as regards the samples taken in any year in which the reservoir in question is in use, the results of analysis for that parameter establish that in at least 95 per cent of those samples coliforms were absent<sup>24</sup>.

- 1 'Year' means a calendar year: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1). The Water Supply (Water Quality) Regulations 2000, SI 2000/3184, apply in relation to the supply of water by every: (1) water undertaker whose area is not wholly or mainly in Wales; and (2) licensed water supplier so far as relating to licensed activities not using the supply system of any water undertaker whose area is wholly or mainly in Wales: reg 1(6) (substituted by SI 2007/2734). The Water Supply (Water Quality) Regulations 2001, SI 2001/3911, apply in relation to the supply of water by every: (a) water undertaker whose area is wholly or mainly in Wales; and (b) licensed water supplier so far as relating to licensed activities using the supply system of any water undertaker whose area is wholly or mainly in Wales: reg 1(6) (substituted by SI 2007/3374). As to the meaning of 'water undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (both amended by SI 2005/2035). As to the meaning of 'Wales' see PARA 16 note 2.
- 2 le for regulation 4(1) purposes. 'Regulation 4(1) purposes', in relation to the supply of water, means a supply: (1) for such domestic purposes as consist in or include, cooking, drinking, food preparation or washing; or (2) for any of those domestic purposes, to premises in which food is produced: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1). As to the meaning of 'domestic purposes' see PARA 334.
- 3 'Water supply zone', in relation to a water undertaker and a year, means an area designated for that year by the water undertaker in accordance with regulation 3 of the appropriate regulations: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1).
- 4 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 3(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 3(1).
- 5 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 3(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 3(2).
- 6 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 3(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 3(3).
- 7 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 3(2A); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 3(2A) (both added by SI 2007/2734).
- 8 le subject to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(4), (5); the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(4), (5): see note 9.
- 9 le for the purposes of the Water Industry Act 1991 Pt III Ch III (ss 67-86A). As to the meaning of 'wholesome' see PARA 373 note 4. As to when water is treated as wholesome at the time of supply see PARA 373 notes 5, 12. Water supplied for regulation 4(1) purposes is not be regarded as wholesome for such purposes if, on transfer from a treatment works for supply for those purposes (1) it contains a concentration of the coliform bacteria or E coli parameter in excess of the prescribed concentrations; or (2) it contains a concentration of nitrite in excess of 0.1mgNO<sub>2</sub>/l: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(4). Nor, subject to reg 4(6) (see the text to notes 22-24), is water supplied for regulation 4(1) purposes to be regarded as wholesome for such purposes if, on transfer from a service reservoir for supply for those purposes, it contains a concentration of the coliform bacteria or E coli parameter in excess of the prescribed concentrations: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(5). As to the meaning of 'service reservoir' see note 22. 'Parameter' means a property, element, organism or substance listed in Sch 1 Table A second column or Table B, or in Sch 2, as read, where appropriate, with the notes to Sch 2 and those Tables; and 'prescribed concentration or value', in relation to any parameter, means the maximum or minimum concentration or value specified in relation to that parameter in Table A or Table B in Sch 1 as measured by reference to the unit of measurement so specified, and as read, where appropriate, with the notes to those Tables: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1). The Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Sch 1, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Sch 1, set out the prescribed Concentrations and Values; and Schedule 2 to each set of regulations sets out the Indicator Parameters. As to the meaning of 'substance' see PARA 367 note 21.
- 10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(1).

11 le a parameter listed in Sch 1 to the appropriate regulations.

12 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(2)(a) (amended by SI 2001/2885); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(2)(a).

13 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(2)(b).

14 le parameters listed in Tables A and B in Sch 1 to the appropriate regulations.

15 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(2)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(2)(c). 'Prescribed concentration or value', in relation to any parameter, means the maximum or minimum concentration or value specified in relation to that parameter in Table A or Table B in Sch 1 to the appropriate regulations as measured by reference to the unit of measurement so specified, and as read, where appropriate, with the notes to those Tables: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1).

16 le the formula set out in the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(2)(d); the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(2)(d).

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(2)(d); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(2)(d).

18 le the parameters set out in Pt I of Table A and in Table B in Sch 1 to the appropriate regulations.

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(3)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(3)(a).

20 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(3)(aa); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(3)(aa) (both added by SI 2007/3374).

21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(3)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(3)(b). 'Consumer' means a person to whom water is supplied for regulation 4(1) purposes by a relevant supplier in the discharge of its duties under the Water Industry Act 1991 Pt III Ch III (ss 67-86A): Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definitions amended by SI 2005/2035). As to the meaning of 'person' see PARA 13 note 29. 'Relevant supplier' means a water undertaker or licensed water supplier: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definitions added by SI 2005/2035).

22 References in the appropriate regulations to a 'service reservoir' are references to any structure, other than a structure at a treatment works, in which a reserve of water that has been treated with a view to complying with the requirements of reg 4 of those regulations is contained and stored for the purpose of meeting a variable demand for the supply of water; but where such references to a service reservoir would otherwise include references to a structure comprising more than one compartment: (1) each compartment which has its own water inlet and water outlet and is not connected hydraulically to any other compartment is to be treated as a single service reservoir; (2) the compartments that are connected hydraulically are to be treated as a single service reservoir; and (3) unless all of the compartments are connected hydraulically, the structure as a whole is not to be treated as a service reservoir: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(3), (4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(3), (4).

23 le for the purposes of the Water Industry Act 1991 Pt III Ch III (ss 67-86A).

24 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(6).



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(2) DUTIES OF WATER UNDERTAKERS IN RELATION TO SUPPLY/(iv) Quality and Sufficiency of Supplies/B. WATER QUALITY/(B) Prescribed Standards of Wholesomeness/377. Wholesomeness of private supplies.

### **377. Wholesomeness of private supplies.**

Water supplied to any premises from a private supply<sup>1</sup> for such domestic purposes<sup>2</sup> as consist in or include drinking, washing or cooking or for food production purposes<sup>3</sup> is to be regarded as wholesome<sup>4</sup> if the following requirements are satisfied and, where the water has been softened or desalinated and is supplied for drinking or cooking or for food production purposes, if the water's hardness and its alkalinity are not below the prescribed relevant minimum concentrations<sup>5</sup>. The requirements are:

- 837 (1) that the water does not contain any element, organism or substance (other than a parameter)<sup>6</sup> at a concentration or value which would be detrimental to public health<sup>7</sup>;
- 838 (2) that the water does not contain any element, organism or substance (whether or not a parameter) at a concentration or value which in conjunction with any other element, organism or substance it contains (whether or not a parameter) would be detrimental to public health<sup>8</sup>;
- 839 (3) that the water does not have a concentration or value of any specified parameter<sup>9</sup> in excess of the prescribed concentration or value<sup>10</sup>;
- 840 (4) in respect of any of certain parameters<sup>11</sup> that:
  - 71 86. (a) samples taken over the preceding 12 months<sup>12</sup> in relation to that parameter have established that the average concentration or value did not exceed the prescribed concentration or value<sup>13</sup>;
  - 87. (b) where only one sample is taken in that period in relation to that parameter, the concentration or value did not exceed the prescribed concentration or value<sup>14</sup>; or
  - 88. (c) where no sample is taken in that period in relation to that parameter, the concentration or value for any sample taken in relation to that parameter in the current year does not exceed the prescribed concentration or value<sup>15</sup>;
  - 72
- 841 (5) that the prescribed requirements in respect of trihalomethanes<sup>16</sup> are satisfied<sup>17</sup>.

1 As to the meaning of 'private supply' see PARA 373 note 15. The Private Water Supplies Regulations 1991, SI 1991/2790, do not apply to a private supply which is used solely for washing a crop after it has been harvested but which does not affect the fitness for consumption of any food or drink in its finished form: reg 2(4).

2 As to the meaning of 'domestic purposes' see PARA 334.

3 As to the meaning of 'food production purposes' see PARA 338 note 44.

4 Ie for the purposes of the Water Industry Act 1991 Pt III Ch III (ss 67-86A). As to the meaning of 'wholesome' see PARA 373 note 4. As to when water is treated as wholesome at the time of supply see PARA 373 notes 5, 12.

5 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(2). Regulation 3 has effect subject to the provisions of Pt III (regs 4-7: see PARA 379): reg 3(1). The prescribed relevant minimum concentrations as to hardness and alkalinity are those specified in Sch 2 Table E: see regs 2(2)(b), 3(4).

6 'Parameter' means a property, element, organism or substance listed in the second column of the Tables in the Private Water Supplies Regulations 1991, SI 1991/2790, Sch 2, in column 1 of Sch 3 or in Sch 4 Pt II: reg 2(1). As to the meaning of 'substance' see PARA 367 note 21.

7 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(a).

8 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(b).

9 Ie any parameter listed in the Private Water Supplies Regulations 1991, SI 1991/2790, Sch 2 Tables A-C.

10 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(c). 'Prescribed concentration or value', in relation to any parameter, means the maximum or minimum concentration or value specified in relation to that parameter in the Tables in Sch 2 as measured by reference to the unit of measurement so specified: reg 2(1).

11 Ie any parameter listed in the Private Water Supplies Regulations 1991, SI 1991/2790, Sch 2 Table D.

12 As to the meaning of 'month' see PARA 23 note 10.

13 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(d)(i).

14 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(d)(ii).

15 Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(d)(iii).

16 Ie the requirements in the Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(e). Those requirements are that: (1) samples taken over the preceding quarter in relation to trihalomethanes have established that the average concentration did not exceed 100 micro µg/l; (2) where only one sample is taken in that period in relation to that parameter, the concentration did not exceed 100 micro µg/l; or (3) where no sample is taken in that period in relation to that parameter, the concentration for any sample taken in relation to that parameter in the current quarter does not exceed 100 µg/l: reg 3(3)(e). 'Trihalomethanes' means trichloromethane, dichlorobromomethane, dibromochloromethane and tribromomethane; and 'quarter' means a period of three months beginning on 1 January, 1 April, 1 July or 1 September in any year: reg 2(1).

17 See the Private Water Supplies Regulations 1991, SI 1991/2790, reg 3(3)(e).

## **UPDATE**

### **377 Wholesomeness of private supplies**

TEXT AND NOTES--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, SI 2010/1384).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(2) DUTIES OF WATER UNDERTAKERS IN RELATION TO SUPPLY/(iv) Quality and Sufficiency of Supplies/B. WATER QUALITY/(B) Prescribed Standards of Wholesomeness/378. Authorisation of temporary supply of water that is not wholesome.

### **378. Authorisation of temporary supply of water that is not wholesome.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may, upon the written<sup>3</sup> application of a relevant supplier<sup>4</sup>, authorise<sup>5</sup> a departure from the provisions relating to wholesomeness of water supply<sup>6</sup> in so far as they relate to a specified parameter<sup>7</sup>, and the supply of water by a relevant supplier in any of the water supply zones which it uses for the purposes of supplying water to consumers<sup>8</sup>. The Secretary of State or, where appropriate, the Welsh Ministers may not, however, authorise such a departure unless satisfied:

- 842 (1) that the authorisation is necessary to maintain in that zone a supply of water for the prescribed purposes<sup>9</sup>;
- 843 (2) that a supply of water for those purposes cannot be maintained in that zone by any other reasonable means<sup>10</sup>; and
- 844 (3) that the supply of water in accordance with the authorisation does not constitute a potential danger to human health<sup>11</sup>.

At the same time as it makes an application for such an authorisation, the water undertaker or combined licensee must serve on the prescribed bodies<sup>12</sup> a copy of the application and of the statement, scheme and summary provided with its application<sup>13</sup>. A body on whom documents have been so served may make representations to the Secretary of State or, as the case may be, the Welsh Ministers in connection with the application<sup>14</sup>.

A departure may be authorised for such period as is in the opinion of Secretary of State or, as the case may be, the Welsh Ministers reasonably required for securing a supply of water for the prescribed purposes<sup>15</sup> that fully satisfies the statutory requirements<sup>16</sup> (the 'departure period')<sup>17</sup>; but no departure period may exceed three years<sup>18</sup>. Where it appears to the Secretary of State or the Welsh Ministers that a supply of water that fully satisfies the statutory requirements cannot be restored by the end of the departure period, he or they may authorise a further departure<sup>19</sup>; and where it appears to the Secretary of State or to the Welsh Ministers that a supply of water that fully satisfies those requirements cannot be restored by the end of the departure period relevant to such an authorisation, he or they may<sup>20</sup> authorise a third departure<sup>21</sup>.

An authorisation under the above provisions may be limited to water supplied from particular sources or classes of source, to particular water supply zones or to zones of particular descriptions<sup>22</sup>. As soon as reasonably practicable after a departure has been authorised, the specified relevant suppliers<sup>23</sup> must publicise the departure<sup>24</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers may at any time modify or revoke an authorisation upon giving the appropriate notice<sup>25</sup>; but the Secretary of State or the Welsh Ministers may revoke or modify an authorisation without notice if it appears to him or them that immediate revocation or modification is required in the interests of public health<sup>26</sup>. A relevant supplier on whose application a departure has been authorised under these provisions must notify the Secretary of State or, as appropriate, the Welsh Ministers as soon as the circumstances which gave rise to the application cease to exist; and the Secretary of State or the Welsh Ministers must thereupon revoke the authorisation without the need for prior notice<sup>27</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier is enforceable<sup>28</sup> by the Secretary of State or, as the case may be, the Welsh Ministers, or the Water Services Regulation Authority<sup>29</sup>, whether or not it constitutes an offence<sup>30</sup>.

1     Ie in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184: see reg 20(1). As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, see PARA 376 note 1. As to the Secretary of State see PARA 15 note 1.

2     Ie in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911: see reg 20(1). As to the application of the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

3     As to the meaning of 'written' see PARA 22 note 1.

4     As to the meaning of 'relevant supplier' see PARA 376 note 21. Every water undertaker or combined licensee must provide with its application: (1) a statement (a) of the grounds on which the authorisation is sought; (b) of the water supply zone in respect of which the authorisation is sought; (c) of the parameters in respect of which the prescribed concentration or value cannot be met; (d) in respect of each parameter to which head (c) applies, of the results of the analysis of the samples taken in the water supply zone in question during the 12 months immediately preceding the first day on which the prescribed concentration or value could not be met; (e) in respect of each parameter to which head (c) applies, of the results of the analysis of the samples (if any) taken in the water supply zone in question between the first day on which the prescribed concentration or value could not be met and the date of the application; (f) of the average daily quantity of water supplied to that zone or, if that quantity cannot readily be ascertained, of the average daily quantity of water supplied from the treatment works that supplies water to that zone; (g) of the estimated population of that zone; (h) as to whether, if a departure were authorised in the terms sought, any relevant food-production undertaking would be affected; (i) of the period for which the authorisation is sought; and (j) of the reasons why the supply cannot be maintained by other reasonable means; (2) a scheme for monitoring the quality of water supplied in the zone during the period for which the authorisation is sought; and (3) a summary of the steps that it proposes to take, either alone or together with other relevant suppliers, in order to secure that the supply fully satisfies the requirements of Pt III (reg 4) of the appropriate regulations (see PARA 376), including (a) a timetable for the work; (b) an estimate of the cost of the work; and (c) provisions for reviewing the progress of the work and for reporting the result of the review to the Secretary of State or, as the case may be, the Welsh Ministers: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(3) (both amended by SI 2005/2035). As to the meaning of 'water undertaker' see PARA 137 note 4. 'Combined licensee' means a company which is the holder of a combined licence within the meaning of the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) (see PARA 152); Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definition added in each case by SI 2005/2035). As to the meaning of 'water supply zone' see PARA 376 note 3. As to the meaning of 'parameter' see PARA 376 note 9. As to the meaning of 'prescribed concentration or value' see PARA 376 note 15. As to the meaning of 'analysis' see PARA 375 note 14. As to the meaning of 'month' see PARA 23 note 10.

5     Ie in accordance with the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21 or the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21: see the text to notes 15-21.

6     Ie a departure from the provisions of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt III (reg 4) or of the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt III (reg 4): see PARA 376.

7     Ie a parameter specified in Pt II of Table A or in Table B in Sch 1 to the appropriate regulations.

8     See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(1) (both amended by SI 2005/2035). As to the meaning of 'consumer' see PARA 376 note 21.

9     Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(2)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(2)(a). The prescribed purposes are regulation 4(1) purposes: as to which see PARA 376 note 2.

10    Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(2)(b).

11 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(2)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(2)(c).

12 le (1) under the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, every appropriate local authority; the Health Protection Agency; where the water supply zone is wholly or partly in Wales, the National Public Health Service for Wales; and the Consumer Council for Water (reg 20(4) (amended by SI 2002/2469; SI 2005/2035; SI 2007/2734)); and (2) under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, every appropriate local authority; the National Public Health Service for Wales; where the water supply zone is wholly or partly in England, the Health Protection Agency; and the Consumer Council for Water (reg 20(4) (amended by SI 2005/2035; SI 2007/2734)). 'Appropriate local authority', in relation to (a) a departure authorised under the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20 or the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20; (b) an application for any such authorisation; or (c) an event specified in the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(6) or the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(6) (see **PARA 390**), means a local authority whose area contains any part of the water supply zone to which the authorisation relates or, in the case of an application, would relate if a departure were authorised in the terms sought, or whose area is affected or is likely to be affected by the event: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definition in each case added by SI 2007/2734). In the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, 'local authority' means any of the following: the Common Council of the City of London, a London borough council, a district council, the council of a county in which there are no district councils: reg 2(1). In the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, 'local authority' means any of the following: in Wales, the council of a county or county borough; and in England, a district council or the council of a county in which there are no district councils: reg 2(1). As to the Health Protection Agency see **HEALTH SERVICES** vol 54 (2008) **PARA 213**. 'National Public Health Service for Wales' means an NHS trust within the meaning of the National Health Service (Wales) Act 2006 if, and in so far as, it has the function of providing services in relation to public health in Wales: Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1); Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1) (definition added in each case by SI 2007/3374). As to NHS trusts see **HEALTH SERVICES** vol 54 (2008) **PARA 155** et seq. As to the Consumer Council for Water see **PARA 115**. As to the meaning of 'England' see **PARA 19** note 8. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) **PARA 22** et seq.

13 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(4) (both amended by SI 2005/2035).

14 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(5). Any such representations must be made not later than the end of the period of 30 days beginning with the date on which the application for the authorisation is made: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20(5).

15 le for regulation 4(1) purposes.

16 le the requirements of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt III (reg 4) or of the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt III (reg 4): see **PARA 376**.

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(1). An authorisation: (1) must specify (a) the grounds on which it is granted; (b) every water supply zone in respect of which it is granted; (c) the extent to which a departure from the prescribed concentration or value of any parameter is authorised; (d) in respect of each parameter to which head (c) applies, the results of the analysis of the samples taken in each water supply zone in question during the 12 months immediately preceding the first day on which the prescribed concentration or value could not be met; (e) in respect of each parameter to which head (c) applies, the results of the analysis of the samples (if any) taken in each water supply zone in question between the first day on which the prescribed concentration or value could not be met and the date of the application; (f) the average daily quantity of water supplied from each of those zones or, if that quantity cannot readily be ascertained, the average daily quantity of water supplied from the treatment works that supplies water to that zone; (g) the estimated population of each of those zones; (h) whether or not any relevant food-production undertaking would be affected; and (i) the departure period; and (2) must require the implementation of a scheme for monitoring the quality of water supplied in each of those zones during the departure period (which may be, but need not be, the scheme submitted in accordance with reg 20(3)(b) of the appropriate regulations (see head (2) in note 4)); and (3) must require the carrying out of the steps which, in the Secretary of State's or the Welsh Ministers' opinion, are reasonably required in order to secure that the supply fully satisfies the requirements of Pt III of the appropriate regulations (whether or not the steps are those proposed in the summary submitted in accordance with reg 20(3)(c) thereof); and (4) must specify, in relation to those steps (a) the timetable for the work; (b) an estimate of the cost of the work; and (c) provisions for reviewing the progress of the work and for reporting to the Secretary of State or the Welsh Ministers the result of the review; and (5) must require the taking of such steps as may be specified to give to the population within the water supply zones to which the authorisation applies

and, in particular, to those groups of that population for which the supply of water in accordance with the authorisation could present a special risk, advice as to the measures (if any) that it would be advisable in the interests of their health for persons within that population or those groups to take for the whole or any part of the departure period: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(3)(a)-(e); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(3)(a)-(e). Where the Secretary of State or, where appropriate, the Welsh Ministers are of the opinion that the extent of the contravention of the requirements of Pt III of the appropriate regulations as respects any parameter is trivial and that the prescribed concentration or value as respects that parameter is likely to be achieved within the period of 30 days beginning with the day on which the prescribed concentration or value in respect of that parameter was contravened, the particulars to be specified in the authorisation are those required by head (1)(c), (i) above, and heads (2)-(5) above do not apply: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(4).

18 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(2).

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(5). Regulation 21(1)-(4) (see the text to notes 15-18) applies to a further departure as it applies to a departure authorised under reg 20: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(6).

20 In accordance with EC Council Directive 98/83 (OJ L330, 05.12.98, p 12) art 9(2). In exceptional circumstances, a member state may ask the Commission for a third derogation for a period not exceeding three years. The Commission must take a decision on any such request within three months: art 9(2).

21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(7); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(7). Regulation 21(3) (see note 17) applies to a departure so authorised as it applies to a departure authorised under reg 20, but with the substitution for the words 'subject to paragraph (4)' of the words 'subject to any direction of the Commission': Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(8); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(8).

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 22; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 22.

23 'Specified relevant suppliers' means relevant suppliers: (1) who use the same water supply zone for the purposes of supplying water to consumers; and (2) for the purposes of that supply, rely on an authorised departure relating to the same facts: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 23(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 23(2) (reg 23 in each case substituted by SI 2007/2734).

24 As soon as reasonably practicable after a departure has been authorised, the specified relevant suppliers must: (1) separately publish, by making accessible, free of charge, on their websites via a hyperlink maintained on their respective homepages for at least 14 days (a) except in a case to which the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 21(4) or the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 21(4) (see note 17) applies, a notice containing a statement of the matters specified in reg 21(3)(a)(ii), (iii), (viii) and (ix) of the appropriate regulations (see heads (1)(b), (c), (h) and (i) in note 17); and (b) in a case to which reg 21(4) applies, a notice containing a statement of the matters specified in reg 21(3)(a)(ii), (iii) and (ix) of the appropriate regulations (see heads (1)(b), (c), and (i) in note 17); and (2) jointly give such other public notice of the authorisation and of its terms and conditions as the Secretary of State or, as appropriate, the Welsh Ministers may, by notice served on the specified relevant suppliers, reasonably require: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 23(1)(a), (b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 23(1)(a), (b) (both as substituted: see note 23).

25 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 24(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 24(1). The Secretary of State must not revoke or modify an authorisation under the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 20 without giving at least six months' notice in writing of his intention to do so to: (1) the relevant supplier to which the authorisation relates; (2) any other relevant supplier which, for the purposes of supplying water to consumers, uses the water supply zone in respect of which the authorised departure has been given; (3) every appropriate local authority; (4) the Health Protection Agency; (4) where the authorisation relates to a water supply zone which is wholly or partly in Wales, the National Public Health Service for Wales; and (5) the Consumer Council for Water: reg 24(2) (amended by SI 2002/2469; SI 2005/2035; SI 2007/2734). The Welsh Ministers must not revoke or modify an authorisation under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 20 without giving at least six months' notice in writing of their intention to do so to: (a) the relevant supplier to which the authorisation relates; (b) any other relevant supplier which, for the purposes of supplying water to consumers, uses the water supply zone in respect of which the authorised departure has been given; (c) every

appropriate local authority; (d) the National Public Health Service for Wales; (e) where the authorisation relates to a water supply zone which is wholly or partly in England, the Health Protection Agency; and (f) the Consumer Council for Water: reg 24(2) (amended by SI 2005/2035; SI 2007/2734).

26 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 24(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 24(2).

27 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 24(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 24(3).

28 Ie under the Water Industry Act 1991 s 18: see PARA 163.

29 As to the Water Services Regulation Authority see PARA 109.

30 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

## **UPDATE**

### **378 Authorisation of temporary supply of water that is not wholesome**

NOTE 12--For 'National Public Health Service for Wales' substitute 'Public Health Wales National Health Service Trust'; 'Public Health Wales National Health Service Trust' means a National Health Service Trust within the meaning of the National Health Service (Wales) Act 2006 if, and in so far as, it has the function of providing services in relation to public health in Wales: SI 2001/3911 reg 2(1) (amended by SI 2009/1824).

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### **379. Relaxation of wholesomeness requirements with regard to a private supply.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, or a local authority<sup>3</sup> may, upon the written<sup>4</sup> application of a relevant person<sup>5</sup>, authorise a relaxation of the requirements relating to wholesomeness of a private supply of water<sup>6</sup> as respects a private supply if the Secretary of State, the Welsh Ministers or, as the case may be, the authority is satisfied:

- 845 (1) that the authorisation is necessary, as an emergency measure, to maintain a supply for human consumption<sup>7</sup>;
- 846 (2) that the authorisation is called for by reason of exceptional meteorological conditions<sup>8</sup>;
- 847 (3) that the authorisation is called for by reason of the nature and structure of the ground in the area from which the supply emanates<sup>9</sup>; or
- 848 (4) that the supply is, or is to be used, solely for food production purposes<sup>10</sup>.

In the circumstances mentioned in head (3) above, such a relaxation may be authorised as respects a private supply notwithstanding that no application for such authorisation has been made<sup>11</sup>.

A relevant person must, if there are any other relevant persons in relation to the private supply in question, at the same time as he makes an application for an authorisation, serve a notice of the application on all those persons or publish a notice of the application at least once in each of two successive weeks in one or more newspapers circulating in the locality of the supply<sup>12</sup>.

A local authority must consult<sup>13</sup> the Secretary of State or, as appropriate, the Welsh Ministers before exercising any such power of relaxation in relation to a specified class<sup>14</sup> of private supply<sup>15</sup>. Authorisations granted under the above provisions relating to private supplies are subject to other prescribed restrictions<sup>16</sup>, may include prescribed conditions<sup>17</sup> and may be modified or revoked<sup>18</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the transfer of the functions of the Secretary of State under the Private Water Supplies Regulations 1991, SI 1991/2790, to the Welsh Ministers see PARA 373 note 2, the position there stated applying by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 3.

3 As to the meaning of 'local authority' see PARA 118 note 17.

4 As to the meaning of 'written' see PARA 22 note 1.

5 The relevant persons, in relation to a private supply of water to any premises in the area of a local authority are: (1) the owners and occupiers of those premises; and (2) whether or not the source of the private supply is in that authority's area, the owners and occupiers of the premises where that source is situated and any other person who exercises powers of management or control in relation to that source: Private Water Supplies Regulations 1991, SI 1991/2790, reg 2(2). As to the meaning of 'private supply' see PARA 377 note 1. As to the meaning of 'owner' see PARA 22 note 9. As to the meaning of 'person' see PARA 13 note 29.

6 Ie the provisions of the Private Water Supplies Regulations 1991, SI 1991/2790, Pt II (reg 3): see PARA 377.

7 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(1)(a).



8 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(1)(b).

9 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(1)(c).

10 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(1)(d). As to the meaning of 'food production purposes' see PARA 338 note 44.

11 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(2).

12 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(3).

13 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

14 le a class A, B, 1 or 2 supply. Any reference to a class followed by: (1) a letter, is a reference to a class of a category one supply; (2) a number, is a reference to a class of a category two supply: Private Water Supplies Regulations 1991, SI 1991/2790, reg 2(3)(a). 'Category one supply' has the meaning given by reg 9 (see PARA 407); and 'category two supply' has the meaning given by reg 10 (see PARA 407): reg 2(1).

15 Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(4). A local authority which is so required to consult the Secretary of State or the Welsh Ministers must comply with such directions as the Secretary of State or the Welsh Ministers may give in relation to the supply in question as to: (1) the transmission to him or to the Welsh Ministers for determination of any application made to the authority; (2) the imposition of conditions on the grant of an authorisation; (3) the refusal of an application; or (4) the revocation or modification of an authorisation: reg 4(5). A local authority which grants an authorisation under reg 4(1)(a) (see head (1) in the text), under reg 4(1)(b) or (c) (see head (2) or (3) in the text) in relation to a class A or 1 supply, or under reg 4(1)(d) (see head (4) in the text) must forthwith send a copy of that authorisation to the Secretary of State or the Welsh Ministers: reg 4(6). A local authority may exercise the powers conferred by reg 4(1) or (2) (see the text to notes 1-11) only if some or all of the premises served by the private supply are within its area; and, where only some of those premises are within its area, only if the powers are exercised jointly with, or with the consent of, any other local authority in whose area the rest of those premises are situated: reg 4(7). As to the meaning of 'modifications' see PARA 141 note 20.

16 An authorisation: (1) granted under the Private Water Supplies Regulations 1991, SI 1991/2790, reg 4(1) (a) (see head (1) in the text) must not so relax the provisions of Pt II (reg 3) (see PARA 377) as to give rise to a risk to public health which the Secretary of State or the Welsh Ministers or, as the case may be, the local authority considers unacceptable; (2) granted under reg 4(1)(b) or (c) (see head (2) or (3) in the text) must not relax the provisions of that Part so far as they relate to parameters mentioned in Sch 2 Table B or C or Sch 2 Table D item 7, or so as to give rise to a public health hazard; (3) granted under reg 4(1)(d) (see head (4) in the text) must not relax the provisions of that Part so as to affect the fitness for human consumption of food or drink in its finished form: reg 5(1). An authorisation must specify the extent to which the prescribed concentration or value for any parameter is authorised to be contravened: reg 5(2). An authorisation granted under reg 4(1)(a) or (b) must specify the date on which it ceases to have effect, and an authorisation granted under reg 4(1)(c) or (d) may specify such a date: reg 5(3). As to the meaning of 'parameter' see PARA 377 note 6. As to the meaning of 'prescribed concentration or value' see PARA 377 note 10.

17 An authorisation may include conditions relating to: (1) the quality of water to which the authorisation applies; (2) the steps to be taken to improve the quality of the water; (3) the monitoring of the quality of the water; and (4) the giving of notice of such matters concerning the water as are mentioned in the authorisation to the Secretary of State or the Welsh Ministers, the local authority or any other person named in the authorisation: Private Water Supplies Regulations 1991, SI 1991/2790, reg 6.

18 Subject to the Private Water Supplies Regulations 1991, SI 1991/2790, reg 7(2)-(5), the Secretary of State or the Welsh Ministers, or a local authority, may at any time modify or revoke an authorisation (whether or not the authorisation is expressed to be granted for a specified period); and regs 4-6 (see the text to notes 1-17) apply with suitable adaptations in relation to the modification of an authorisation: reg 7(1). The Secretary of State or the Welsh Ministers, or a local authority may not revoke or modify an authorisation without giving at least six months' notice of the intention to do so by: (1) serving notice of the revocation or modification on any relevant person on whose application the authorisation was granted; (2) publishing a notice of the revocation or modification in such manner as the Secretary of State or the Welsh Ministers or, as the case may be, the authority, considers appropriate for bringing it to the attention of relevant persons; and (3) in the case of a modification or revocation by the Secretary of State or the Welsh Ministers, by serving a copy of the notice on the appropriate local authority; but the Secretary of State, Welsh Ministers or local authority may revoke or modify an authorisation without notice if it appears to him or them that the immediate revocation or modification of the authorisation is required in the interests of public health: reg 7(2). For these purposes, 'appropriate local authority' means any local authority whose area includes any premises in relation to which the authorisation applies: reg 7(3). A person on whose application an authorisation has been granted must notify the Secretary of State, Welsh Ministers or local authority as soon as he is aware that the circumstances

which gave rise to the application for the authorisation cease to exist; and, notwithstanding reg 7(2), the Secretary of State, Welsh Ministers or local authority must thereupon revoke the authorisation: reg 7(4). Nothing in reg 7 permits a local authority to modify or revoke an authorisation granted by the Secretary of State or the Welsh Ministers: reg 7(5). As to the meaning of 'month' see PARA 23 note 10. As to the meaning of 'notice' see PARA 22 note 1.

## **UPDATE**

### **379 Relaxation of wholesomeness requirements with regard to a private supply**

TEXT AND NOTES--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, SI 2010/1384).

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### **380. Investigations and remedial action by water undertaker.**

Where a water undertaker<sup>1</sup> or combined licensee<sup>2</sup> has reason to believe that water of a relevant description<sup>3</sup>:

- 849 (1) fails, or is likely to fail, to satisfy a prescribed requirement<sup>4</sup> with regard to wholesomeness of water supply<sup>5</sup>; or
- 850 (2) is to be regarded<sup>6</sup> as unwholesome<sup>7</sup>; or
- 851 (3) would, if the prescribed exception<sup>8</sup> were ignored, be regarded<sup>9</sup> as unwholesome<sup>10</sup>,

the water undertaker or combined licensee must immediately take such steps as are necessary to identify the following matters<sup>11</sup>. Those matters are: (a) the cause and extent of the failure or, as the case may be, the apprehended failure<sup>12</sup>; (b) the Schedule 1 parameters<sup>13</sup> in respect of which the prescribed concentration or value<sup>14</sup> has not been, or is unlikely to be, achieved<sup>15</sup>; and (c) in relation to each parameter so identified, whether the failure, or apprehended failure, to achieve the prescribed concentration or value is attributable to the domestic distribution system<sup>16</sup>, to the maintenance of that system or to neither of those matters<sup>17</sup>.

Where a departure from the requirements with regard to wholesomeness of water supply has been authorised<sup>18</sup>, the above requirements apply only in respect of the Schedule 1 parameters (if any) that are not specified in the authorisation<sup>19</sup>; and every water undertaker or combined licensee which has reason to believe that water of a relevant description fails, or is likely to fail, to satisfy the concentration or value required by the authorisation in relation to any Schedule 1 parameter, must immediately take such steps as are necessary to identify the following matters<sup>20</sup>. Those matters are: (i) the cause and extent of the failure or, as the case may be, the apprehended failure<sup>21</sup>; (ii) the Schedule 1 parameters in respect of which the required concentration or value has not been, or is unlikely to be, achieved<sup>22</sup>; and (iii) in relation to each parameter so identified, whether the failure, or apprehended failure, to achieve that concentration or value is attributable to the domestic distribution system, to the maintenance of that system or to neither of those matters<sup>23</sup>.

As soon as may be after the matters specified in heads (a) to (c) or heads (i) to (iii) above, as the case may be, have been identified, the water undertaker or combined licensee must notify the Secretary of State<sup>24</sup>, or in relation to Wales, the Welsh Ministers<sup>25</sup> of the specified matters<sup>26</sup> and send a copy of that notice to any other relevant supplier which uses the supply system for the purposes of supplying water to consumers who are likely to be affected by the failure<sup>27</sup>. Where the water undertaker or combined licensee has identified a failure attributable to the domestic distribution system or to the maintenance of such a system, it must, at the same time as such notification is given, by notice in writing to those of its consumers who are likely to be affected by the failure, and to any other relevant supplier which uses the supply system for the purposes of supplying water to consumers who are likely to be affected by the failure, inform them of the nature of the failure and provide details of the steps (if any) that, in its opinion, it is necessary or desirable for those consumers to take in the interests of their health<sup>28</sup>. It must also send a copy of that notice to the Secretary of State or, as the case may be, to the Welsh Ministers and to each appropriate local authority<sup>29</sup>.

Where a notification given in accordance with the above provisions in the circumstances mentioned in heads (1) to (3) above<sup>30</sup> discloses a failure in respect of a specified parameter<sup>31</sup> and that the failure is not attributable to the domestic distribution system or the maintenance of that system,<sup>32</sup> and it appears to the Secretary of State or, as the case may be, the Welsh Ministers that the failure is not trivial and is likely to recur<sup>33</sup>, the Secretary of State or the Welsh Ministers may, by notice in writing to any relevant supplier which uses the supply system for the purposes of supplying water to consumers in respect of which the notification was given, require that relevant supplier to seek<sup>34</sup> a departure from the requirements as to wholesomeness of supply<sup>35</sup>. Similarly, where a notification given in accordance with the above provisions in the circumstances where a departure from the requirements as to wholesomeness of supply has been authorised<sup>36</sup> discloses a failure in relation to any specified parameter<sup>37</sup> and that the failure is not attributable to the domestic distribution system or the maintenance of that system<sup>38</sup>, and it appears to the Secretary of State or, as the case may be, the Welsh Ministers that the failure in respect of that parameter is not trivial and is likely to recur<sup>39</sup>, the Secretary of State or the Welsh Ministers must consider whether the terms of the authorisation should be modified<sup>40</sup>.

Where a water undertaker or combined licensee has reason to believe that water of a relevant description<sup>41</sup> does not meet the specifications for indicator parameters<sup>42</sup>, it must take such steps as are necessary to identify:

- 852 (A) the reason why the specifications are not met<sup>43</sup>;
- 853 (B) the indicator parameters in respect of which the specifications are not met<sup>44</sup>; and
- 854 (C) if the specification for the coliform bacteria or colony count parameter<sup>45</sup> is not met, whether the inability to meet that specification is attributable to the domestic distribution system, to the maintenance of that system or to neither of those matters<sup>46</sup>.

As soon as may be after the matters specified in heads (A) to (C) above have been identified, the water undertaker or combined licensee must notify the Secretary of State, or as the case may be, the Welsh Ministers of those matters, and whether it is its opinion that, in relation to each parameter identified in accordance with head (B), a recurrence of the inability to meet the specification in respect of that parameter is likely<sup>47</sup>. The water undertaker or combined licensee must also send a copy of that notice to any other relevant supplier which uses the supply system for the purposes of supplying water to consumers who are likely to be affected by the failure<sup>48</sup>. Where, in a case to which head (C) above applies, the inability to meet the specification has been identified as attributable to the domestic distribution system or to the maintenance of that system, the water undertaker or combined licensee must, at the same time as such notification is given, by notice in writing to those of its consumers who are likely to be affected by the failure, and to any other relevant supplier which uses the supply system for the purposes of supplying water to consumers who are likely to be affected by the failure, inform them of the nature of the failure and provide details of the steps (if any) that, in its opinion, it is necessary or desirable for those consumers to take in the interests of their health<sup>49</sup>. A copy of that notice must also be sent to the Secretary of State or the Welsh Ministers and to each appropriate local authority<sup>50</sup>. Where such an inability<sup>51</sup> is, in the opinion of the water undertaker or combined licensee, likely to affect the supply of water to the public in premises in which water is so supplied, it must, at the same time as notice is given to its consumers, notify such persons as the Secretary of State or the Welsh Ministers may from time to time determine for these purposes of the matters of which notice is so given to consumers<sup>52</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier is enforceable<sup>53</sup> by the Secretary of State or, as the case may be, the Welsh Ministers, or the Water Services Regulation Authority<sup>54</sup>, whether or not it constitutes an offence<sup>55</sup>.

- 1 As to the meaning of 'water undertaker' see PARA 137 note 4. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.
- 2 As to the meaning of 'combined licensee' see PARA 378 note 4.
- 3 For the purposes of reg 17 in the appropriate regulations, 'water of a relevant description' means water supplied by a relevant supplier which uses a supply system for the purposes of supplying water to consumers, being a supply system into which the water undertaker or combined licensee introduces water: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(1A); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(1A) (both added by SI 2005/2035). As to the meanings of 'relevant supplier' and 'consumer' see PARA 376 note 21. As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definition added in each case by SI 2005/2035).
- 4 le a requirement of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(2) or, as the case may be, of the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(2): see PARA 376.
- 5 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(1)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(1)(a).
- 6 le by virtue of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(4) or, as the case may be, the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(4): see PARA 376.
- 7 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(1)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(1)(b).
- 8 le if the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(6) or, as the case may be, the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 4(6) (see PARA 376) were ignored.
- 9 le by virtue of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(5) or, as the case may be, of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 4(5): see PARA 376.
- 10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(1)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(1)(c).
- 11 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(1) (both amended by SI 2005/2035).
- 12 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(2)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(2)(a).
- 13 le the parameters listed in Sch 1 to the appropriate regulations. As to the meaning of 'parameter' see PARA 376 note 9.
- 14 As to the meaning of 'prescribed concentration or value' see PARA 376 note 15.
- 15 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(2)(b). Where such a failure as is mentioned in heads (1)-(3) in the text relates to the copper or lead parameter, the relevant supplier must, as soon as reasonably practicable after the occurrence, modify or replace such of its pipes and their associated fittings as it knows or has reason to believe have the potential for contributing to copper or lead in the water supplied to the premises, so as to eliminate that potential (whether or not the presence of copper or lead in those pipes contributed to the failure): Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(9); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(9) (both amended by SI 2005/2035). As to the meaning of 'pipe' see PARA 138 note 11.
- 16 'Domestic distribution system' means the pipework, fittings and appliances which are installed between the taps that are normally used for human consumption and the distribution network but only if they are not the responsibility of the water supplier, in its capacity as a water supplier, according to the relevant national law: EC Council Directive 98/83 (OJ L330, 05.12.98, p 12) art 2(2); definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(2).
- 17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(2)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(2)(c).

18 le under the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt VI (see regs 20-24) or under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt VI ( see regs 20-24): see PARA 378.

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(3)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(3)(a).

20 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(3)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(3)(b) (both amended by SI 2005/2035).

21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(4)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(4)(a).

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(4)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(4)(b).

23 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(4)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(4)(c).

24 le in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184. As to the Secretary of State see PARA 15 note 1.

25 le in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

26 le of the matters specified in heads (a) to (c) or heads (i) to (iii) in the text, as the case may be, which have been identified; whether it is its opinion that, in relation to each parameter identified in accordance with head (b) or head (ii) in the text, a failure in respect of that parameter is likely to recur; and of the action (if any) taken by it in relation to a failure which is attributable to the domestic distribution system or the maintenance of that system: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(5)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(5)(a) (in each case reg 17(5), (6) substituted, (6A) added by SI 2005/2035).

27 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(5)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(5)(b) (both as substituted: see note 26). A water undertaker or combined licensee which has complied with the requirements of reg 17(5) and (6) (see the text to notes 28-29) of the regulations in question need not, in respect of the same failure or apprehended failure, comply with the requirements of reg 35(6)(a)(iv) (see PARA 390) of such regulations: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(7); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(7) (both amended by SI 2005/2035; SI 2007/2734).

28 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(6)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(6)(a) (both as substituted: see note 26). A relevant supplier which receives such a notice must immediately send or cause to be sent a copy of that notice to those of its consumers who are likely to be affected by the failure: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(6A); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(6A) (both as added: see note 26). Where such a failure affects the supply of water to the public in premises in which water is so supplied, the water undertaker or combined licensee must, as soon as may be, notify such persons as the Secretary of State or the Welsh Ministers may from time to time determine for these purposes of the matters of which notice is given to consumers in accordance with reg 17(6)(a) of the regulations in question: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(8); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(8) (both amended by SI 2005/2035).

29 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(6)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(6)(b) (both as substituted: see note 26). As to the meaning of 'appropriate local authority' see PARA 378 note 12.

30 le given in accordance with the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 17(5) or, as the case may be, the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 17(5) (see the text to notes 24-27) in the circumstances mentioned in reg 17(1) of the appropriate regulations (including reg 17(1) as read with reg 17(3)(a) thereof (see the text to note 19)).

31 le a failure in respect of a parameter specified in Pt II of Table A or in Table B in Sch 1 to the appropriate regulations.

32 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(1)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(1)(a) (reg 19(1)(a) in each case substituted by SI 2007/2734).

33 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(1)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(1)(b).

34 Ie in accordance with reg 20 of the appropriate regulations: see PARA 378.

35 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(1) (in each amended by SI 2005/2035). The exercise by the Secretary of State or the Welsh Ministers of this power does not preclude the exercise by the Secretary of State or the Welsh Ministers, in relation to the same circumstances, of the power conferred by the Water Industry Act 1991 s 18 (see PARA 163): Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(2).

36 Ie in accordance with reg 17(5) of the appropriate regulations in the circumstances mentioned in reg 17(3)(b) thereof: see the text to note 20.

37 Ie any parameter specified in Pt II of Table A or in Table B in Sch 1 to the appropriate regulations.

38 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(3)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(3)(a).

39 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(3)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(3)(b).

40 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(3). The authorisation referred to in the text is that given under reg 20 (see PARA 378) of the appropriate regulations.

41 For the purposes of reg 18 in the appropriate regulations, 'water of a relevant description' means water supplied by a relevant supplier which uses a supply system for the purposes of supplying water to consumers, being a supply system into which the water undertaker or combined licensee introduces water: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(1A); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(1A) (both added by SI 2005/2035).

42 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(1) (both amended by SI 2005/2035). 'Indicator parameter' means a parameter listed in Sch 2 to the appropriate regulations; 'specification', in relation to an indicator parameter, means the concentration, value or state, shown as applicable to that parameter in Sch 2 to those regulations as measured by reference to the unit of measurement so shown; and 'state', in relation to an indicator parameter, means the state specified in relation to that parameter in Sch 2 to those regulations as measured by reference to the unit of measurement so specified: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1).

43 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(1)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(1)(a).

44 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(1)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(1)(b).

45 Ie items 4 and 5 in Sch 2 to the appropriate regulations.

46 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(1)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(1)(c).

47 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(2)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(2)(a) (in each case reg 18(2), (3) substituted, (3A) added, by SI 2005/2035). Where a notification given in accordance with reg 18(2) of the appropriate regulations discloses an inability to meet the specification applicable to an indicator parameter, and the Secretary of State or, as the case may be, the Welsh Ministers consider that the inability poses a risk to human health, the Secretary of State or the Welsh Ministers may, by notice in writing to any relevant supplier which uses the supply system for the purposes of supplying water to consumers in respect of which the notification was given, require that relevant supplier to take such steps as may be determined by the Secretary of State or, as appropriate, the Welsh Ministers and specified in the notice: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(4) (in each case reg 19(4), (5) amended by SI 2005/2035). It is the duty of a relevant supplier to which such a notice has been given to take the steps

specified in the notice: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 19(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 19(5) (both as so amended).

48 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(2)(b) (both as substituted: see note 47).

49 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(3)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(3)(a) (both as substituted: see note 47). A relevant supplier which receives such a notice must immediately send or cause to be sent a copy of that notice to those of its consumers who are likely to be affected by the failure: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(3A); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(3A) (both as added: see note 47).

50 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(3)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(3)(b) (both as substituted: see note 47).

51 Ie such an inability as is mentioned in reg 18(3) to the appropriate regulations: see the text to notes 49-50.

52 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 18(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 18(4) (in each case amended by SI 2005/2035).

53 Ie under the Water Industry Act 1991 s 18: see PARA 163.

54 As to the Water Services Regulation Authority see PARA 109.

55 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(2) DUTIES OF WATER UNDERTAKERS IN RELATION TO SUPPLY/(iv) Quality and Sufficiency of Supplies/B. WATER QUALITY/(B) Prescribed Standards of Wholesomeness/381. Monitoring of supplies.

### **381. Monitoring of supplies.**

For the purpose of determining whether water<sup>1</sup> satisfies the requirements as to wholesomeness of supply<sup>2</sup> or, if a departure has been authorised<sup>3</sup> in relation to that supply, those requirements as read with the terms of that authorisation, a water undertaker<sup>4</sup> must take, or cause to be taken, and analyse<sup>5</sup>, or cause to be analysed, not less than the specified number<sup>6</sup> of samples of the water within each of the water supply zones<sup>7</sup> which it supplies<sup>8</sup>.

Where the distribution of water in any part of a water supply zone is by tanker and is or is likely to be an intermittent short-term supply, samples of water from each tanker from which water is distributed must be taken 48 hours after the commencement of the distribution from that tanker and every 48 hours thereafter until the distribution is discontinued<sup>9</sup>. Except in such a case, the specified Schedule 1 parameters<sup>10</sup> and the indicator parameters<sup>11</sup> must be subject either to check monitoring<sup>12</sup> or to audit monitoring<sup>13</sup>. The copper, lead and nickel parameters and the parameters relevant to radioactivity (total indicative dose and tritium), must be monitored in such manner as the Secretary of State or, as appropriate, the Welsh Ministers may determine from time to time and specify by notice in writing<sup>14</sup> given to each water undertaker<sup>15</sup>.

Except in relation to water supplied from a tanker, sampling points<sup>16</sup> in respect of every parameter, other than a parameter for which samples are taken from an authorised supply point, must be selected at random unless, by notice in writing to a water undertaker (whether or not on the application of the undertaker), the Secretary of State or, as appropriate, the Welsh Ministers otherwise determines<sup>17</sup>. Provision is made in relation to the number of samples to be taken<sup>18</sup>. As soon as a relevant supplier has reasonable grounds for believing that any element, organism or substance, other than residual disinfectant or a parameter, whether alone or in combination with a parameter or any other element, organism or substance, may cause the supply within any of the water supply zones which it supplies to be a supply which does not satisfy the requirements for wholesomeness of supply<sup>19</sup> or, if a departure has been authorised<sup>20</sup>, those provisions as read with the terms of that authorisation, it must take, or cause to be taken, sufficient samples from water within that zone, whether from a service reservoir, a treatment works or otherwise, in respect of that element, organism or substance, in order to establish whether that water is wholesome<sup>21</sup>.

For the purposes of establishing the quality of water to be supplied to any of its water supply zones, a water undertaker must take, or cause to be taken, and analyse, or cause to be analysed, not less than the specified number of samples<sup>22</sup>; and for the purposes of establishing the quality of water to be supplied in any supply system<sup>23</sup> into which a combined licensee introduces water, a combined licensee must take, or cause to be taken, and analyse, or cause to be analysed, not less than the specified number of samples<sup>24</sup>. Separate provision is made with regard to sampling at treatment works<sup>25</sup>, at service reservoirs<sup>26</sup> and at new sources<sup>27</sup>.

Every water undertaker or combined licensee must secure, so far as is reasonably practicable, that in taking, handling, transporting, storing and analysing any sample required to be taken under these provisions, or causing any such sample to be taken, handled, transported, stored and analysed, the appropriate requirements are satisfied<sup>28</sup>. Every water undertaker or combined licensee must maintain such records as are sufficient to enable it to establish, in

relation to each such sample taken, that such of the appropriate requirements as are applicable to that sample have been satisfied<sup>29</sup>.

Every water undertaker or combined licensee must identify every point from which it abstracts water<sup>30</sup> for supply<sup>31</sup>; and at every such abstraction point, the relevant water undertaker or combined licensee must take, or cause to be taken such samples, and analyse, or cause to be analysed, those samples for such properties, organisms and substances as it considers necessary in order to comply with the provisions relating to water treatment<sup>32</sup>. In relation to any abstraction point, the Secretary of State or, as the case may be, the Welsh Ministers may, by notice served on the relevant water undertaker or combined licensee, require the relevant water undertaker or combined licensee to take, or cause to be taken such numbers of samples of water per year as may be specified, and to analyse, or cause to be analysed, those samples for such concentrations or values of such properties, organisms and substances as may be specified and at such frequencies as may be specified<sup>33</sup>. Specific provision is made as to the frequency at which analysis is to take place<sup>34</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier is enforceable<sup>35</sup> by the Secretary of State or, as the case may be, the Welsh Ministers, or the Water Services Regulation Authority<sup>36</sup>, whether or not it constitutes an offence<sup>37</sup>.

The monitoring of private supplies is the duty of the local authority<sup>38</sup>.

1 The Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt IV (regs 5-10) and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt IV (regs 5-10) (see the text to notes 2-21) apply to water supplied for regulation 4(1) purposes by a relevant supplier in the performance of its duties under the Water Industry Act 1991 Pt III Ch III (ss 67-86A) (quality and sufficiency of supplies): Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 5(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 5(3) (in both cases reg 5(3) substituted, (4) added by SI 2005/2035). As to the meaning of 'regulation 4(1) purposes' see PARA 376 note 2. As to the meaning of 'relevant supplier' see PARA 376 note 21.

As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

2 Ie the requirements of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt III (reg 4) or, as the case may be, the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt III (reg 4): see PARA 376.

3 Ie under the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt VI (regs 17-24) or, as the case may be, under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt VI (regs 17-24): see PARA 378.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to the meaning of 'analyse' see PARA 375 note 14.

6 Ie the number specified in, or in accordance with provisions of, the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt IV (regs 5-10) or the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt IV (regs 5-10): see the text to notes 9-21.

7 As to the meaning of 'water supply zone' see PARA 376 note 3.

8 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 6(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 6(1) (both amended by SI 2005/2035). Regulations 5-9 of the appropriate regulations apply to a combined licensee in relation to samples taken from supply points as they apply to a water undertaker, but only in so far as the combined licensee is introducing water into a water supply zone in which the water undertaker takes samples under Pt IV (regs 5-10) (to the extent authorised by or under reg 8: see note 17) from supply points: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 5(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 5(4) (both as added: see note 1). As to the meaning of 'combined licensee' see PARA 378 note 4. 'Supply point' means a blending point, service reservoir, treatment works or other point, not being a sampling point, which the Secretary of State in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, or the Welsh Ministers in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, authorise for the purposes of reg 6 of the appropriate regulations: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1). 'Blending point' means a point at which waters originating from two

or more sources and treated for the purposes of their supply for regulation 4(1) purposes are combined under conditions that are designed to secure that, after such combination, the requirements of reg 4(2) (see PARA 376) of the appropriate regulations are met: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1). As to the meaning of 'service reservoir' see PARA 376 note 22. As to the Secretary of State see PARA 15 note 1. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

9 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 6(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 6(3). As to the analysis of such samples see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 6(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 6(4).

10 Ie the parameters listed in Tables A and B in Sch 1 to the appropriate regulations. As to the meaning of 'parameter' see PARA 376 note 9.

11 As to the meaning of 'indicator parameter' see PARA 380 note 42.

12 'Check monitoring' means monitoring for the purpose of obtaining information at regular intervals: (1) as to the organoleptic and microbiological quality of water; and (2) where relevant, as to the effectiveness of drinking-water treatment (particularly of disinfection), for the purpose of determining (a) as regards the parameters listed in Tables A and B in Sch 1 to the appropriate regulations, whether water supplied for regulation 4(1) purposes satisfies the provisions of Pt III of the appropriate regulations or, if a departure has been authorised under Pt VI of the appropriate regulations in relation to that supply, those provisions as read with the terms of that departure; and (b) as regards indicator parameters, whether water supplied for regulation 4(1) purposes meets the specifications for those parameters: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 5(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 5(2). 'Disinfection' means a process of water treatment to remove, or to render harmless to human health, every pathogenic micro-organism and pathogenic parasite that would otherwise be present in the water; and 'disinfected' is to be construed accordingly: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (in each case definition substituted by SI 2007/2734).

13 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 6(2), (5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 6(2), (5). 'Audit monitoring' means monitoring for the purpose of obtaining information from which it may be established: (1) as regards the parameters listed in Tables A and B in Sch 1 to the appropriate regulations, whether water supplied for regulation 4(1) purposes satisfies the provisions of Pt III of those regulations or, if a departure has been authorised under Pt VI of those regulations in relation to that supply, those provisions as read with the terms of that departure; and (2) as regards indicator parameters, whether water supplied for regulation 4(1) purposes meets the specifications for those parameters: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 5(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 5(1).

14 As to the meaning of 'writing' see PARA 22 note 1.

15 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 6(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 6(6). In certain cases, however, water need not be monitored in relation to radioactivity: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 6(7)-(9); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 6(7)-(9) (in each case reg 6(9) amended by SI 2005/2035).

16 'Sampling point': (1) in relation to water supplied from a distribution network, means a point, being a consumer's tap, that is selected for the purposes of Pt IV (regs 5-10) of the appropriate regulations; (2) in relation to water supplied from a tanker, means the point at which the water emerges from the tanker: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1). As to the meaning of 'consumer' see PARA 376 note 21.

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 7; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 7. Certain powers are given to the Secretary of State or, as appropriate, the Welsh Ministers with respect to the authorisation of points from which samples may be taken: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 8; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 8 (in each case amended by SI 2005/2035; SI 2007/3374).

18 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 9; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 9 (in each case amended by SI 2005/2035; SI 2007/3374).

19 Ie the provisions of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt III (reg 4) or, as the case may be, the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt III (reg 4): see PARA 376.

20 le under the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, Pt VI (regs 17-24) or, as the case may be, under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, Pt VI (regs 17-24): see PARA 378.

21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 10; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 10 (in each case amended by SI 2005/2035). As to the meaning of 'substance' see PARA 367 note 21.

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 12(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 12(1) (in each case reg 12(1) substituted, (2) added, by SI 2005/2035). The specified number of samples is that specified in Pt V (regs 12-16) (see the text to notes 23-29) of the appropriate regulations.

23 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definition added in each case by SI 2005/2035).

24 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 12(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 12(2) (in each case as added: see note 22). The specified number of samples is that specified in Pt V (regs 12-16) (see the text to notes 22-29) of the appropriate regulations.

25 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 13; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 13 (in each case amended by SI 2005/2035; SI 2007/3374).

26 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 14; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 14 (in each case amended by SI 2005/2035).

27 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 15; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 15 (in each case amended by SI 2005/2035; SI 2007/3374).

28 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16(1) (in each case reg 16(1), (2) amended by SI 2005/2035). 'Appropriate requirements' means such of the following requirements as are applicable: (1) the sample is representative of the quality of the water at the time of sampling; (2) the sample is not contaminated when being taken; (3) the sample is kept at such temperature and in such conditions as will secure that there is no material alteration of the concentration or value for the measurement or observation of which the sample is intended; (4) the sample is analysed as soon as may be after it has been taken (a) by or under the supervision of a person who is competent to perform that task; and (b) with the use of such equipment as is suitable for the purpose; (5) any laboratory at which samples are analysed has a system of analytical quality control that is subjected from time to time to checking by a person who is (a) not under the control of the laboratory, the water undertaker or the combined licensee; and (b) approved by the Secretary of State or, as appropriate, the Welsh Ministers for that purpose: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16(2) (both as so amended). For the purposes of head (5), 'laboratory' means a person who undertakes the analysis of samples for these purposes, whether at the time and place at which the samples are taken or otherwise: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16(3). As to analysis of samples see further the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16(5)-(11) (amended by SI 2001/2885; SI 2005/2035); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16(5)-(11) (amended by SI 2005/2035). As to the meaning of 'person' see PARA 13 note 29.

29 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16(4) (in each case amended by SI 2005/2035).

30 le water for supply for regulation 4(1) purposes.

31 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16A(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16A(1) (in each case reg 16A added by SI 2007/2734).

32 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16A(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16A(2) (as added: see note 31). The provisions relating to water treatment referred to in the text are those of regs 26-28 (see PARAS 382-383) of the appropriate regulations.

33 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16A(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16A(3) (as added: see note 31). The Secretary of State or, as appropriate, the Welsh Ministers may, by notice served on the relevant water undertaker or combined licensee, revoke or amend a notice served under reg 16A(3) of the appropriate regulations: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16A(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16A(4) (as so added).

34 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 16A(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 16A(5) (as added: see note 31).

35 Ie under the Water Industry Act 1991 s 18: see PARA 163.

36 As to the Water Services Regulation Authority see PARA 109.

37 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

38 See the Private Water Supplies Regulations 1991, SI 1991/2790, Pts IV-V (regs 8-22); and PARA 407.

## **UPDATE**

### **381 Monitoring of supplies**

NOTE 38--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, SI 2010/1384).

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## (C) WATER TREATMENT

### **382. Disinfection and other treatment arrangements.**

Unless the statutory conditions are satisfied, before supplying water for the specified purposes<sup>1</sup>, a water undertaker<sup>2</sup> or combined licensee<sup>3</sup> must disinfect<sup>4</sup> the water<sup>5</sup> and, where necessary, subject the water to sufficient preliminary treatment<sup>6</sup> to prepare it for disinfection<sup>7</sup>. When any property, organism or substance is present in a water source at a level that may constitute a potential danger to human health<sup>8</sup>, then, unless the statutory conditions are satisfied, before supplying water for the specified purposes using water from any source, a water undertaker or combined licensee must design and continuously operate an adequate treatment process<sup>9</sup> for water from the source<sup>10</sup>.

The statutory conditions are that the water undertaker or combined licensee: (1) must supply water from the treatment works as a matter of urgency in order to prevent an unexpected interruption in piped supply to consumers<sup>11</sup>; and (2) before the supply is made, has taken all necessary steps to inform consumers that the water is not disinfected or adequately treated<sup>12</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier<sup>13</sup> is enforceable<sup>14</sup> by the Secretary of State<sup>15</sup> or, as the case may be, the Welsh Ministers<sup>16</sup>, or the Water Services Regulation Authority<sup>17</sup>, whether or not it constitutes an offence<sup>18</sup>.

1     le for regulation 4(1) purposes. For the purposes of reg 26 in the appropriate regulations, water is supplied for regulation 4(1) purposes when it leaves a treatment works: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(5)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(5)(b)(iii) (in each case reg 26 substituted by SI 2007/3374). As to the meaning of 'regulation 4(1) purposes' see PARA 376 note 2. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

2     As to the meaning of 'water undertaker' see PARA 137 note 4.

3     As to the meaning of 'combined licensee' see PARA 378 note 4.

4     As to the meaning of 'disinfect' see PARA 381 note 12.

5     Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(1)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(1)(a) (as substituted: see note 1).

6     'Sufficient preliminary treatment' means the treatment necessary: (1) to remove, or to reduce the value or concentration of, any property or substance which would interfere with disinfection; and (2) to reduce turbidity to less than one Nephelometric Turbidity Unit: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(5)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(5)(b) (both as substituted: see note 1). As to the meaning of 'substance' see PARA 367 note 21.

7     Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(1)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(1)(b) (both as substituted: see note 1).

8     Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(2) (both as substituted: see note 1).

9     'Adequate treatment process' means a process of blending or purification treatment which removes, or renders harmless the value or concentration of, any property of, organism or substance in, water, so that

supplies do not constitute a potential danger to human health: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(5)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(5)(a) (both as substituted: see note 1).

10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(3) (both as substituted: see note 1).

11 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(4)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(4)(a) (both as substituted: see note 1). As to the meaning of 'consumer' see PARA 376 note 21.

12 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 26(4)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 26(4)(b) (both as substituted: see note 1).

13 As to the meaning of 'relevant supplier' see PARA 376 note 21.

14 Ie under the Water Industry Act 1991 s 18: see PARA 163.

15 Ie in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184. As to the Secretary of State see PARA 15 note 1.

16 Ie in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

17 As to the Water Services Regulation Authority see PARA 109.

18 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

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### **383. Risk assessment.**

In relation to every treatment works and supply system<sup>1</sup> from which water is supplied for the specified<sup>2</sup> purposes<sup>3</sup>, every water undertaker<sup>4</sup> or combined licensee<sup>5</sup> must carry out a risk assessment of each of its treatment works and connected supply system in order to establish whether there is a significant risk of supplying water from those works or supply system that would constitute a potential danger to human health<sup>6</sup>. Every water undertaker or combined licensee must keep its risk assessments under review<sup>7</sup>. Where a water undertaker or combined licensee becomes aware of any factors which make it likely that a risk assessment under these provisions would establish that there is a significant risk of supplying water that would constitute a potential danger to human health, it must serve a notice on the Secretary of State or, as appropriate, the Welsh Ministers specifying the relevant factors<sup>8</sup>.

As soon as reasonably practicable after a water undertaker or combined licensee has carried out a risk assessment or review of such assessment under the above provisions, it must submit to the Secretary of State or, as the case may be, the Welsh Ministers a report of the assessment or review<sup>9</sup>. The report must contain: (1) a description of the methods used to carry out the assessment or review<sup>10</sup>; (2) where the assessment or review establishes that there is no significant risk of supplying water that would constitute a potential danger to human health, a statement confirming this<sup>11</sup>; and (3) where the assessment or review establishes that measures have been taken to remove a significant risk of supplying water that would constitute a potential danger to human health monitoring data which verifies this and details of those measures<sup>12</sup>. Where the assessment or review establishes that there is a significant risk of supplying water that would constitute a potential danger to human health, the report must: (a) contain a full explanation including details of every property, organism or substance<sup>13</sup> that has been identified as contributing to the risk<sup>14</sup>; and (b) specify the measures that the water undertaker or combined licensee has made operational as at the date of the report, and intends to make operational, to mitigate the risk<sup>15</sup>.

Where the Secretary of State or, as the case may be, the Welsh Ministers receive a report which states that there is or has been a significant risk of supplying water that would constitute a potential danger to human health, he or they may, by notice served on the water undertaker or combined licensee, require the water undertaker or combined licensee:

- 855 (i) to maintain such specified<sup>16</sup> measures for such period of time as the Secretary of State or, as appropriate, the Welsh Ministers consider appropriate to mitigate the risk<sup>17</sup>;
- 856 (ii) to review, revise or make operational such specified measures by such date as the Secretary of State or, as appropriate, the Welsh Ministers consider appropriate to mitigate the risk<sup>18</sup>;
- 857 (iii) to audit whether the measures have been effective by such means as may be specified<sup>19</sup>;
- 858 (iv) not to supply water<sup>20</sup> from specified treatment works or supply systems, or not to so supply unless specified conditions are satisfied<sup>21</sup>; and
- 859 (v) to give the Secretary of State or, as appropriate, the Welsh Ministers such information as he or they may require to monitor progress towards mitigation of that risk<sup>22</sup>.



The Secretary of State or, as appropriate, the Welsh Ministers may, by notice served on the relevant water undertaker or combined licensee, revoke or amend such a notice<sup>23</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier<sup>24</sup> is enforceable<sup>25</sup> by the Secretary of State or, as the case may be, the Welsh Ministers<sup>26</sup>, or the Water Services Regulation Authority<sup>27</sup>, whether or not it constitutes an offence<sup>28</sup>.

1 As to the meaning of 'supply system' see PARA 319 note 8: definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definition added in each case by SI 2005/2035).

2 le for regulation 4(1) purposes. As to the meaning of 'regulation 4(1) purposes' see PARA 376 note 2.

3 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 27(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 27(1) (in each case regs 27, 28 substituted by SI 2007/3374). As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to the meaning of 'combined licensee' see PARA 378 note 4.

6 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 27(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 27(2) (both as substituted: see note 3). Pursuant to this obligation, every water undertaker or combined licensee must carry out a risk assessment in respect of: (1) each of its treatment works and connected supply systems which is in use on 22 December 2007, and it expects to use after 1 October 2008, before 1 October 2008; and (2) any other treatment works and connected supply system, before supplying water from them: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 27(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 27(3) (both as so substituted). The Secretary of State or, as the case may be, the Welsh Ministers may by notice served on a water undertaker or combined licensee require a risk assessment or review to be carried out by a date specified in the notice: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 27(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 27(5) (both as so substituted). As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

7 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 27(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 27(4) (both as substituted: see note 3).

8 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 27(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 27(6) (both as substituted: see note 3).

9 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(1) (both as substituted: see note 3).

10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(2)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(2)(a) (both as substituted: see note 3).

11 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(2)(b) (both as substituted: see note 3).

12 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(2)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(2)(c) (both as substituted: see note 3).

13 As to the meaning of 'substance' see PARA 367 note 21.

14 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(3)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(3)(a) (both as substituted: see note 3).

15 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(3)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(3)(b) (both as substituted: see note 3).

16 In the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(4), and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(4), 'specified' means specified in the notice served under that provision: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(5) (both as substituted: see note 3).

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(4)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(4)(a) (both as substituted: see note 3).

18 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(4)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(4)(b) (both as substituted: see note 3).

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(4)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(4)(c) (both as substituted: see note 3).

20 Ie for regulation 4(1) purposes.

21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(4)(d); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(4)(d) (both as substituted: see note 3).

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(4)(e); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(4)(e) (both as substituted: see note 3).

23 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 28(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 28(6) (both as substituted: see note 3).

24 As to the meaning of 'relevant supplier' see PARA 376 note 21.

25 Ie under the Water Industry Act 1991 s 18: see PARA 163.

26 Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

27 As to the Water Services Regulation Authority see PARA 109.

28 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

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### **384. Contamination from pipes.**

Where there is a risk (the 'prescribed risk') that water supplied by a relevant supplier<sup>1</sup> would:

- 860 (1) for the reason that there is the presence in the water of a concentration of copper or lead which is attributable to the fact that copper or lead is the major component of a pipe<sup>2</sup> which is subject to pressure from a water main<sup>3</sup> or which would be so subject but for the closing of some valve, or its associated fittings<sup>4</sup>; and
- 861 (2) after leaving the relevant supplier's pipes, contain a concentration of copper or lead which exceeds the prescribed concentration<sup>5</sup>;

every water undertaker<sup>6</sup> or combined licensee<sup>7</sup> which introduces water into the supply system<sup>8</sup> used by the relevant supplier must treat the water in such a way as will, in its opinion, eliminate the prescribed risk or reduce it to a minimum<sup>9</sup>. These provisions do not, however, require a water undertaker or combined licensee to treat water if the treatment is unlikely to achieve a significant reduction in the concentration of copper or lead<sup>10</sup>, or if treatment is not reasonably practicable<sup>11</sup>.

Where at any time in the period beginning with 25 December 2003 and ending immediately before 25 December 2013, a relevant supplier has reason to believe that water supplied by it for the prescribed purposes<sup>12</sup> from a pipe:

- 862 (a) of which the major component is lead<sup>13</sup>;
- 863 (b) which is subject to water pressure from a water main or would be so subject but for the closing of some valve<sup>14</sup>; and
- 864 (c) which belongs, as to part, to a relevant supplier and, as to the remainder, to the owner<sup>15</sup> of any premises to which the relevant supplier supplies water for the prescribed purposes<sup>16</sup>,

contains, at the consumer's<sup>17</sup> tap, a concentration of lead which exceeds the lower but does not exceed the higher prescribed concentration<sup>18</sup>, and the undertaker has received from the owner of premises to which water is so supplied notice in writing<sup>19</sup> of the owner's intention to replace so much of the pipe as belongs to him and of his desire that the relevant supplier replaces the remainder of the pipe<sup>20</sup>, the relevant supplier must modify or replace its part of the pipe<sup>21</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier is enforceable<sup>22</sup> by the Secretary of State<sup>23</sup> or, as the case may be, the Welsh Ministers<sup>24</sup>, or the Water Services Regulation Authority<sup>25</sup>, whether or not it constitutes an offence<sup>26</sup>.

1 As to the meaning of 'relevant supplier' see PARA 376 note 21. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

2 Ie such a pipe as is mentioned in the Water Industry Act 1991 s 68(3)(a): see PARA 374. As to the meaning of 'pipe' see PARA 138 note 11. As to the vesting of pipes in the undertaker see PARA 464.

3 As to the meaning of 'water main' see PARA 138 note 11.

- 4 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(1), (2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(1), (2).
- 5 I.e a concentration of copper in excess of 2mg/litre or a concentration of lead in excess of 10µg/litre: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(1)(a), (b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(1)(a), (b).
- 6 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 7 As to the meaning of 'combined licensee' see PARA 378 note 4.
- 8 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (definition added in each case by SI 2005/2035).
- 9 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(1) (in each case reg 30(1), (3) amended by SI 2005/2035).
- 10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(3)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(3)(a) (in each case reg 30(3) as amended: see note 9).
- 11 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(3)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(3)(b).
- 12 I.e for regulation 4(1) purposes. As to the meaning of 'regulation 4(1) purposes' see PARA 376 note 2.
- 13 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(5)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(5)(a).
- 14 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(5)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(5)(b).
- 15 As to the meaning of 'owner' see PARA 22 note 9.
- 16 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(5)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(5)(c) (in each case amended by SI 2001/2885; SI 2005/2035).
- 17 As to the meaning of 'consumer' see PARA 376 note 21.
- 18 I.e exceeds 10µg/l but does not exceed 25µg/l: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(4)(a); the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(4)(a) (in each case amended by SI 2001/2885).
- 19 As to the meaning of 'writing' see PARA 22 note 1.
- 20 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(4)(b); the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(4)(b) (in each case amended by SI 2005/2035).
- 21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 30(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 30(4) (in each case amended by SI 2005/2035).
- 22 I.e under the Water Industry Act 1991 s 18: see PARA 163.
- 23 I.e in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184. As to the Secretary of State see PARA 15 note 1.
- 24 I.e in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. Functions under reg 39 were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.
- 25 As to the Water Services Regulation Authority see PARA 109.
- 26 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

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### **385. Application and introduction of substances and products.**

Subject to certain exceptions<sup>1</sup>, a water undertaker<sup>2</sup> or combined licensee<sup>3</sup> must not apply any substance or product to, or introduce any substance or product into, water which is to be supplied for the prescribed purposes<sup>4</sup> unless one of the following requirements is satisfied<sup>5</sup>. The requirements are:

- 865 (1) that the Secretary of State or, as appropriate, the Welsh Ministers have for the time being approved the application or introduction of that substance or product and it is applied or introduced in accordance with any conditions attaching to that approval<sup>6</sup>;
- 866 (2) that the Secretary of State or, as appropriate, the Welsh Ministers are satisfied that the substance or product either alone or in combination with any other substance or product in the water is unlikely to affect adversely the quality of the water supplied<sup>7</sup>;
- 867 (3) that the substance or product is to be applied or introduced solely for the purposes of testing or research, and the water undertaker or combined licensee has given to the Secretary of State or, as appropriate, the Welsh Ministers not less than three months<sup>8</sup> notice in writing of its intention so to apply or introduce the substance or product<sup>9</sup>.

Where substances or products are applied or introduced in any case in which the requirement mentioned in head (3) above is satisfied, their application or introduction must be discontinued within 12 months of the date on which they were first applied or introduced or, if the Secretary of State or, as the case may be, the Welsh Ministers by notice given in writing to the water undertaker or combined licensee so direct, within such other period, whether longer or shorter, as may be specified in the notice<sup>10</sup>.

The Secretary of State or, as appropriate, the Welsh Ministers may, by notice given in writing to any water undertaker or combined licensee, prohibit it from applying to, or introducing into, water intended to be supplied for the prescribed purposes any substance or product which the undertaker or combined licensee would otherwise be authorised<sup>11</sup> to apply or introduce<sup>12</sup>. Such a prohibition may be without limitation as to time or for such period as is specified in the notice<sup>13</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may:

- 868 (a) revoke by an instrument in writing any approval given under head (1) above<sup>14</sup>;
- 869 (b) modify any such approval by an instrument in writing by including conditions or varying existing conditions<sup>15</sup>;
- 870 (c) give any such prohibition notice<sup>16</sup>;

but may not, unless satisfied that it is necessary to do so in the interests of public health without notice, do any of those things without giving all such persons as are, in the opinion of the Secretary of State or, as the case may be, the Welsh Ministers likely to be affected by the

revocation or modification of the approval or by the giving of the notice at least six months' notice in writing of his or their intention<sup>17</sup>.

At least once in each year beginning with the year 2004, the Secretary of State or, as appropriate, the Welsh Ministers must issue a list of all the substances and products in relation to which:

- 871 (i) an approval under head (1) above has been granted or refused<sup>18</sup>;
- 872 (ii) such an approval has been revoked or modified<sup>19</sup>;
- 873 (iii) a prohibition notice<sup>20</sup> has been given<sup>21</sup>,

with particulars of the action taken<sup>22</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier<sup>23</sup> is enforceable<sup>24</sup> by the Secretary of State or, as the case may be, the Welsh Ministers, or the Water Services Regulation Authority<sup>25</sup>, whether or not it constitutes an offence<sup>26</sup>.

1 A substance or product which, at the time of its application or introduction, bears an appropriate CE marking in accordance with the Directive, or conforms to: (1) an appropriate harmonised standard or European technical approval; or (2) an appropriate British Standard or some other national standard of a relevant state which provides an equivalent level of protection and performance, may, however, be applied or introduced, notwithstanding that none of the requirements of heads (1)-(3) in the text is satisfied; but any such application or introduction is subject to: (a) such national conditions of use restricting the dosing concentration as are for the time being in force in relation to such substances and products pursuant to a determination of the Secretary of State or, as appropriate, the Welsh Ministers, by an instrument in writing; and (b) such other requirements, within the meaning of European Parliament and EC Council Directive 98/34 (OJ L204, 21.07.98, p 37) (which lays down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services) as amended from time to time, in relation to such substances and products, as have been communicated to the Commission in the form of a draft technical regulation in accordance with art 8 of that Directive, and whose adoption by a member state has also been communicated to the Commission: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(3) (both amended by SI 2007/2734). As to the meaning of 'substance' see PARA 367 note 21. As to the meaning of 'writing' see PARA 22 note 1. As to the Secretary of State see PARA 15 note 1. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

'The Directive' means EC Council Directive 89/106 (OJ L40, 11.2.1989, p 12) on the approximation of laws, regulations and administrative provisions of the member states relating to construction products, as amended from time to time; 'relevant state' means a state which is a member state or any other state which is an EEA state; 'EEA state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183); 'European technical approval' means a favourable technical assessment of the fitness for use of a construction product for an intended use, issued for the purposes of the Directive by a body authorised by a relevant state to issue European technical approvals for those purposes and notified by that body to the European Commission; and 'harmonised standard' means a standard established as mentioned in the Directive by the European standards organisation on the basis of a mandate given by the European Commission and published by the Commission in the Official Journal of the European Community: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(1) (both amended by SI 2007/2734). As to the meaning of 'member state' see the Interpretation Act 1978 s 5, Sch 1; European Communities Act 1972 s 1(2), Sch 1 Pt II.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the meaning of 'combined licensee' see PARA 378 note 4.

4 Ie for regulation 4(1) purposes. As to the meaning of 'regulation 4(1) purposes' see PARA 376 note 2.

5 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(2) (both amended by SI 2005/2035).

6 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(4)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(4)(a). An application for such an approval may be made by any person: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(5). If the Secretary of State or, as appropriate, the Welsh Ministers decides to issue such an approval, he or they may include in the approval such conditions as he or they consider appropriate and, subject to reg 31(10) of the appropriate regulations (see the text to notes 14-17), may at any time revoke or vary any approval previously given: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(6). The Secretary of State or, as the case may be, Welsh Ministers may, by notice served on the person who makes such an application for approval, require the person to pay a charge which reflects the administrative expenses incurred or likely to be incurred by the Secretary of State or the Welsh Ministers in connection with the application; and in determining the amount of any such charge, may adopt such methods and principles for its calculation as appear to him or them to be appropriate: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(13); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(13) (both added by SI 2007/3374). As to the meaning of 'person' see PARA 13 note 29.

7 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(4)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(4)(b).

8 As to the meaning of 'month' see PARA 23 note 10.

9 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(4)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(4)(c) (both amended by SI 2005/2035).

10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(7); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(7) (both amended by SI 2005/2035).

11 Ie by virtue of reg 31(2) (see the text to notes 1-5) and reg 31(4)(b) or (c) (see heads (2) and (3) in the text), or of reg 31(3) (see note 1), of the appropriate regulations: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(8)(a), (b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(8)(a), (b).

12 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(8); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(8) (both amended by SI 2005/2035).

13 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(9); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(9).

14 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(10)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(10)(a). Notice must be given forthwith by the Secretary of State or, as appropriate, the Welsh Ministers to all persons likely to be affected by the making of such an instrument as is mentioned in reg 31(10)(a) or (b) (see the text to note 15) of the appropriate regulations: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(11); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(11).

15 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(10)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(10)(b). See also note 14.

16 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(10)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(10)(c).

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(10); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(10).

18 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(12)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(12)(a).

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(12)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(12)(b).

20 Ie a notice under reg 31(8) of the appropriate regulations: see the text to notes 11-12.

21 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(12)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(12)(c).

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(12); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(12).

- 23 As to the meaning of 'relevant supplier' see PARA 376 note 21.
- 24 le under the Water Industry Act 1991 s 18: see PARA 163.
- 25 As to the Water Services Regulation Authority see PARA 109.
- 26 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.



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### **386. Use of processes.**

The Secretary of State<sup>1</sup> or, as appropriate, the Welsh Ministers<sup>2</sup> may at any time by notice in writing<sup>3</sup> given to a water undertaker<sup>4</sup> or combined licensee<sup>5</sup> require it to make an application to him or them for approval of the use of any process; and may prohibit it for such period as may be specified in the notice from using any such process in connection with the supply by it of water for the prescribed<sup>6</sup> purposes<sup>7</sup>. The Secretary of State or, as appropriate, the Welsh Ministers may refuse the application or impose on any approval given for these purposes such conditions as he or they think fit, and may at any time by notice in writing to the water undertaker or combined licensee revoke an approval so given or modify or revoke any condition imposed by virtue of this provision<sup>8</sup>. However, the Secretary of State or, as the case may be, the Welsh Ministers may not revoke any approval given for these purposes, modify any condition so imposed, or prohibit a water undertaker or combined licensee from using any process, unless he or they have given to the water undertaker or combined licensee at least six months<sup>9</sup> notice in writing of the intention to revoke, modify or prohibit, as the case may be<sup>10</sup>; but this does not apply in any case in which the Secretary of State or the Welsh Ministers are of the opinion that the immediate revocation, modification or prohibition is necessary in the interests of public health<sup>11</sup>.

At least once in each year beginning with the year 2004, the Secretary of State or, as appropriate, the Welsh Ministers must issue a list of all the processes in relation to which:

- 874 (1) an approval under the above provisions has been granted or refused;
- 875 (2) such an approval has been revoked or modified;
- 876 (3) a notice<sup>12</sup> has been given,

with particulars of the action taken<sup>13</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier<sup>14</sup> is enforceable<sup>15</sup> by the Secretary of State or, as the case may be, the Welsh Ministers, or the Water Services Regulation Authority<sup>16</sup>, whether or not it constitutes an offence<sup>17</sup>.

1    Ie in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184. As to the Secretary of State see PARA 15 note 1. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, see PARA 376 note 1.

2    Ie in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. As to the Welsh Ministers see PARA 16 note 5. As to the application of the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

3    As to the meaning of 'writing' see PARA 22 note 1.

4    As to the meaning of 'water undertaker' see PARA 137 note 4.

5    As to the meaning of 'combined licensee' see PARA 378 note 4.

6    Ie for regulation 4(1) purposes. As to the meaning of 'regulation 4(1) purposes' see PARA 376 note 2.

7    Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 32(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 32(1) (in each case reg 32(1)-(3) amended by SI 2005/2035).

8 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 32(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 32(2) (both as amended: see note 7).

9 As to the meaning of 'month' see PARA 23 note 10.

10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 32(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 32(3) (both as amended: see note 7).

11 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 32(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 32(4).

12 Is a notice under reg 32(1) of the appropriate regulations: see the text to notes 1-7.

13 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 31(12); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 31(12) (applied with modifications by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 32(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 32(5) respectively).

14 As to the meaning of 'relevant supplier' see PARA 376 note 21.

15 Is under the Water Industry Act 1991 s 18: see PARA 163.

16 As to the Water Services Regulation Authority see PARA 109.

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

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## (D) OFFENCES

### **387. Offences in relation to water treatment.**

A water undertaker<sup>1</sup> or combined licensee<sup>2</sup> which contravenes<sup>3</sup> the provisions relating to the disinfection and treatment of water<sup>4</sup>, or the terms of a notice requiring the taking of certain steps to mitigate risk<sup>5</sup>, is guilty of an offence<sup>6</sup>. In any proceedings against a water undertaker or combined licensee for such an offence, it is a defence for that water undertaker or combined licensee to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence<sup>7</sup>.

A water undertaker or combined licensee which applies or introduces any substance or product in contravention of the prescribed restrictions<sup>8</sup> or of a prohibition notice given with respect thereto<sup>9</sup>, or which uses any process in contravention of a prohibition imposed<sup>10</sup> or without complying with a condition imposed with respect thereto<sup>11</sup>, is guilty of an offence<sup>12</sup>.

If any person<sup>13</sup>, in furnishing any information<sup>14</sup> or making any application in respect of the provisions relating to the contamination of pipes or the introduction of substances and products<sup>15</sup>, makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, he is guilty of an offence<sup>16</sup>. Proceedings for this offence may not be instituted except by or with the consent of the Secretary of State<sup>17</sup> or, as appropriate, the Welsh Ministers<sup>18</sup>, or of the Director of Public Prosecutions<sup>19</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'combined licensee' see PARA 378 note 4.

3 As to the meaning of 'contravene' see PARA 20 note 5.

4 I.e. which contravenes reg 26(1) or (3) of the appropriate regulations: see PARA 382.

5 I.e. a notice served under reg 28(4)(d) of the appropriate regulations: see PARA 383.

6 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(1) (in each case reg 33(1), (2) substituted by SI 2007/3374). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum; or, on conviction on indictment, a fine: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(1)(a), (b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(1)(a), (b) (both as so substituted). As to the statutory maximum see PARA 169 note 20. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

7 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(2) (both as substituted: see note 6).

8 I.e. in contravention of reg 31(2) of the appropriate regulations: see PARA 385.

9 I.e. given under reg 31(8) of the appropriate regulations: see PARA 385.

10 I.e. under reg 32(1) of the appropriate regulations: see PARA 386.

11 I.e. by imposed virtue of reg 32(2) of the appropriate regulations: see PARA 386.

12 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(3) (both amended by SI 2005/2035). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum; or, on conviction on indictment, a fine: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(3)(a), (b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(3)(a), (b).

13 As to the meaning of 'person' see PARA 13 note 29.

14 As to the meaning of 'information' see PARA 117 note 13.

15 In any application under reg 31 or reg 32 of the appropriate regulations: see PARAS 385-386.

16 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(5) (both amended by SI 2007/2734). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum; or, on conviction on indictment, a fine: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(5)(a), (b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(5)(a), (b).

17 In relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184. As to the Secretary of State see PARA 15 note 1.

18 In relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 33(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 33(6). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

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### **388. Offence of supplying water unfit for human consumption.**

Where a water undertaker's supply system<sup>1</sup> is used for the purposes of supplying water to any premises and that water is unfit for human consumption<sup>2</sup>, the relevant persons<sup>3</sup> are guilty of an offence<sup>4</sup>. In any proceedings against any relevant person for such an offence it is a defence for that person to show that it:

877 (1) had no reasonable grounds for suspecting that the water would be used for human consumption<sup>5</sup>; or

878 (2) took all reasonable steps and exercised all due diligence<sup>6</sup> for securing that the water was fit for human consumption on leaving the primary water undertaker's pipes or was not used for human consumption<sup>7</sup>.

Proceedings for an offence under these provisions may not be instituted except by the Secretary of State<sup>8</sup> or, in relation to Wales, by the Welsh Ministers<sup>9</sup>, or by the Director of Public Prosecutions<sup>10</sup>.

1 As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8. As to the meaning of 'water undertaker' see PARA 137 note 4.

2 There is no statutory definition of 'unfit for human consumption.' It would appear that a standard below that of 'wholesome' is envisaged. As to the prescribed standards of wholesomeness see PARA 376 et seq.

3 The relevant persons are: (1) the water undertaker whose supply system is used for the purposes of supplying the water (referred to as the 'primary water undertaker'); and (2) any employer of persons, or any self-employed person, who is concerned in the supply of the water: Water Industry Act 1991 s 70(1A) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 20(1), (3)). As to the meaning of 'person' see PARA 13 note 29.

4 Water Industry Act 1991 s 70(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 20(1), (2)). The penalty for such an offence is, on summary conviction, a fine not exceeding £20,000; or, on conviction on indictment, a fine: Water Industry Act 1991 s 70(1)(a), (b) (s 70(1)(a) amended by the Water Act 2003 s 61(1)). For the purposes of the Water Industry Act 1991 s 210 (see PARA 185) and any other enactment under which an individual is guilty of an offence by virtue of s 70(1) the penalty on conviction on indictment of an offence under s 70 is deemed to include imprisonment (in addition to or instead of a fine) for a term not exceeding two years: s 70(2). As to the meaning of 'enactment' see PARA 14 note 31. As to the factors to be considered by the court when determining the level of fine for such an offence in the case of a conviction on indictment see *R v Yorkshire Water Services Ltd* [2001] EWCA Crim 2635, [2002] 2 Cr App Rep (S) 37, [2001] All ER (D) 250 (Nov); considered in *R v Anglian Water Services Ltd* [2003] EWCA Crim 2243, [2004] 1 Cr App Rep (S) 374, sub nom *Hart v Anglian Water Services Ltd* [2003] All ER (D) 551 (Jul).

5 Water Industry Act 1991 s 70(3)(a).

6 For these purposes: (1) in the case of proceedings against a primary water undertaker, showing that the undertaker took all reasonable steps and exercised all due diligence includes (among other things) showing that the relevant arrangements were reasonable in all the circumstances; and (2) in the case of proceedings against any other relevant person, showing that the person took all reasonable steps and exercised all due diligence includes (among other things) showing that it took all reasonable steps and exercised all due diligence for securing that all aspects of the relevant arrangements for which it was responsible were properly carried out: Water Industry Act 1991 s 70(3A) (s 70(3A), (3B): added by the Water Act 2003 s 101(1), Sch 8 paras 2, 20(1), (5)). 'Relevant arrangements' means arrangements made by the primary water undertaker to ensure that all other relevant persons were required to take all reasonable steps and exercise all due diligence for securing that the water was fit for human consumption on leaving the undertaker's pipes or was not used for human

consumption: Water Industry Act 1991 s 70(3B) (as so added). As to the meaning of 'pipe' see PARA 138 note 11. As to the vesting of pipes in the undertaker see PARA 464.

7 Water Industry Act 1991 s 70(3)(b) (s 70(3) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 20(1), (4)(c)). In practice the undertaker would issue a warning to the effect that the water was not fit for human consumption.

8 As to the Secretary of State see PARA 15 note 1. The Drinking Water Inspectorate must carry out such investigations as the Secretary of State or the Welsh Ministers may require it to carry out for the purpose of ascertaining whether any duty or other requirement as to water quality imposed on a relevant person under the Water Industry Act 1991 s 70 is being, has been or is likely to be contravened, or advising the Secretary of State or the Welsh Ministers as to whether, and if so in what manner, any of the powers of the Secretary of State or the Welsh Ministers in relation to such a contravention should be exercised: see s 86(2); and PARA 126. The Inspectorate's prosecution policy is available on the Inspectorate's website at [www.dwi.gov.uk](http://www.dwi.gov.uk).

9 The functions of the Secretary of State under the Water Industry Act 1991 s 70 were transferred to the National Assembly for Wales: (1) in relation to any water undertaker whose area is wholly or mainly in Wales; (2) in relation to any licensed water supplier so far as relating to licensed activities using the supply system of any such water undertaker; and (3) in relation to any other person who is a relevant person in relation to any such undertaker or licensed water supplier: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(d)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

10 Water Industry Act 1991 s 70(4). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

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## (E) RECORDS AND INFORMATION

### 389. Maintenance of records.

Every water undertaker<sup>1</sup> or combined licensee<sup>2</sup> must, in respect of each of the water supply zones<sup>3</sup> which it uses for the purposes of supplying water to consumers<sup>4</sup>, prepare and maintain a record containing<sup>5</sup>:

- 879 (1) the name of the zone<sup>6</sup>;
- 880 (2) the name of every water treatment works, service reservoir<sup>7</sup> and other supply point<sup>8</sup> from which water is supplied to premises within the zone<sup>9</sup>;
- 881 (3) an estimate of the population of the zone<sup>10</sup>;
- 882 (4) particulars of any departure from the requirements as to wholesomeness of supply which is authorised<sup>11</sup> and which applies to water supplied in the zone<sup>12</sup>;
- 883 (5) particulars of the action taken or required to be taken by the water undertaker or combined licensee to comply with (a) any enforcement order<sup>13</sup>; (b) any departure from the requirements as to wholesomeness of supply authorised<sup>14</sup>; and (c) any notice<sup>15</sup> requiring steps to remedy an inability to meet the specification applicable to an indicator parameter<sup>16</sup>;
- 884 (6) particulars of the result of any analysis of samples<sup>17</sup> taken<sup>18</sup>; and
- 885 (7) such other particulars as the water undertaker or combined licensee may determine<sup>19</sup>.

A water undertaker or combined licensee must make: (i) initial entries in the record in respect of the matters mentioned in heads (1) to (4) and (5)(b) above before 1 March 2004 or, in the case of a combined licensee, no later than three months<sup>20</sup> after the day on which it first introduces water into a supply system<sup>21</sup> for the purposes of supplying water to consumers<sup>22</sup>; (ii) entries in respect of the matters mentioned in head (5)(a) and (c) above within 28 days of the date of the order and notice respectively<sup>23</sup>; and (iii) entries relating to the results of the analysis of samples within 28 days of the day on which the result is first known to the water undertaker or combined licensee<sup>24</sup>.

A retail licensee<sup>25</sup> must, in respect of each of the water supply zones which it uses for the purposes of supplying water to consumers, prepare and maintain a record containing:

- 886 (A) the name of the zone<sup>26</sup>;
- 887 (B) particulars of any departure from the requirements as to wholesomeness of supply authorised<sup>27</sup> which applies to water supplied in the zone<sup>28</sup>;
- 888 (C) particulars of the action taken or required to be taken by the retail licensee to comply with (aa) any enforcement order made<sup>29</sup>; (bb) any departure from the requirements as to wholesomeness of supply authorised<sup>30</sup>; and (cc) any notice<sup>31</sup> requiring steps to remedy an inability to meet the specification applicable to an indicator parameter<sup>32</sup>; and
- 889 (D) such other particulars as the retail licensee may determine<sup>33</sup>.

A retail licensee must make initial entries in the record in respect of the matters mentioned in heads (A), (B) and (C)(bb) above no later than three months after the day on which it first uses a supply system for the purposes of supplying water to consumers<sup>34</sup>; and entries in respect of the matters mentioned in head (C)(aa) and (cc) above within 28 days of the date of the order and notice respectively<sup>35</sup>.

The relevant supplier<sup>36</sup> must at least once in each year review and bring up to date the record required to be kept by heads (1) to (7) or heads (A) to (D) above (as the case may be)<sup>37</sup>.

Nothing in these provisions requires a relevant supplier to retain a record: (AA) of information mentioned in any of heads (1), (2) and (6) or in head (A) above at any time more than 30 years after the date on which the information was first entered in the record<sup>38</sup>; (BB) of information mentioned in any other of heads (3) to (5) or (7), or heads (B) to (D) above at any time more than five years after the date on which the information was first entered in the record<sup>39</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier is enforceable<sup>40</sup> by the Secretary of State<sup>41</sup> or, as the case may be, the Welsh Ministers<sup>42</sup>, or the Water Services Regulation Authority<sup>43</sup>, whether or not it constitutes an offence<sup>44</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'combined licensee' see PARA 378 note 4.

3 As to the meaning of 'water supply zone' see PARA 376 note 3.

4 As to the meaning of 'consumer' see PARA 376 note 21.

5 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1) (both amended by SI 2005/2035). As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

6 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(a).

7 As to the meaning of 'service reservoir' see PARA 376 note 22.

8 As to the meaning of 'supply point' see PARA 381 note 8.

9 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(b).

10 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(c).

11 Ie any departure authorised under Pt VI (regs 17-24) of the appropriate regulations: see PARA 378.

12 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(d); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(d).

13 Ie any enforcement order made under the Water Industry Act 1991 s 18: see PARA 163.

14 Ie any departure authorised under Pt VI (regs 17-24) of the appropriate regulations: see PARA 378.

15 Ie any notice under reg 19(4) of the appropriate regulations: see PARA 378.

16 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(e); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(e) (both amended by SI 2005/2035).

17 Ie samples taken in accordance with Pt IV (regs 5-10) (see PARA 381) or any of regs 12-14, 16A (see PARA 381) and reg 28 (see PARA 383) of the appropriate regulations. As to the meaning of 'analysis' see PARA 375 note 14.



18 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(f); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(f) (both amended by SI 2001/2885; SI 2007/2734).

19 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1)(g); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1)(g) (both amended by SI 2005/2035).

20 As to the meaning of 'month' see PARA 23 note 10.

21 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (in each case definition added by SI 2005/2035).

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(2)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(2)(a) (both amended by SI 2005/2035).

23 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(2)(b).

24 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(2)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(2)(c) (both amended by SI 2005/2035).

25 'Retail licensee' means a company which is the holder of a retail licence within the meaning of the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R) (see PARA 152): Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 2(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 2(1) (in each case definition added by SI 2005/2035).

26 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1A)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1A)(a) (in each case reg 34(1A), (2A) added by SI 2005/2035).

27 Ie any departure authorised under Pt VI (regs 17-24) of the appropriate regulations: see PARA 378.

28 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1A)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1A)(b) (both as added: see note 26).

29 Ie any enforcement order made under the Water Industry Act 1991 s 18: see PARA 163.

30 Ie any departure authorised under Pt VI (regs 17-24) of the appropriate regulations: see PARA 378.

31 Ie any notice under reg 19(4) of the appropriate regulations: see PARA 378.

32 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1A)(c); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1A)(c) (both as added: see note 26).

33 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(1A)(d); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(1A)(d) (both as added: see note 26).

34 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(2A)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(2A)(a) (both as added: see note 26).

35 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(2A)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(2A)(b) (both as added: see note 26).

36 As to the meaning of 'relevant supplier' see PARA 376 note 21.

37 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(3) (both amended by SI 2005/2035).

38 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(4)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(4)(a) (in each case reg 34(4) amended by SI 2005/2035).

39 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 34(4)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 34(4)(b) (both as amended: see note 38).

40 Ie under the Water Industry Act 1991 s 18: see PARA 163.

41 Ie in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184. As to the Secretary of State see PARA 15 note 1.

42     le in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. Functions under the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

43     As to the Water Services Regulation Authority see PARA 109.

44     Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

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### **390. Provision of information.**

Subject as set out below<sup>1</sup>, any person<sup>2</sup> may request a relevant supplier<sup>3</sup> to send him a copy of any record maintained by the relevant supplier<sup>4</sup>, and the relevant supplier must, within seven days of the receipt of the request, send a copy of the record requested to the person<sup>5</sup>. A relevant supplier must comply with such a request: (1) in the case of a request relating to a water supply zone<sup>6</sup>, free of charge if the person receives a supply of water in the zone<sup>7</sup>; or (2) in any other case, on payment of such reasonable charge as the relevant supplier may determine<sup>8</sup>. A relevant supplier is not obliged to comply with a request which is vexatious<sup>9</sup>; nor, where a relevant supplier has previously complied with a request which was made by any person, is it obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the subsequent request<sup>10</sup>.

A water undertaker<sup>11</sup> must include in, or append to, at least one of the accounts<sup>12</sup> sent to each customer<sup>13</sup> in any year a statement informing him of his right<sup>14</sup> to request a copy of any record maintained by the undertaker<sup>15</sup>. As soon as possible after an event which, by reason of its effect or likely effect on the water supplied by a relevant supplier, gives rise or is likely to give rise to a significant risk to human health, the relevant supplier must notify the specified persons<sup>16</sup>. Where a person has received such a notification, he may require the relevant supplier to provide him with such further information relating to the event and its consequences as he may reasonably require<sup>17</sup>.

Any duty or requirement imposed by these provisions on a relevant supplier is enforceable<sup>18</sup> by the Secretary of State<sup>19</sup> or, as the case may be, the Welsh Ministers<sup>20</sup>, or the Water Services Regulation Authority<sup>21</sup>, whether or not it constitutes an offence<sup>22</sup>.

1    Ie subject to reg 35(2), (3) and (4) of the appropriate regulations: see the text to notes 6-10.

2    As to the meaning of 'person' see PARA 13 note 29.

3    As to the meaning of 'relevant supplier' see PARA 376 note 21.

4    Ie a record maintained under reg 34 of the appropriate regulations: see PARA 389.

5    Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(1) (in each case reg 35 substituted by SI 2007/2734). As to the public right to information generally and to information concerning the water industry and water services see PARA 177 et seq. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.

6    As to the meaning of 'water supply zone' see PARA 376 note 3.

7    Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(2)(a); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(2)(a) (both as substituted: see note 5).

8    Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(2)(b); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(2)(b) (both as substituted: see note 5).

9    See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(3); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(3) (both as substituted: see note 5).

10 See the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(4); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(4) (both as substituted: see note 5).

11 As to the meaning of 'water undertaker' see PARA 137 note 4.

12 As to charges see PARA 419 et seq.

13 As to the meaning of 'customer' see PARA 118 note 7.

14 *le* under reg 35(1) of the appropriate regulations: see the text to notes 1-5.

15 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(5); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(5) (both as substituted: see note 5).

16 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(6); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(6) (both as substituted: see note 5). The specified persons, in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, are: (1) in every case: every appropriate local authority, the Health Protection Agency, the Consumer Council for Water, and the Secretary of State; and (2) in any case where the event gives rise or is likely to give rise to a significant risk to human health in Wales: the National Public Health Service for Wales and the Welsh Ministers; reg 35(6)(a), (b) (as so substituted). The specified persons, in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, are: (a) in every case: every appropriate local authority, the National Public Health Service for Wales, the Consumer Council for Water, and the Welsh Ministers; and (b) in any case where the event gives rise or is likely to give rise to a significant risk to human health in England: the Health Protection Agency and the Secretary of State; reg 35(6)(a), (b) (as so substituted). As to the meaning of 'appropriate local authority' see PARA 378 note 12. As to the Health Protection Agency see **HEALTH SERVICES** vol 54 (2008) PARA 213. As to the Consumer Council for Water see PARA 115. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'National Public Health Service for Wales' see PARA 378 note 12. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'England' see PARA 19 note 8.

17 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 35(7); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 35(7) (both as substituted: see note 5).

18 *le* under the Water Industry Act 1991 s 18: see PARA 163.

19 *le* in relation to the Water Supply (Water Quality) Regulations 2000, SI 2000/3184.

20 *le* in relation to the Water Supply (Water Quality) Regulations 2001, SI 2001/3911. Functions under reg 39 were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

21 As to the Water Services Regulation Authority see PARA 109.

22 Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 39; Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 39 (both amended by SI 2005/2035). As to offences see PARA 387.

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## **(v) Complaints Procedures**

### **391. Duty to establish procedure for dealing with complaints.**

Each water undertaker<sup>1</sup> must establish a procedure for dealing with complaints made by its customers or potential customers<sup>2</sup> in connection with the supply of water<sup>3</sup>. No such procedure may be established, and no modification<sup>4</sup> of such a procedure may be made, unless the water undertaker has consulted<sup>5</sup> the regional committee<sup>6</sup> to which it has been allocated<sup>7</sup>, and the proposed procedure or modification has been approved by the Water Services Regulation Authority<sup>8</sup>. The water undertaker must publicise the procedure in such manner as may be approved by the Water Services Regulation Authority<sup>9</sup>, and send a description of the procedure, free of charge, to any person<sup>10</sup> who asks for one<sup>11</sup>.

The Water Services Regulation Authority may give a direction to a water undertaker requiring the undertaker to review its procedure or the manner in which the procedure operates<sup>12</sup>. The direction may specify the manner in which the review is to be conducted<sup>13</sup>, and must require a written<sup>14</sup> report of the review to be made to the Authority<sup>15</sup>. Where the Authority receives such a report, it may, after consulting the water undertaker, direct that undertaker to make such modifications of the procedure, or the manner in which the procedure operates, as may be specified in the direction<sup>16</sup>.

The duty of a water undertaker to comply with this requirement to establish a procedure for dealing with complaints, and to comply with any direction given to it under these provisions, is enforceable<sup>17</sup> by the Water Services Regulation Authority<sup>18</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'customer or potential customer' see PARA 118 note 7.

3 Water Industry Act 1991 s 86A(1) (s 86A added by the Competition and Service (Utilities) Act 1992 s 29).

4 As to the meaning of 'modification' see PARA 141 note 20.

5 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

6 As to regional committees see PARA 117.

7 Water Industry Act 1991 s 86A(2)(a) (as added (see note 3); and amended by the Water Act 2003 s 101(1), Sch 7 Pt 2 para 27(1), (3)).

8 Water Industry Act 1991 s 86A(2)(b) (as added (see note 3); and amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

9 Water Industry Act 1991 s 86A(3)(a) (as added (see note 3); and amended by the Water Act 2003 s 36(2)).

10 As to the meaning of 'person' see PARA 13 note 29.

11 Water Industry Act 1991 s 86A(3)(b) (as added: see note 3).

12 Water Industry Act 1991 s 86A(4) (as added (see note 3); and amended by the Water Act 2003 s 36(2)). Where the Authority is considering whether to exercise its powers under the Water Industry Act 1991 s 86A(4) or (6) (see the text to note 16) in relation to a water undertaker, it is the duty of that undertaker to give it such information as it may reasonably require for the purpose of assisting it in coming to a decision: s 86A(9) (as so

added and amended). Section 202 (see PARA 182) has effect with the necessary modifications in relation to information which the Authority requires for that purpose as it has effect in relation to information which the Secretary of State or the Welsh Ministers require for the purposes mentioned in s 202(1): s 86A(10) (as so added and amended). As to the meaning of 'information' see PARA 117 note 13. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

13 Water Industry Act 1991 s 86A(5)(a) (as added: see note 3).

14 As to the meaning of 'written' see PARA 22 note 1.

15 Water Industry Act 1991 s 86A(5)(b) (as added (see note 3); and amended by the Water Act 2003 s 36(2)).

16 Water Industry Act 1991 s 86A(6) (as added (see note 3); and amended by the Water Act 2003 s 36(2)). See also note 12. The Water Industry Act 1991 s 86A(2) (see the text to notes 4-8) does not apply to any modification made in compliance with such a direction: s 86A(7) (as so added).

17 le under the Water Industry Act 1991 s 18: see PARA 163.

18 Water Industry Act 1991 s 86A(8) (as added (see note 3); and amended by the Water Act 2003 s 36(2)).

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### **392. Complaints about water services.**

Where a customer<sup>1</sup> of a relevant undertaker<sup>2</sup> complains in writing<sup>3</sup> about the supply of water or the provision of sewerage services<sup>4</sup> by the undertaker<sup>5</sup>, the undertaker must provide a substantive reply to the customer within ten working days<sup>6</sup>. If the undertaker does not comply with this requirement, it must pay the customer £20<sup>7</sup>; and no application by the customer for the payment is necessary<sup>8</sup>. However, the undertaker need not pay the customer if:

- 890 (1) the address that the customer wrote to was not a notified address of the undertaker for a complaint of that kind<sup>9</sup>;
- 891 (2) the customer does not wish to pursue the complaint and has so informed the undertaker<sup>10</sup>;
- 892 (3) it was impracticable for the undertaker to send a reply within the required period because of: (a) industrial action by employees of the undertaker<sup>11</sup>; or (b) the act or default of a person<sup>12</sup> who is neither an officer, employee or agent of the undertaker<sup>13</sup>, nor a person acting on behalf of the undertaker or of an agent of the undertaker<sup>14</sup>; or
- 893 (4) the complaint was frivolous or vexatious<sup>15</sup>, or the undertaker reasonably considered that a visit was necessary before replying, and severe weather made that visit impracticable<sup>16</sup>.

1 As to the meaning of 'customer' see PARA 327 note 10.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 As to the meaning of 'sewerage services' see PARA 129 note 7.

5 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(1)(a). As to the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, generally see PARA 327.

6 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(2)(a). The first day of the period for reply is the day after the day when the undertaker receives the complaint: reg 7(3). As to the meaning of 'working day' see PARA 328 note 19.

7 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(4). As to the making of payments, the effect of the making and acceptance of payments under the regulations, and the determination of disputes relating thereto see PARA 327.

8 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(5).

9 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(a). For these purposes, an address of an undertaker is a notified address of the undertaker for a complaint of a particular kind if the undertaker has notified that address to its customers as the appropriate address for a complaint of that kind by publishing it in a telephone directory, notifying it on the undertaker's website, or showing it on the undertaker's publicity material: reg 7(7).

10 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(b).

11 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(c)(i).

12 As to the meaning of 'person' see PARA 13 note 29.

13 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(c)(ii)(aa).

14 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(c)(ii)(bb).

15 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(d)(i).

16 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(d)(ii).



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### **(3) SUPPLY BY LICENSED WATER SUPPLIERS**

#### **393. Domestic supply and non-domestic supply.**

The owner<sup>1</sup> or occupier<sup>2</sup> of any premises may serve a notice<sup>3</sup> on a water undertaker<sup>4</sup> informing the undertaker that the premises are to be supplied by a licensed water supplier<sup>5</sup>, and specifying the time after which a supply of water to the premises by the undertaker will no longer be required<sup>6</sup>. Where the charges for the water supplied by the undertaker are fixed in relation to the premises by reference to volume<sup>7</sup>, the time specified in the notice must fall at least two working days<sup>8</sup> after the notice is served<sup>9</sup>.

A notice may similarly be served in respect of non-domestic supplies<sup>10</sup>.

1 As to the meaning of 'owner' see PARA 22 note 9.

2 As to the meaning of 'occupier' see PARA 339 note 8.

3 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 Water Industry Act 1991 s 63AA(1)(a) (s 63AA added by the Water Act 2003 s 101(1), Sch 8 paras 2, 17). As to the meaning of 'licensed water supplier' see PARA 152.

6 Water Industry Act 1991 s 63AA(1)(b) (as added: see note 5).

7 I.e. under the Water Industry Act 1991 Pt V Ch I (ss 142-150B): see PARA 419 et seq.

8 Any reference to two working days is a reference to a period of 48 hours calculated after disregarding any time falling on a Saturday or Sunday, or Christmas Day, Good Friday or any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321): Water Industry Act 1991 s 63AA(3) (as added: see note 5).

9 Water Industry Act 1991 s 63AA(2) (as added: see note 5).

10 See the Water Industry Act 1991 s 63AB(1), (2); and PARA 347.

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### **394. Interim duty of water undertaker.**

Where a licensed water supplier<sup>1</sup> ceases to supply any premises with water<sup>2</sup>, and the owner<sup>3</sup> or occupier<sup>4</sup> of the premises has not notified the water undertaker<sup>5</sup> in whose area<sup>6</sup> the premises are that he has made arrangements for the continuation of the supply of water to the premises<sup>7</sup>, or that he intends any supply of water to the premises to cease<sup>8</sup>, it is the duty of the water undertaker to continue the supply of water to the premises which was made by the licensed water supplier<sup>9</sup>. Where a supply is so made, the charges payable in respect of the supply must be fixed from time to time by a charges scheme<sup>10</sup>, and the supply must be made until:

894 (1) a supply is made under the undertaker's domestic or non-domestic supply duties<sup>11</sup>; or

895 (2) a notice is served<sup>12</sup> by the undertaker on the owner or occupier of the premises stating that the supply is to be discontinued<sup>13</sup>,

whichever is earlier<sup>14</sup>; but such a notice may not be served before the end of the period of three months<sup>15</sup> beginning with the day on which the supply by the supplier ceased<sup>16</sup>.

However, a water undertaker is not required by virtue of these provisions to provide a supply of water to any premises if the provision of the supply would:

896 (a) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes<sup>17</sup>, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works<sup>18</sup>; or

897 (b) otherwise put at risk its ability to meet any of the existing or probable future obligations mentioned in head (a) above<sup>19</sup>.

The supply of water to any premises by a water undertaker under these provisions does not prevent a proposed supply to those premises by that undertaker under the non-domestic supply duty<sup>20</sup> from being regarded as a new supply for the purposes of that duty<sup>21</sup>.

Where a duty is imposed by the above provisions in respect of any premises, any breach of the duty which causes the owner or occupier of the premises to sustain loss or damage<sup>22</sup> is actionable at the suit of that owner or occupier; but, in any proceedings brought against a water undertaker in pursuance of this provision, it is a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach<sup>23</sup>.

The statutory provisions relating to disconnections<sup>24</sup> apply as they apply where a supply of water is made<sup>25</sup> under the domestic or non-domestic supply duties<sup>26</sup>.

1 As to the meaning of 'licensed water supplier' see PARA 152.

2 Water Industry Act 1991 s 63AC(1)(a) (s 63AC added by the Water Act 2003 s 101(1), Sch 8 paras 2, 17).

3 As to the meaning of 'owner' see PARA 22 note 9.

4 As to the meaning of 'occupier' see PARA 339 note 8.

- 5 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 6 As to water undertakers' areas see PARA 318.
- 7 Water Industry Act 1991 s 63AC(1)(b)(i) (as added: see note 2).
- 8 Water Industry Act 1991 s 63AC(1)(b)(ii) (as added: see note 2).
- 9 Water Industry Act 1991 s 63AC(2) (as added: see note 2).
- 10 Water Industry Act 1991 s 63AC(3)(a) (as added: see note 2). The charges scheme referred to in the text is one under s 143: see PARA 421.
- 11 Water Industry Act 1991 s 63AC(3)(b)(i) (as added: see note 2). The duties referred to in the text are those under either s 52 (see PARA 339) or s 55 (see PARA 347).
- 12 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 13 Water Industry Act 1991 s 63AC(3)(b)(ii) (as added: see note 2).
- 14 Water Industry Act 1991 s 63AC(3) (as added: see note 2).
- 15 As to the meaning of 'month' see PARA 23 note 10.
- 16 Water Industry Act 1991 s 63AC(4) (as added: see note 2).
- 17 As to the meaning of 'domestic purposes' see PARA 334.
- 18 Water Industry Act 1991 s 63AC(5)(a) (as added: see note 2).
- 19 Water Industry Act 1991 s 63AC(5)(b) (as added: see note 2).
- 20 Ie under the Water Industry Act 1991 s 55: see PARA 347.
- 21 Water Industry Act 1991 s 63AC(6) (as added: see note 2).
- 22 As to the meaning of 'damage' see PARA 129 note 7.
- 23 Water Industry Act 1991 s 63AC(7) (as added: see note 2).
- 24 Ie the Water Industry Act 1991 ss 60-63: see PARA 355 et seq.
- 25 Ie under the Water Industry Act 1991 s 52 (see PARA 339) or s 55 (see PARA 347).
- 26 Water Industry Act 1991 s 63AC(8) (as added: see note 2).

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## **(4) POWERS AND DUTIES OF LOCAL AUTHORITIES IN RELATION TO WATER SUPPLIES**

### **(i) In general**

#### **395. General functions of local authorities in relation to water quality.**

It is the duty of every local authority<sup>1</sup> to take all such steps as it considers appropriate for keeping itself informed about the wholesomeness<sup>2</sup> and sufficiency of water supplies provided to premises in its area, including every private supply<sup>3</sup> to any such premises<sup>4</sup>. It is also the duty of a local authority to comply with any direction given by the Secretary of State<sup>5</sup> or, in relation to Wales, the Welsh Ministers<sup>6</sup> to that authority, to authorities of a description applicable to that authority or to local authorities generally as to the cases and circumstances in which they are or are not to exercise any of their statutory powers<sup>7</sup> in relation to private supplies<sup>8</sup>, and the manner in which those powers are to be exercised<sup>9</sup>.

The Secretary of State or, as appropriate, the Welsh Ministers may by regulations<sup>10</sup> make such supplementary provision<sup>11</sup> as he or they consider appropriate for imposing duties and conferring powers on local authorities with respect to the acquisition of information<sup>12</sup> about the quality and sufficiency of water supplies provided to premises in their areas<sup>13</sup>, and regulating the performance of any statutory duty imposed<sup>14</sup> on local authorities in relation to water quality<sup>15</sup>. Such regulations may in particular:

- 898 (1) prescribe the matters to be taken into account by a local authority in determining what is appropriate for the purposes of keeping itself informed as mentioned above<sup>16</sup>;
- 899 (2) provide<sup>17</sup> for such samples of water to be taken and analysed at such times and in such manner as may be prescribed<sup>18</sup>;
- 900 (3) authorise local authorities to exercise or perform any statutory power or duty relating to water quality<sup>19</sup> through prescribed persons<sup>20</sup>; and
- 901 (4) provide for the recovery by a local authority from prescribed persons of such amounts as may be prescribed in respect of expenses reasonably incurred by the authority in the exercise of any such power or the performance of any such duty<sup>21</sup>.

1 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2 As to the meaning of 'wholesome' see PARA 373 note 4.

3 As to the meaning of 'private supply' see PARA 373 note 15. As to the monitoring of private supplies by local authorities see PARA 407.

4 Water Industry Act 1991 s 77(1). As to powers of entry with respect to this duty see s 84; and PARA 408. As to powers to obtain information see s 85; and PARA 409.

5 As to the Secretary of State see PARA 15 note 1.

- 6 The functions of the Secretary of State under the Water Industry Act 1991 s 77, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 7 le the powers conferred on local authorities by the Water Industry Act 1991 Pt III Ch III (ss 67-86A).
- 8 Water Industry Act 1991 s 77(2)(a).
- 9 Water Industry Act 1991 s 77(2)(b).
- 10 As to the making of regulations see PARA 21. The following regulations have been made: the Private Water Supplies Regulations 1991, SI 1991/2790 (see PARA 407); and the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911 (see note 15).
- 11 le supplementing the provisions of the Water Industry Act 1991 s 77, s 78 (see PARA 396) and s 79(2) (see PARA 397).
- 12 As to the meaning of 'information' see PARA 117 note 13.
- 13 Water Industry Act 1991 s 77(3)(a).
- 14 le under any of the provisions mentioned in note 11.
- 15 Water Industry Act 1991 s 77(3)(b). In performing its duty under s 77(1) (see the text to notes 1-4) in so far as that duty relates to water supplies which are not private supplies, a local authority: (1) must make such arrangements with the specified relevant supplier as will secure that the authority is notified as mentioned in reg 35(6)(a)(i) of the appropriate regulations (see PARA 390); and (2) may take, or cause to be taken, and analyse, or cause to be analysed, by a person designated by it in writing, such samples of the water supplied to premises in its area as it may reasonably require: see the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, regs 37(1), 38(1); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, regs 37(1), 38(1) (in each case reg 38(1) amended by SI 2005/2035; SI 2007/2734). Regulation 16 of the appropriate regulations (see PARA 381) applies to samples taken by virtue of this provision as it applies to samples taken for the purposes of Parts IV and V of the appropriate regulations; but with the following modifications: (a) in reg 16(1), for the words 'A water undertaker or combined licensee' there are substituted the words 'A local authority'; and (b) in reg 16(2)(e), for the words 'the laboratory, the water undertaker or the combined licensee' there are substituted 'the laboratory, the water undertaker, the combined licensee or the authority': Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 38(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 38(2) (both amended by SI 2005/2035). As to the meaning of 'local authority' in this context see PARA 378 note 12. 'Specified relevant supplier', in relation to a local authority, means: (i) a water undertaker any of whose water supply zones include an area which is situated within the area of that authority; or (ii) a licensed water supplier which uses any such water supply zones for the purposes of supplying water to consumers: Water Supply (Water Quality) Regulations 2000, SI 2000/3184, reg 37(2); Water Supply (Water Quality) Regulations 2001, SI 2001/3911, reg 37(2) (both substituted by SI 2005/2035). As to the meaning of 'analyse' see PARA 375 note 14. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'writing' see PARA 22 note 1. As to the meaning of 'combined licensee' see PARA 378 note 4. As to the meaning of 'water supply zone' see PARA 376 note 3. As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'consumer' see PARA 376 note 21. As to the application of the Water Supply (Water Quality) Regulations 2000, SI 2000/3184, and the Water Supply (Water Quality) Regulations 2001, SI 2001/3911, see PARA 376 note 1.
- 16 Water Industry Act 1991 s 77(4)(a).
- 17 le for the purposes of the exercise or performance of any power or duty conferred or imposed on a local authority by or under any of the provisions mentioned in the Water Industry Act 1991 s 77(3): see notes 11, 14.
- 18 Water Industry Act 1991 s 77(4)(b).
- 19 le such power or duty as is mentioned in the Water Industry Act 1991 s 77(4)(b): see note 17.
- 20 Water Industry Act 1991 s 77(4)(c).
- 21 Water Industry Act 1991 s 77(4)(d).

## UPDATE

### **395 General functions of local authorities in relation to water quality**

NOTE 10--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, SI 2010/1384).

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### **396. Local authority functions in relation to undertakers' supplies.**

It is the duty of a local authority<sup>1</sup> to notify any water undertaker<sup>2</sup> of anything appearing to the authority to suggest:

- 902 (1) that any supply by that undertaker, or by a licensed water supplier<sup>3</sup> using that undertaker's supply system<sup>4</sup>, of water for domestic or food production purposes<sup>5</sup> to any premises in the area of that authority is, has been or is likely to become unwholesome<sup>6</sup> or, so far as any such premises are concerned, insufficient for domestic purposes<sup>7</sup>;
- 903 (2) that the unwholesomeness or insufficiency of any such supply is, was or is likely to be such as to cause a danger to life or health<sup>8</sup>; or
- 904 (3) that the duty imposed on that undertaker to ensure there is no deterioration in water quality<sup>9</sup> is being, has been or is likely to be so contravened<sup>10</sup> as to affect any supply of water to premises in that area<sup>11</sup>.

Where a local authority has notified a water undertaker of any such matter, it is that authority's duty, if it is not satisfied that all such remedial action as is appropriate will be taken by the undertaker, to inform the Secretary of State<sup>12</sup> or, in relation to Wales, the Welsh Ministers<sup>13</sup> about the contents of the notification<sup>14</sup>.

1 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the meaning of 'licensed water supplier' see PARA 152.

4 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 78(3) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 26(1), (3)).

5 As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44.

6 As to the meaning of 'unwholesome' see PARA 373 note 4.

7 Water Industry Act 1991 s 78(1)(a) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 26(1), (2)).

8 Water Industry Act 1991 s 78(1)(b).

9 It is the duty imposed by the Water Industry Act 1991 s 68(1)(b): see PARA 374.

10 As to the meaning of 'contravene' see PARA 20 note 5.

11 Water Industry Act 1991 s 78(1)(c).

12 As to the Secretary of State see PARA 15 note 1.

13 The functions of the Secretary of State under the Water Industry Act 1991 s 78, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

14 Water Industry Act 1991 s 78(2).



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### **397. Local authority functions where piped supplies insufficient or unwholesome.**

The following provisions apply to a case in which it is not practicable at reasonable cost for a water undertaker<sup>1</sup>, by supplying water in pipes<sup>2</sup>, to provide or maintain such a supply of wholesome<sup>3</sup> water to any particular premises in its area<sup>4</sup> as is sufficient, so far as those premises are concerned, for domestic purposes<sup>5</sup>.

In any such case, it is the duty of the local authority<sup>6</sup> in whose area the premises in question are situated to require the undertaker to provide a supply of water to those premises otherwise than in pipes<sup>7</sup>. In order to impose such a requirement the local authority must be satisfied that the insufficiency or unwholesomeness of the supply of water for domestic purposes to those premises is such as to cause a danger to life or health<sup>8</sup>, and that it is practicable at reasonable cost for the water undertaker, by providing it otherwise than in pipes, to provide to those premises such a supply of wholesome water as is sufficient for those purposes<sup>9</sup>.

Where, in a case to which these provisions apply:

- 905 (1) the insufficiency or unwholesomeness of the supply of water for domestic purposes to the premises in question is such as to cause a danger to life or health<sup>10</sup>;
- 906 (2) it is practicable at reasonable cost for the water undertaker, by providing it otherwise than in pipes, to provide to those premises such a supply of wholesome water as, so far as those premises are concerned, is sufficient for domestic purposes<sup>11</sup>; and
- 907 (3) the local authority in whose area those premises are situated notifies the undertaker of the danger to life or health and requires the undertaker to provide a supply otherwise than in pipes<sup>12</sup>,

it is the undertaker's duty, for such period as may be required by the local authority, to provide any supply to those premises which it is practicable at reasonable cost to provide otherwise than in pipes and which it is required to provide by that authority<sup>13</sup>. This duty of the water undertaker is enforceable<sup>14</sup> by the Water Services Regulation Authority<sup>15</sup>.

Where, under these provisions, a local authority requires the provision by a water undertaker of a supply of water to any premises, that authority is liable to the undertaker for any charges payable<sup>16</sup> in respect of the provision of that supply<sup>17</sup>, but has power to recover the whole or any part of any charges so paid from the owner<sup>18</sup> or occupier<sup>19</sup> of the premises to which the supply is provided<sup>20</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'pipe' see PARA 138 note 11.

3 As to the meanings of 'wholesome' and 'unwholesome' see PARA 373 note 4.

4 As to water undertakers' areas see PARA 318.

5 Water Industry Act 1991 s 79(1). As to the meaning of 'domestic purposes' see PARA 334.

6 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water

Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

7 Water Industry Act 1991 s 79(2). References in s 79 to the provision of a supply of water to any premises otherwise than in pipes have effect, in a case in which it is practicable at reasonable cost to provide a supply, whether or not in pipes, to a place within a reasonable distance of those premises, as including references to the provision of a supply to that place: s 79(5). Regulation under s 77 may supplement the provisions of s 79(2): see PARA 395.

8 See the Water Industry Act 1991 s 79(2)(a).

9 See the Water Industry Act 1991 s 79(2)(b).

10 Water Industry Act 1991 s 79(3)(a).

11 Water Industry Act 1991 s 79(3)(b).

12 Water Industry Act 1991 s 79(3)(c).

13 Water Industry Act 1991 s 79(3).

14 Ie under the Water Industry Act 1991 s 18: see PARA 163.

15 Water Industry Act 1991 s 79(6) (amended by the Competition and Service (Utilities) Act 1992 s 56(6), Sch 1 para 23; Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

16 Ie by virtue of the Water Industry Act 1991 Pt V Ch I (ss 142-150B): see PARA 419 et seq.

17 Water Industry Act 1991 s 79(4)(a).

18 As to the meaning of 'owner' see PARA 22 note 9.

19 As to the meaning of 'occupier' see PARA 339 note 8.

20 Water Industry Act 1991 s 79(4)(b).

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**398. Duty in respect of new houses.**

A local authority must reject any plans of a house deposited with it in accordance with building regulations, unless a proposal is put before it that appears to it to be satisfactory for providing the occupants of the house with a supply of wholesome water sufficient for their domestic purposes<sup>1</sup>. This duty is discussed in detail elsewhere in this work<sup>2</sup>.

1 See the Building Act 1984 s 25.

2 See **BUILDING** vol 4(2) (2002 Reissue) PARA 337.

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### **399. Assistance with provision of separate service pipes.**

If it thinks fit, a local housing authority<sup>1</sup> may give assistance in respect of the provision of a separate service pipe for a house which has a piped supply of water from a water main but no separate service pipe<sup>2</sup>, by way of making a grant in respect of all or any part of the expenses incurred in the provision of the separate service pipe<sup>3</sup>. Where all or any part of the works required for the provision of the separate service pipe are carried out by water undertakers<sup>4</sup> (whether in exercise of default powers<sup>5</sup> or in any other case) those expenses include the sums payable by the owner of the house, or any other person<sup>6</sup>, to the water undertakers for carrying out the works<sup>7</sup>.

1 As to local housing authorities (within the meaning of the Housing Act 1985) see **HOUSING** vol 22 (2006 Reissue) PARA 9.

2 Housing Act 1985 s 523(1).

3 See the Housing Act 1985 s 523(2).

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to such powers see the Water Industry Act 1991 s 64; and PARA 352.

6 As to the meaning of 'person' see PARA 13 note 29.

7 Housing Act 1985 s 523(3) (amended by the Water Act 1989 s 190(3), Sch 27 Pt I).

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#### **400. Powers of parish or community councils.**

A parish or community council<sup>1</sup> has power to utilise any well, spring or stream within its parish or community<sup>2</sup> and to provide facilities for obtaining water from it, and may execute any works, including works of maintenance or improvement, incidental to or consequential on any exercise of this power<sup>3</sup>. Such a council may contribute towards the expenses incurred by any such council, or by any other person<sup>4</sup>, in doing anything authorised by this provision<sup>5</sup>; but these powers are not to be construed as authorising such a council to interfere with the rights of any person, or as restricting, in the case of a public well or other works, any powers of the local authority<sup>6</sup> relating to public pumps, wells and cisterns<sup>7</sup>. A parish or community council has no power to take proceedings in its own name to enforce a right of the inhabitants of the parish to the use of the well or spring<sup>8</sup>.

1 As to parish councils in England see **LOCAL GOVERNMENT** vol 69 (2009) PARA 27 et seq. As to community councils in Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 41 et seq.

2 'Parish' in relation to a common parish council acting for two or more grouped parishes, means those parishes: Public Health Act 1936 s 1(2) (s 1 substituted by the Local Government Act 1972 s 180, Sch 14 para 1). 'Community', in relation to a common community council acting for two or more grouped communities, means those communities: Public Health Act 1936 s 1(2) (as so substituted).

3 Public Health Act 1936 s 125(1).

4 As to the meaning of 'person' see PARA 13 note 29.

5 Public Health Act 1936 s 125(2).

6 As to the meaning of 'local authority' see PARA 51 note 1.

7 Public Health Act 1936 s 125(1) proviso. As to the local authority's powers in relation to public pumps etc see PARA 401.

8 *Stoke Parish Council v Price* [1899] 2 Ch 277. Such use, if not exempt, may require an abstraction licence under the Water Resources Act 1991: see PARA 214 et seq.

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#### 401. Vesting of wells etc in local authority.

All public pumps, wells, cisterns, reservoirs<sup>1</sup> conduits and other works used for the gratuitous supply<sup>2</sup> of water to the inhabitants of any part of the district<sup>3</sup> of a local authority<sup>4</sup> vest in and are under the control of that authority<sup>5</sup>, whether they are on private property or not<sup>6</sup>. The local authority may cause the works to be maintained and supplied with wholesome water<sup>7</sup>, or may substitute, maintain and supply with wholesome water other such works equally convenient<sup>8</sup>. By reason of the vesting in it of the relevant works, the local authority is entitled to bring civil proceedings in respect of interference with them<sup>9</sup>, but the vesting does not entitle the authority to grant a licence to persons to bottle and sell the water<sup>10</sup>. The liability of a local authority for flooding from these works may cease if the works have become vested in a water undertaker<sup>11</sup>. The inhabitants of a district may acquire the right of drawing water<sup>12</sup>, and if a landowner properly draws away the water, the local authority may not trespass in order to obtain a supply for a well vested in it<sup>13</sup>.

1 For these purposes, 'reservoir' may include a natural pond: *Leadgate Local Board v Bland* (1881) 45 JP 526.

2 As to 'gratuitous supply' see *South Devon Water Board v Gibson* [1955] 2 QB 448, [1955] 2 All ER 813, CA.

3 'District', in relation to a local authority in Greater London, means a London borough, the City of London, the Inner Temple or the Middle Temple, as the case may be, and in relation to a local authority in Wales, means a county or, as the case may be, a county borough: Public Health Act 1936 s 1(2) (s 1 substituted by the Local Government Act 1972 s 180, Sch 14 para 1; definition amended by the Local Government (Wales) Act 1994 s 22(3), Sch 9 para 3(2)(a)). As to London boroughs, the City of London, and the Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 30-32. As to local government areas and authorities in Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 37 et seq. As to the meaning of 'Wales' see PARA 16 note 2.

4 As to the meaning of 'local authority' see PARA 51 note 1. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Public Health Act 1936 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

5 Public Health Act 1936 s 124(1). A similar provision in the Towns Improvement Clauses Act 1847 s 121 only applies when incorporated in a local Act: see s 1. See also *Holmfirth Local Board v Shore* (1895) 59 JP 344.

6 *Holmfirth Local Board v Shore* (1895) 59 JP 344, following *Smith v Archibald* (1880) 5 App Cas 489, HL. As to the powers of parish councils in relation to public wells see PARA 400.

7 As to wholesomeness of water supply see PARA 373 et seq.

8 Public Health Act 1936 s 124(1).

9 *Holmfirth Local Board v Shore* (1895) 59 JP 344.

10 *Mostyn v Atherton* [1899] 2 Ch 360 at 368 per Byrne J. It is only the soil which vests in the local authority and therefore the authority is not the owner of an abandoned mine shaft (used as a well) so as to be liable for fencing it: *Knuckey v Redruth RDC* [1904] 1 KB 382, DC.

11 *Gilson v Kerrier RDC* [1976] 3 All ER 343, [1976] 1 WLR 904, CA. As to water undertakers see PARA 137.

12 *Smith v Archibald* (1880) 5 App Cas 489 at 51-513, HL, per Lord Blackburn. Such use, if not exempt, may require an abstraction licence under the Water Resources Act 1991: see PARA 214 et seq.

13     *Edwards v Jolliffe* [1877] WN 120.

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#### **402. Local authority powers in relation to pollution and contamination of wells etc.**

If a local authority<sup>1</sup> is satisfied that any public pump, well, cistern, reservoir, conduit or other works used for the gratuitous supply of water vested in the authority<sup>2</sup> is no longer required, or that the water obtained from those works is polluted and that it is not reasonably practicable to remedy the cause of the pollution, it may close the works or restrict the use of the water obtained from them<sup>3</sup>.

If a local authority is of opinion that the water in or obtained from any well, tank or other source of supply not vested in the authority, being water which is, or is likely to be, used for domestic purposes<sup>4</sup> or in the preparation of food or drink for human consumption, is, or is likely to become, so polluted as to be prejudicial to health<sup>5</sup>, the authority may apply to a magistrates' court<sup>6</sup>. Thereupon a summons may be issued to the owner<sup>7</sup> or occupier of the premises to which the source of supply belongs, or to any other person alleged in the application to be in control of them<sup>8</sup>. The court must hear any user of the water with a claim to be heard, and may cause the water to be analysed at the cost of the local authority<sup>9</sup>. The court may make an order directing the source of supply to be permanently or temporarily closed or cut off or the water to be used for certain purposes only, or such other order as appears to the court to be necessary to prevent injury or danger to the health of persons using the water or consuming food or drink prepared with or from it; and if a person on whom the order is made fails to comply with it, the court, on the application of the local authority, may authorise the authority to do whatever may be necessary for giving effect to the order, and any expenses reasonably incurred by the authority in so doing may be recovered by it from the person in default<sup>10</sup>.

Any well, tank, cistern or water butt used for the supply of water for domestic purposes which is so placed, constructed or kept as to render the water in it liable to contamination prejudicial to health is a statutory nuisance<sup>11</sup>.

1 As to the meaning of 'local authority' see PARA 51 note 1. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Public Health Act 1936 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2 As to the vesting of such works in the local authority see PARA 401.

3 Public Health Act 1936 s 124(2).

4 'Domestic purposes' is not defined for these purposes. As to the definition of 'domestic purposes' in the Water Industry Act 1991 see PARA 334.

5 'Prejudicial to health' means injurious, or likely to cause injury, to health: Public Health Act 1936 s 343(1). See further **NUISANCE** vol 78 (2010) PARA 158.

6 Public Health Act 1936 s 140(1). As to magistrates' courts see **MAGISTRATES** vol 29(2) (Reissue) PARA 583 et seq.

7 'Owner' means the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive it if those premises were let at a rackrent; and 'premises' includes messuages, buildings, land, easements and hereditaments of any tenure: Public Health Act 1936 s 343(1). As to the meaning of 'person' see PARA 13 note 29.



8 Public Health Act 1936 s 140(1).

9 Public Health Act 1936 s 140(2).

10 Public Health Act 1936 s 140(2), (3). A person who wilfully obstructs any person acting in the execution of the Public Health Act 1936 or of any order made or issued under it is, in any case for which no other provision is made by the Act, liable to a fine not exceeding level 1 on the standard scale: s 288 (amended by the Public Health Act 1961 ss 5(3), 11(2), Sch 1; the Criminal Justice Act 1982 ss 35, 37, 38, 46). As to the standard scale see PARA 141 note 18.

11 See the Public Health Act 1936 s 141 (amended by the Environmental Protection Act 1990 s 162(1), Sch 15 para 4(1), (2)). As to statutory nuisances see **NUISANCE** vol 78 (2010) PARAS 104, 115, 155 et seq.

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#### **403. Power to supply steam and hot water to houses.**

A local authority<sup>1</sup> may enter into and carry out agreements for the supply, to premises within or outside its area, of heat, steam and hot water<sup>2</sup>, may construct, lay and maintain pipes and associated works<sup>3</sup> for that purpose<sup>4</sup>, and may contribute towards the cost incurred by another person<sup>5</sup> in providing or maintaining such works<sup>6</sup>. Certain provisions of the former water supply legislation<sup>7</sup> are applied, with modifications, to such works<sup>8</sup>, and local authorities may make byelaws with respect to the works and the supply<sup>9</sup>.

1 'Local authority' means a county council, a county borough council, a district council, a London borough council, the Common Council of the City of London, and the Council of the Isles of Scilly: Local Government (Miscellaneous Provisions) Act 1976 s 44(1) (definition substituted by the Local Government Act 1985 s 84, Sch 14 para 53(b); and amended by s 102(2), Sch 17, SI 1996/3071). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36.

2 See the Local Government (Miscellaneous Provisions) Act 1976 s 11(1)(e).

3 'Associated works', in relation to pipes, means any of the following connected with the pipes, ie any valve, filter, stopcock, pump, meter, inspection chamber and manhole and any other prescribed works: Local Government (Miscellaneous Provisions) Act 1976 s 11(7). 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, by the Welsh Ministers: see s 11(7). The functions of the Secretary of State under the Local Government (Miscellaneous Provisions) Act 1976 s 11, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. At the date at which this volume states the law no such regulations had been made.

4 Local Government (Miscellaneous Provisions) Act 1976 s 11(4)(a). A local authority operating an installation producing heat must annually send particulars to the Secretary of State or, as appropriate, the Welsh Ministers: see s 11(6).

5 As to the meaning of 'person' see PARA 13 note 29.

6 Local Government (Miscellaneous Provisions) Act 1976 s 11(4)(b).

7 Ie the Water Act 1945 Sch 3 Pt V (ss 19-21), Pt VI (ss 22, 25, 27(1), 28(1)), s 82(1)-(5) (repealed with savings by the Water Act 1989 s 190(2), (3), Sch 26 para 53(b), Sch 27 Pt I): Local Government (Miscellaneous Provisions) Act 1976 ss 11(5), 12(2).

8 As to the modifications so made see the Local Government (Miscellaneous Provisions) Act 1976 ss 11(5), 12(2).

9 See the Local Government (Miscellaneous Provisions) Act 1976 s 12(1) (amended by virtue of the Criminal Justice Act 1982 ss 40, 46).

#### **UPDATE**

#### **403 Power to supply steam and hot water to houses**

NOTE 1--Definition of 'local authority' in Local Government (Miscellaneous Provisions) Act 1976 s 44(1) further amended: Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 43.

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## **(ii) Powers and Duties in relation to Private Supplies**

### **404. Remedial powers of local authorities in relation to private supplies.**

Where a local authority<sup>1</sup> is satisfied, in relation to any premises in its area which are supplied with water for domestic or food production purposes<sup>2</sup> by means of a private supply<sup>3</sup>, that:

- 908 (1) any water which is being, has been or is likely to be supplied for those purposes to those premises by means of that private supply is not, was not or is likely not to be wholesome<sup>4</sup>; or
- 909 (2) that private supply is failing, has failed or is likely to fail to provide to any house<sup>5</sup> on those premises such a supply of wholesome water as is sufficient, so far as that house is concerned, for domestic purposes<sup>6</sup>,

the authority may serve a notice (a 'private supply notice')<sup>7</sup> in relation to that private supply on any one or more of the relevant persons<sup>8</sup>. The notice must:

- 910 (a) give particulars of the matters mentioned in heads (1) and (2) above in respect of which it is served<sup>9</sup>;
- 911 (b) specify the steps which, in the opinion of the authority serving the notice, are required to be taken for ensuring that there is a supply of water to those premises which is both wholesome and, so far as any house on those premises is concerned, sufficient for domestic purposes<sup>10</sup>; and
- 912 (c) specify a period, ending not less than 28 days after the day on which the notice is served, within which any representations or objections with respect to the notice must be received by that authority<sup>11</sup>; and
- 913 (d) state the effect of the statutory provisions relating to the confirmation of private supply notices<sup>12</sup> in relation to the notice<sup>13</sup>.

Where a local authority serves such a notice on any relevant person, then subject to the procedure for confirmation and variation of the notice<sup>14</sup>, it may do one or more of the following by that notice:

- 914 (i) designate as steps to be taken by the authority itself such of the steps specified in the notice as it considers it appropriate so to designate<sup>15</sup>;
- 915 (ii) require that person, within such reasonable period as may be specified in the notice, to take one or more of the specified steps<sup>16</sup>;
- 916 (iii) require that person, at such times as may be determined in accordance with provision contained in the notice, to make to another relevant person or to that authority such payments as may be so determined in respect of expenses reasonably incurred by that other person or that authority in taking any step specified in the notice<sup>17</sup>;
- 917 (iv) undertake from time to time to make such payments to that person as may be so determined in respect of expenses reasonably incurred by that person in taking any step specified in the notice<sup>18</sup>.

The power of a local authority to serve a private supply notice specifying the steps which are required to be taken in relation to any source from which a private supply is provided both to premises in the area of that authority and to premises in the area of another local authority, is exercisable only where the other authority consents to the service of the notice<sup>19</sup>, or the authorities act jointly in exercising their respective powers under these provisions in relation to that source<sup>20</sup>. The powers conferred by a private supply notice<sup>21</sup> must be so exercised in relation to a private supply of water to any premises where there is no house as to secure that no local authority is required to bear any of the expenses incurred, whether by the authority or by any other person, in taking any of the steps for ensuring that the supply is wholesome which are specified in the notice<sup>22</sup>.

1 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2 As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44.

3 As to the meaning of 'private supply' see PARA 373 note 15.

4 Water Industry Act 1991 s 80(1)(a). As to the meaning of 'wholesome' see PARA 373 note 4.

5 As to the meaning of 'house' see PARA 133 note 5.

6 Water Industry Act 1991 s 80(1)(b).

7 See the Water Industry Act 1991 s 80(7). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

8 Water Industry Act 1991 s 80(1). The relevant persons, in relation to a private supply of water to any premises in the area of a local authority, are: (1) the owners and occupiers of those premises (s 80(7)(a)); and (2) whether or not the source of the private supply is in that authority's area, the owners and occupiers of the premises where that source is situated and any other person exercising powers of management or control in relation to that source (s 80(7)(b)). As to the meaning of 'owner' see PARA 22 note 9. As to the meaning of 'occupier' see PARA 339 note 8. As to the meaning of 'person' see PARA 13 note 29.

9 Water Industry Act 1991 s 80(2)(a).

10 Water Industry Act 1991 s 80(2)(b).

11 Water Industry Act 1991 s 80(2)(c).

12 Ie the effect, in relation to the notice, of the Water Industry Act 1991 s 81(2), (3): see PARA 405.

13 See the Water Industry Act 1991 s 80(2)(d).

14 Ie subject to the Water Industry Act 1991 s 81 (see PARA 405) and s 82 (see PARA 406).

15 Water Industry Act 1991 s 80(3)(a). For the purposes of the taking of any steps falling to be taken by a local authority by virtue of a designation under s 80(3)(a), the provisions of Pt VI (ss 155-192) (see PARA 453 et seq) have effect: (1) as if the relevant works powers, so far as conferred on a water undertaker for the purpose of carrying out its functions, were also conferred on a local authority for the purpose of ensuring that a supply of water provided by means of a private supply to any premises in the authority's area is both wholesome and, so far as any house on those premises is concerned, sufficient for domestic purposes (s 83(1)(a)); (2) as if any such power, so far as it is conferred on a water undertaker in relation to things belonging to or operated or used by the undertaker for the purposes of its functions were conferred by virtue of head (1) above on a local authority in relation to things belonging to or operated or used by that authority, or a relevant person, in connection with the provision of water by means of a private supply (s 83(1)(b)); (3) as if references to a water undertaker in any provision of Pt VI relating to a relevant works powers, except the references in s 181 (see PARA 474) and s 182 (see PARA 475), included references to a local authority (s 83(1)(c)); and (4) as if the making by any person in pursuance of a private supply notice of any payment in respect of sums incurred in the laying

of any pipe entitled that person, for the purposes of s 179(1) (see PARA 464), to an interest in the pipe (s 83(1) (d)). Where by virtue of the Water Industry Act 1991 a local authority has power under the Local Government Act 1972 Pt VII (ss 111-146A) (miscellaneous powers of a local authority: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 425 et seq) to acquire, whether compulsorily or otherwise, any land or right over land for the purpose of ensuring that private supplies of water to premises in its area are both wholesome and, so far as houses on those premises are concerned, sufficient for domestic purposes, that power includes power to acquire land or any interest or right in or over land in order, for that purpose, to dispose of the land or the interest or right to a person who is a relevant person in relation to such a private supply: Water Industry Act 1991 s 83(2). 'Relevant works powers' means the powers conferred on water undertakers by s 158 (see PARA 462), s 159 (see PARA 463), s 161 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329), s 163 (see PARA 463) and s 165 (see PARA 466): s 83(3). As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'functions' see PARA 133 note 5. As to the meanings of 'pipe' and 'laying a pipe' see PARA 138 note 11. As to the meaning of 'land' see PARA 14 note 21.

16 Water Industry Act 1991 s 80(3)(b). The steps that a relevant person may be required to take by a private supply notice in relation to any premises include: (1) requiring a supply of water to be provided to those premises by a water undertaker or by any other person (s 80(6)(a)); and (2) taking such steps for the purpose of securing that such a requirement is complied with, and of enabling such a supply to be so provided, as may be specified in the notice (s 80(6)(b)). As to the duties of a water undertaker where a connection notice is served in compliance with a private supply notice see s 46(4); and PARA 336.

17 Water Industry Act 1991 s 80(3)(c). As to the recovery of expenses see PARA 131 note 6.

18 Water Industry Act 1991 s 80(3)(d).

19 Water Industry Act 1991 s 80(4)(a).

20 Water Industry Act 1991 s 80(4)(b).

21 Ie the powers conferred by the Water Industry Act 1991 ss 80-82: see PARAS 405-406.

22 See the Water Industry Act 1991 s 80(5).

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#### **405. Confirmation of private supply notices.**

A private supply notice<sup>1</sup> served by a local authority<sup>2</sup> does not take effect until the end of the period specified in it as the period within which representations or objections with respect to the notice must be received by that authority<sup>3</sup>. Where any written<sup>4</sup> representation or objection with respect to a private supply notice served by a local authority is received by that authority, before the end of the specified period, from a person<sup>5</sup> on whom the notice was served, that notice does not take effect unless: (1) it is submitted by the authority to the Secretary of State<sup>6</sup> or, in relation to Wales, the Welsh Ministers<sup>7</sup> and is confirmed by the Secretary of State or, as the case may be, the Welsh Ministers either with or without modifications<sup>8</sup>; or (2) the representation or objection is withdrawn<sup>9</sup>.

If a local authority submits a private supply notice to the Secretary of State or the Welsh Ministers for confirmation, the Secretary of State or, where appropriate, the Welsh Ministers:

- 918 (a) must consider whether the notice should be confirmed and whether, if it is confirmed, it should be confirmed with or without modifications<sup>10</sup>;
- 919 (b) may, with respect to the matters specified in the notice or any proposed modification of it, direct the local authority to serve<sup>11</sup> a private supply notice, in such terms as may be specified in the direction, on any relevant person<sup>12</sup> who has not previously been served with such a notice<sup>13</sup>;
- 920 (c) may, for either of those purposes, cause a local inquiry<sup>14</sup> to be held or may afford to the local authority and to every person who has made representations or objections with respect to the notice, or to any proposed direction under head (b) above, an opportunity of appearing before and being heard by a person appointed by the Secretary of State or, as the case may be, the Welsh Ministers for the purpose<sup>15</sup>; and
- 921 (d) if satisfied that the person on whom any notice to be served in pursuance of a direction under head (b) above has had a proper opportunity of having his representations or objections with respect to the proposal for the direction considered, may dispense, in relation to the notice so served, with certain procedural requirements<sup>16</sup>.

Where the Secretary of State or the Welsh Ministers confirms a private supply notice, whether with or without modifications, he or they, or if he or they so directs the local authority concerned, must serve notice of that confirmation on every person originally served with the notice<sup>17</sup>, and the private supply notice takes effect, with any modifications made by the Secretary of State or the Welsh Ministers, at the time specified in the notice of confirmation<sup>18</sup>.

1 As to the meaning of 'private supply notice' see PARA 404.

2 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

3 Water Industry Act 1991 s 81(1). The period specified must be at least 28 days: see s 80(2)(c); and PARA 404.

4 As to the meaning of 'written' see PARA 22 note 1.

5 As to the meaning of 'person' see PARA 13 note 29.

6 As to the Secretary of State see PARA 15 note 1.

7 The functions of the Secretary of State under the Water Industry Act 1991 s 81, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

8 Water Industry Act 1991 s 81(2)(a). As to the meaning of 'modifications' see PARA 141 note 20.

9 Water Industry Act 1991 s 81(2)(b).

10 Water Industry Act 1991 s 81(3)(a).

11 As to the service of documents see PARA 22.

12 As to the meaning of 'relevant person' see PARA 404 note 8.

13 Water Industry Act 1991 s 81(3)(b).

14 The Local Government Act 1972 s 250(2)-(5) (powers in relation to local inquiries: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) apply to local inquiries under any provision of the Water Industry Act 1991 as they apply to inquiries under that section: see the Water Industry Act 1991 s 215(2).

15 Water Industry Act 1991 s 81(3)(c).

16 Water Industry Act 1991 s 81(3)(d). The requirements referred to in the text are the provisions of s 81(1), (2) (see the text to notes 1-9) and of s 80(2)(c), (d) (see PARA 404).

17 Water Industry Act 1991 s 81(4)(a).

18 Water Industry Act 1991 s 81(4)(b).



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#### **406. Enforcement and variation of private supply notice.**

Where any relevant person<sup>1</sup> who is required by virtue of a private supply notice<sup>2</sup> to take any step in relation to any premises fails to take that step within the period specified in the notice, the local authority<sup>3</sup> which served the notice may<sup>4</sup> take that step itself<sup>5</sup>, and may recover from the person<sup>6</sup> who failed to take that step within the specified period any expenses reasonably incurred<sup>7</sup> in taking that step<sup>8</sup>.

Nothing in the Water Industry Act 1991 confers any right of action on any person in respect of any loss or damage<sup>9</sup> sustained by that person in consequence of the failure by any other person to take any step specified in a private supply notice<sup>10</sup>.

Any sum required to be paid to any person by virtue of any requirement or undertaking contained in a private supply notice is recoverable by that person from the person who is required to pay it<sup>11</sup>. Any requirement which is imposed by virtue of a private supply notice on the owner<sup>12</sup> or occupier<sup>13</sup> of any premises<sup>14</sup>, and is expressed to bind those premises in relation to the owners or occupiers from time to time, binds successive owners or occupiers of those premises and is a local land charge<sup>15</sup>.

A local authority may by notice served<sup>16</sup> on any person modify<sup>17</sup> or revoke the effect in relation to that person of any private supply notice or any notice previously served under this provision, including a notice which has been confirmed, with or without modifications, by the Secretary of State<sup>18</sup> or, in relation to Wales<sup>19</sup>, the Welsh Ministers<sup>20</sup>.

1 As to the meaning of 'relevant person' see PARA 404 note 8.

2 As to the meaning of 'private supply notice' see PARA 404.

3 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

4 ie in accordance with any applicable provision having effect by virtue of the Water Industry Act 1991 s 83 (see PARA 404) or 84 (see PARA 408).

5 Water Industry Act 1991 s 82(1).

6 As to the meaning of 'person' see PARA 13 note 29.

7 For the purposes of any requirement under which payments are required to be made to that person by any person other than the authority, sums paid by virtue of this provision in respect of the taking of any step are deemed to be expenses incurred in the taking of that step by the person who failed to take it: Water Industry Act 1991 s 82(2)(b). As to the recovery of expenses generally see PARA 131 note 6.

8 Water Industry Act 1991 s 82(2)(a).

9 As to the meaning of 'damage' see PARA 129 note 7.

10 Water Industry Act 1991 s 82(3).

11 Water Industry Act 1991 s 82(4).

12 As to the meaning of 'owner' see PARA 22 note 9.

13 As to the meaning of 'occupier' see PARA 339 note 8.

14 Water Industry Act 1991 s 82(5)(a).

15 Water Industry Act 1991 s 82(5)(b). As to local land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 671 et seq.

16 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

17 As to the meaning of 'modify' see PARA 141 note 20.

18 As to the Secretary of State see PARA 15 note 1. As to the confirmation of private supply notices by the Secretary of State or the Welsh Ministers see PARA 405. As to the Welsh Ministers see PARA 16 note 5.

19 The functions of the Secretary of State under the Water Industry Act 1991 s 82, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2.

20 Water Industry Act 1991 s 82(6). Section 80(2)(c), (d) (see PARA 404) and s 81 (see PARA 405) apply in relation to any notice so served on any person as they apply in relation to a private supply notice, except where the notice: (1) extends the period within which any step is required to be taken by that person (s 82(7)(a)); or (2) discharges, postpones or abates any obligation of that person to make a payment to the local authority (s 82(7)(b)).

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#### **407. Monitoring of private supplies.**

It is the duty of every local authority<sup>1</sup> to take and analyse<sup>2</sup> samples of water from every category one and category two private supply<sup>3</sup> serving premises in its area<sup>4</sup>. Samples must be taken, in relation to premises supplied with water for food production purposes, from a point immediately before the point where the supply is so used, and in relation to all other premises, at a tap used for supplying water for drinking or cooking<sup>5</sup>. Where a local authority is required<sup>6</sup> to take more than one sample within a specified period, the samples must be taken at regular intervals<sup>7</sup>. At the request of a person who is a relevant person<sup>8</sup> in relation to a private supply serving premises in its area, a local authority must take and analyse a sample from the supply for compliance of the parameters<sup>9</sup> specified by that person with the prescribed concentrations or values<sup>10</sup> for those parameters<sup>11</sup>. A local authority must comply with the prescribed standard, reduced or increased sampling frequencies<sup>12</sup> and with certain additional monitoring provisions<sup>13</sup>.

A local authority must secure, so far as is reasonably practicable, that in taking, handling, transporting, storing and analysing or causing to be analysed any sample taken in the performance of these duties, the appropriate requirements are satisfied<sup>14</sup>. Within 28 days of the results of analysis of any sample of any private supply taken from any premises being available to the local authority which took the sample, the authority must notify the owner<sup>15</sup> of those premises of the results of that analysis and any other relevant person who is to be charged for the taking and analysis of the sample from those premises<sup>16</sup>. A local authority may, in respect of a private supply serving premises in its area, charge any relevant person<sup>17</sup> for expenses reasonably incurred by the authority for (1) sampling a supply, subject to a maximum charge of £50 per visit to any premises for that purpose; and (2) the analysis of samples, subject to the maximum prescribed charges<sup>18</sup>.

A local authority may enter into arrangements with a relevant person for the taking and analysis of samples in accordance with the monitoring provisions<sup>19</sup> on behalf of, but at no expense to, the authority<sup>20</sup>, or with any other person for the analysis of samples in accordance with those provisions on behalf of the authority, whether or not involving the authority in expense<sup>21</sup>. It may, however, enter into such arrangements only if it is satisfied that the tasks will be carried out by, or under the supervision of, a person competent to perform them and otherwise in accordance with the monitoring provisions<sup>22</sup>.

1 As to the meaning of 'local authority' see PARA 118 note 17.

2 As to the meaning of 'analyse' see PARA 375 note 14.

3 A private supply is a category one supply if any water from the supply is supplied for domestic purposes and the supply is not a category two supply: Private Water Supplies Regulations 1991, SI 1991/2790, reg 9(1). Category one supplies are divided into classes A-F by reference to the number of persons supplied with water for domestic purposes and the relevant average daily volume of water supplied, with a category one supply which only serves a single dwelling classified as a class F supply and a supply which serves more than 5,000 people classified as a class A supply: see reg 9(2)-(4). As to the meaning of 'private supply' see PARA 377 note 1. As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'person' see PARA 13 note 29.

A private supply is a category two supply if any water from the supply is used for food production purposes or is supplied for domestic purposes to premises used: (1) as a staff canteen or for the purposes of a business involving the preparation of food or drink for consumption on the premises; (2) as a hospital, nursing home, residential home, hostel, boarding school or other similar institution; or (3) as a camp site or a site for touring caravans or for the purposes of a business involving the provision of holiday or other short term

accommodation: reg 10(1). A private supply is not, however, a category two supply where it is used for cleansing or cooling operations in connection with the processing of milk and, if it were not for that use, would be classified as a category one supply, unless it would fall within class E (supplies to less than 25 people) in which case it is classified as a class 5 supply: reg 10(2). Category two supplies are divided into classes by reference to the average daily volume of water supplied for domestic or food production purposes, with special provision in relation to supplies used solely for cleansing or cooling operations in connection with the processing of milk (which are all class 5 supplies), or for washing crops (which are all either class 4 or class 5 supplies): see reg 10(3)-(6). As to the meaning of 'food production purposes' see PARA 338 note 44.

As to the classification of new or restored supplies see reg 11. The local authority has a duty to review, at least once in each year, the classification of all the private supplies serving premises in its area: reg 12.

4 Private Water Supplies Regulations 1991, SI 1991/2790, reg 8.

5 Private Water Supplies Regulations 1991, SI 1991/2790, reg 13(2). A local authority must: (1) determine the times of the year and of the day when samples of water from a private supply are to be taken; (2) if a private supply serves a number of premises, select at random the premises at which samples are to be taken, so as to ensure that, so far as is reasonably practicable, analysis of the samples will produce data which is representative of the quality of water from that supply: reg 13(1).

6 Under the provisions of the Private Water Supplies Regulations 1991, SI 1991/2790, regs 14-18, Schs 3, 4 (sampling frequencies: see the text to notes 12-13): reg 13(3).

7 Private Water Supplies Regulations 1991, SI 1991/2790, reg 13(3). As to sampling of new or restored supplies see reg 13(4), (5); and as to the duty to take samples from private supplies of classes C-E and 3-5 serving premises in the authority's area to ascertain and record the extent to which any pesticides or related products are present see reg 13(6).

8 As to the meaning of 'relevant person' see PARA 379 note 5.

9 As to the meaning of 'parameter' for these purposes see PARA 377 note 6.

10 As to the meaning of 'prescribed concentrations or values' see PARA 377 note 10.

11 Private Water Supplies Regulations 1991, SI 1991/2790, reg 13(7).

12 See the Private Water Supplies Regulations 1991, SI 1991/2790, regs 14-16, Sch 3.

13 See the Private Water Supplies Regulations 1991, SI 1991/2790, regs 17, 18, Sch 4.

14 Private Water Supplies Regulations 1991, SI 1991/2790, reg 19(1). 'Appropriate requirements' means such of the following requirements as are applicable: (1) that the sample is representative of the quality of the water at the time of sampling; (2) that the sample is not contaminated when being taken or subsequently; (3) that the sample is kept at such temperature and in such conditions as will secure that there is no material alteration of the concentration or value for the measurement or observation of which the sample is intended; (4) that the sample is analysed as soon as may be after the time it has been taken (a) by, or under the supervision of, a person who is competent to perform that task; (b) with the use of such equipment as is suitable for the purpose; (c) by applying such analytical systems and methods as are capable of establishing, within acceptable limits of deviation and detection, whether the sample contains concentrations or values which contravene the prescribed concentrations or values; and (5) that any laboratory at which samples are analysed has a system of analytical quality control that is subject from time to time to checking by a person who is (a) not under the control of either the laboratory or the authority; or (b) approved by the Secretary of State or, in relation to Wales, by the Welsh Ministers for that purpose: see reg 19(2). As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Private Water Supplies Regulations 1991, SI 1991/2790, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 3, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

15 As to the meaning of 'owner' see PARA 22 note 9.

16 Private Water Supplies Regulations 1991, SI 1991/2790, reg 19(3).

17 Where there is more than one relevant person, the local authority must, in determining who is to be charged and any apportionment of the charge, have regard to the terms, if any, on which the water is supplied and the purposes for which it is used: Private Water Supplies Regulations 1991, SI 1991/2790, reg 20(3).

18 Private Water Supplies Regulations 1991, SI 1991/2790, reg 20(1). For the maximum prescribed charges see Sch 5. The power to charge includes a power to charge, whether or not any notice under the Water Industry Act 1991 s 80 (see PARA 404) has been served, for the sampling and analysis of samples following the taking of remedial action in relation to any private supply; but does not include a power to charge for the taking and analysis of any sample taken solely in order to confirm or clarify the results of the analysis of a previous sample, or, in the case of a class C-E or class 3-5 supply, for the taking and analysis of any sample taken pursuant to the Private Water Supplies Regulations 1991, SI 1991/2790, reg 13(6) (recording extent to which pesticides etc present: see note 7): reg 20(2).

19 le in accordance with the Private Water Supplies Regulations 1991, SI 1991/2790.

20 The arrangements in this case must include a requirement for the results of any analysis to be sent to the local authority as soon as they are available: Private Water Supplies Regulations 1991, SI 1991/2790, reg 21(3).

21 Private Water Supplies Regulations 1991, SI 1991/2790, reg 21(1).

22 Private Water Supplies Regulations 1991, SI 1991/2790, reg 21(2).

## **UPDATE**

### **407 Monitoring of private supplies**

TEXT AND NOTES--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, SI 2010/1384).

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### (iii) Rights of Entry and Power to Obtain Information

#### 408. Local authority rights of entry etc.

Any person designated for the purpose by a local authority<sup>1</sup> within whose area any waterworks<sup>2</sup> are situated has a right, on producing some duly authenticated document showing his authority, at all reasonable hours to enter any premises for the purpose of ascertaining where there is or has been any contravention<sup>3</sup> of the provisions prohibiting contamination of water sources<sup>4</sup> in relation to those waterworks<sup>5</sup>.

Any person designated in writing<sup>6</sup> for the purpose by a local authority may<sup>7</sup>:

- 922 (1) enter any premises for the purpose of:  
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  89. (a) ascertaining whether any provision contained in or made or having effect under the Water Industry Act 1991 with respect to any water fittings<sup>8</sup>, or with respect to the waste or misuse of water, is being or has been contravened<sup>9</sup>;
  90. (b) determining whether, and if so in what manner, any power or duty conferred or imposed on any person<sup>10</sup> by regulations for preventing contamination and waste and in respect of water fittings<sup>11</sup> should be exercised or performed<sup>12</sup>; or
  91. (c) exercising any such power or performing any such duty<sup>13</sup>;
- 74  
923 (2) carry out such inspections, measurements and tests on premises entered by him, or on water fittings or other articles found on any such premises, and take away such samples of water or of land<sup>14</sup> and such water fittings and other articles, as that person has been authorised<sup>15</sup> to carry out or take away<sup>16</sup>;
- 924 (3) enter any premises for the purpose, in relation to any private supply<sup>17</sup>, of determining whether, and if so in what manner, any statutory power or duty conferred or imposed on that authority<sup>18</sup> should be exercised or performed<sup>19</sup>, or exercising any such power or performing any such duty<sup>20</sup>;
- 925 (4) enter any premises to which a supply of water is provided by a water undertaker for the purpose, in relation to a supply so provided, of determining whether, and if so in what manner, any such power should be exercised or any such duty performed<sup>21</sup>, or exercising any such power or performing any such duty<sup>22</sup>; or
- 926 (5) carry out such inspections, measurements and tests on premises entered by that person or of articles found on any such premises, and take away such samples of water or of any land or articles, as the local authority considers appropriate for the purposes of any such power or duty<sup>23</sup> and has authorised that person to carry out or take away<sup>24</sup>.

1 For the purposes of the Water Industry Act 1991 s 84(1), the reference to a local authority includes a reference to a county council in England and to the Sub-treasurer of the Inner Temple and the Under Treasurer of the Middle Temple; and any expenses incurred by the Common Council of the City of London in the exercise of its functions under that provision is to be defrayed as part of its general expenses: s 84(6). As to the meaning of 'local authority' see PARA 118 note 17. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the meaning of 'England' see PARA 19 note 8. As to the Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 32. The Local Better Regulation Office has the

objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2 As to the meaning of 'waterworks' see PARA 369 note 4: definition applied by the Water Industry Act 1991 s 84(7).

3 As to the meaning of 'contravention' see PARA 20 note 5.

4 Ie the Water Industry Act 1991 s 72: see PARA 369.

5 Water Industry Act 1991 s 84(1). Schedule 6 Pt I (paras 1-5) (see PARAS 482-484) applies to this right of entry; but nothing therein entitles any person designated for these purposes by a local authority to have access to any waterworks belonging to a water undertaker: s 84(4). As to the meaning of 'water undertaker' see PARA 137 note 4.

6 As to the meaning of 'writing' see PARA 22 note 1.

7 The Water Industry Act 1991 Sch 6 Pt II (paras 6-13) (see PARAS 482-485) applies to the rights and powers conferred by s 84(2), (3): s 84(5).

8 As to the meaning of 'water fittings' see PARA 134 note 6.

9 Water Industry Act 1991 s 84(2)(a)(i).

10 As to the meaning of 'person' see PARA 13 note 29.

11 Ie regulations under the Water Industry Act 1991 s 74: see PARAS 366, 368.

12 Water Industry Act 1991 s 84(2)(a)(ii).

13 Water Industry Act 1991 s 84(2)(a)(iii).

14 As to the meaning of 'land' see PARA 14 note 21.

15 Ie in accordance with regulations under the Water Industry Act 1991 s 74: see PARAS 366, 368. In this respect see the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 9; and PARA 367.

16 Water Industry Act 1991 s 84(2)(b).

17 As to the meaning of 'private supply' see PARA 373 note 15.

18 Ie by any of the Water Industry Act 1991 ss 77-82: see PARAS 395-397, 404-406.

19 Water Industry Act 1991 s 84(3)(a)(i).

20 Water Industry Act 1991 s 84(3)(a)(ii).

21 Water Industry Act 1991 s 84(3)(b)(i).

22 Water Industry Act 1991 s 84(3)(b)(ii).

23 Water Industry Act 1991 s 84(3)(c)(i).

24 Water Industry Act 1991 s 84(3)(c)(ii).

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#### **409. Local authority power to obtain information.**

A local authority<sup>1</sup> may serve on any person<sup>2</sup> a notice<sup>3</sup> requiring him to furnish that authority, within a period or at times specified in the notice and in a form and manner so specified, with such information<sup>4</sup> as is reasonably required by that authority for the purpose of exercising or performing any statutory power or duty conferred or imposed on that authority<sup>5</sup> in relation to water supply<sup>6</sup>. The Secretary of State<sup>7</sup> or, in relation to Wales, the Welsh Ministers<sup>8</sup> may, however, by regulations<sup>9</sup> make provision for restricting the information which may be so required and for determining the form in which the information is to be so required<sup>10</sup>.

A person who fails without reasonable excuse to comply with the requirements of a notice served on him under these provisions is guilty of an offence<sup>11</sup>.

1 As to the meaning of 'local authority' see PARA 118 note 17. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Industry Act 1991 ss 77-85 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

4 As to the meaning of 'information' see PARA 117 note 13.

5 Ie conferred or imposed by or under any of the Water Industry Act 1991 ss 77-82: see PARAS 395-397, 404-406.

6 Water Industry Act 1991 s 85(1).

7 As to the Secretary of State see PARA 15 note 1.

8 The functions of the Secretary of State under the Water Industry Act 1991 s 85, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

9 As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

10 Water Industry Act 1991 s 85(2).

11 Water Industry Act 1991 s 85(3). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: s 85(3). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.



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## **(5) FLUORIDATION**

### **410. Early fluoridation schemes.**

The first express authorisation of fluoridation schemes was contained in the Water (Fluoridation) Act 1985<sup>1</sup>, although prior to that there were in existence numerous agreements between water authorities and health authorities relating to fluoridation. At the date at which this title states the law<sup>2</sup>, a water undertaker may continue to operate a scheme for increasing the fluoride content of water which was first entered into before 20 December 1984 as arrangements by a former water authority<sup>3</sup> or a statutory water company<sup>4</sup> but which now has effect as if entered into by the water undertaker<sup>5</sup>, if it was in operation immediately before that date or work had been begun before that date for enabling it to be brought into operation<sup>6</sup>. This is subject to the condition that the arrangements require fluoridation to be effected only by the addition of one or more of the specified compounds of fluorine<sup>7</sup> and that the concentrations of fluoride in the water supplied to consumers<sup>8</sup> are maintained, so far as reasonably practicable, at one milligram per litre<sup>9</sup>. The statutory power to supply water to which fluoride has been added to consumers in another area<sup>10</sup> applies in relation to such a scheme<sup>11</sup>.

The arrangements under which such a scheme is operated may be varied to take account of any statutory amendment<sup>12</sup> changing the specified compounds of fluorine<sup>13</sup>. A pre-1985 scheme ceases to have effect upon the appropriate authority<sup>14</sup> giving to the undertaker reasonable notice of the authority's desire to terminate it<sup>15</sup>.

These provisions are, however, prospectively repealed by the Water Act 2003<sup>16</sup>. With effect from the appointed day<sup>17</sup>, relevant pre-1985 arrangements<sup>18</sup> will be treated<sup>19</sup> as if they were arrangements entered into<sup>20</sup> by the water undertaker in question with the relevant authority<sup>21</sup>. The relevant authority may request such modifications<sup>22</sup> to the arrangements as it considers necessary<sup>23</sup> in order to give effect to this provision<sup>24</sup>.

1     I.e. the Water (Fluoridation) Act 1985 (repealed in relation to England and Wales by the Water Consolidation (Consequential Provisions) Act 1991 s 3(1), Sch 3 (but still in force in relation to Scotland)). See now the Water Industry Act 1991 Pt III Ch IV (ss 87-91); and PARAS 411-415.

2     Until the coming into force of the Water Act 2003 s 58(7) (pre-1985 fluoridation schemes: see the text to notes 17-24), notwithstanding the commencement of s 58(2), (3), (5) and (6) (see PARAS 411-415), the Water Industry Act 1991 ss 87, 88, 89, 90 (all as originally enacted) continue to apply to pre-1985 arrangements and are saved for the purposes of s 91 and Sch 7 (pre-1985 Fluoridation Schemes): see the Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, art 3, Schedule para 1. In addition, any provision of any subordinate legislation that refers to the Water Industry Act 1991 s 87, 88, 89 or 90 (as originally enacted) is saved with references to the relevant provision for the purposes of pre-1985 arrangements notwithstanding that for all other purposes the references to those sections will be read as a reference to the new s 87, 88, 89 or 90 (in accordance with the Interpretation Act 1978 s 17): Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, Schedule para 2. 'Pre-1985 arrangements' means arrangements in pursuance of which a scheme for increasing fluoride content of water was being operated by a water undertaker by virtue of the Water Industry Act 1991 Sch 7 para 1 (see the text to notes 3-9) immediately before 25 February 2009 (i.e. the date of the coming into force of the Water Act 2003 s 58(2) (see PARA 413)): Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, art 1(3). The Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, applies in relation to England only: see art 1(2). As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'England' see PARA 19 note 8.

3     As to the former water authorities see PARA 108.

- 4 As to the meaning of 'statutory water company' see PARA 134 note 1.
- 5 As to the transfer of water authorities' functions etc on privatisation see PARA 108.
- 6 See the Water Industry Act 1991 s 91, Sch 7 para 1(1).
- 7 Ie hexafluorosilicic acid ( $\text{H}_2\text{SiF}_6$ ) or disodium hexafluorosilicate ( $\text{Na}_2\text{SiF}_6$ ): see the Water Industry Act 1991 s 87(4); applied by Sch 7 para 1(2)(a).
- 8 As to the meaning of 'consumer' see PARA 122 note 35.
- 9 Water Industry Act 1991 Sch 7 para 1(2).
- 10 Ie the Water Industry Act 1991 s 87(6), (7) (as originally enacted): see PARA 412.
- 11 Water Industry Act 1991 Sch 7 para 2(1)(a).
- 12 Ie any amendment made under the Water Industry Act 1991 s 88: see PARA 412.
- 13 Water Industry Act 1991 Sch 7 para 2(1)(c).
- 14 'Appropriate authority', in relation to a fluoridation scheme which is operated under the Water Industry Act 1991 Sch 7, means the strategic health authority or health authority to which the water undertaker concerned is answerable in accordance with the arrangements under which the scheme is operated: Sch 7 para 2(2) (Sch 7 paras 2, 3 amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 120(1), (4); and SI 2002/2469). References in the Water Industry Act 1991 Pt III Ch IV (ss 87-91, Sch 7) (as originally enacted) to a 'strategic health authority' or a 'health authority' are references to any such authority established under the National Health Service Act 1977 s 8 (repealed): Water Industry Act 1991 s 87(9) (as originally enacted; amended by the Health Authorities Act 1995 Sch 1 para 120(1), (2), and SI 2002/2469). As to strategic health authorities see now the National Health Act 2006 s 13; and **HEALTH SERVICES** vol 54 (2008) PARA 94. The functions of health authorities in Wales are transferred to local health boards: see **HEALTH SERVICES** vol 54 (2008) PARA 449 note 1.
- 15 Water Industry Act 1991 Sch 7 para 2(1)(b). Section 89 (as originally enacted) (publicity and consultation, including the Secretary of State's power to dispense with the other requirements of that provision: see PARA 412) applies where a strategic health authority or a health authority proposes to terminate such a scheme as it applies where a health authority proposes to withdraw an application under s 87 (as originally enacted); and accordingly, in s 89(7) (as originally enacted), the reference to whether an application should be withdrawn is to be treated as a reference to whether such a scheme should be terminated: Sch 7 para 3(1), (2) (as amended: see note 14).
- 16 As from a day to be appointed, the Water Industry Act 1991 Sch 7 ceases to have effect and s 91 is substituted: see the Water Act 2003 ss 58(7), (9), 105(3), (6). At the date at which this volume states the law no such day had been appointed.
- 17 Ie the day on which the Water Act 2003 s 58 comes into force: see the Water Industry Act 1991 s 91(6) (s 91 prospectively substituted by the Water Act 2003 s 58(1), (7)).
- 18 'Relevant pre-1985 arrangements' means arrangements in pursuance of which a scheme for increasing the fluoride content of water was being operated by a water undertaker by virtue of the Water Industry Act 1991 Sch 7 para 1 (see the text to notes 1-9) immediately before the appointed day: s 91(6) (as prospectively substituted: see note 17).
- 19 Ie for the purposes of the Water Industry Act 1991 Pt III Ch IV (ss 87-91): see PARAS 411-415.
- 20 Ie under the Water Industry Act 1991 s 87(1): see PARA 413.
- 21 Water Industry Act 1991 s 91(1) (as prospectively substituted: see note 17). For the purposes of Pt III Ch IV (ss 87-91), references to a 'relevant authority': (1) in relation to areas in England, are to a strategic health authority established under the National Health Service Act 2006 s 13 (see **HEALTH SERVICES** vol 54 (2008) PARA 94); (2) in relation to areas in Wales, are to the Welsh Ministers: s 87(3)(a) (substituted by the Water Act 2003 s 58(1), (2); amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1, paras 137, 138). Functions under the Water Industry Act 1991 ss 87, 91 were originally vested in the National Assembly for Wales and will now be exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.
- 22 As to the meaning of 'modifications' see PARA 141 note 20.

23 Eg to insert the terms mentioned in the Water Industry Act 1991 s 87(6) (see PARA 413): s 91(2) (as prospectively substituted: see note 17).

24 Water Industry Act 1991 s 91(2) (as prospectively substituted: see note 17). If the relevant authority and the water undertaker fail to agree the modifications requested by the authority: (1) s 87B(2), (3) or, as the case may be, s 87B(4) (see PARA 413) apply as if the parties had failed to agree the terms of arrangements requested under s 87(1); and (2) following determination of the modifications (a) the relevant authority must give notice of the determination to the water undertaker; and (b) the arrangements are deemed to have been modified as so determined with effect from the day after the date of the notice: s 91(3) (as so prospectively substituted). Sections 87(11) (see PARA 413) and 89(1) (see PARA 411) (which relate to consultation) do not apply to the deemed entry into, and modification of, arrangements by virtue of s 91: s 91(4) (as so prospectively substituted).

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#### **411. Publicity and consultation as to fluoridation.**

At the date at which this volume states the law the following provisions have effect in relation to England only<sup>1</sup>.

Before taking any of the following steps a relevant authority<sup>2</sup> must: (1) consult and ascertain opinion in accordance with regulations<sup>3</sup> made by the appropriate authority<sup>4</sup>; and (2) comply with the requirements set out in regulations made by the appropriate authority<sup>5</sup>. Those steps are:

- 927 (a) requesting a water undertaker<sup>6</sup> to enter into arrangements<sup>7</sup> to increase the fluoride content of the water it supplies<sup>8</sup>;
- 928 (b) requesting a water undertaker to vary any such arrangements in, or except in, prescribed circumstances or cases<sup>9</sup>;
- 929 (c) giving notice to a water undertaker<sup>10</sup> to terminate any such arrangements<sup>11</sup>;
- 930 (d) maintaining any such arrangements in prescribed circumstances<sup>12</sup>.

Heads (1) and (2) above do not, however, apply in relation to a proposal by a relevant authority to take the step mentioned in head (c) above if the appropriate authority so directs by an instrument in writing<sup>13</sup>; and such a direction may apply either generally or in relation to a particular proposal<sup>14</sup>. Further, before carrying out the required consultation in relation to a step mentioned in head (a), (b) or (c) above, a relevant authority must consult the water undertaker in question as to whether the arrangements which would result from taking that step would be operable and efficient or, where it is proposed to terminate the arrangements, as to whether it would be reasonably practicable to do so<sup>15</sup>.

1 At the date at which this volume states the law the Water Industry Act 1991 ss 87(11), 89 (both as substituted) apply in relation to England only: see the Water Act 2003 (Commencement No 3) (England) Order 2005, SI 2005/344, art 2; Water Act 2003 (Commencement No 8) Order 2008, SI 2008/1922, art 2(b)-(d). Until such day as the Water Industry Act 1991 ss 87(11), 89 (both as substituted) are brought into force in relation to Wales, s 89 (as originally enacted and amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 120(1), (3); SI 2002/2469) (see PARA 412) continues to apply in relation to Wales. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2 As to the meaning of 'relevant authority' see PARA 410 note 21.

3 Such regulations must include provision about the process which relevant authorities are to follow for those purposes: Water Industry Act 1991 s 89(3)(a) (s 89 substituted by the Water Act 2003 s 58(1), (5)). On the occasion of the first exercise by the Secretary of State of the power to make regulations under the Water Industry Act 1991 s 89, the instrument containing the regulations may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 213(1A) (added by the Water Act 2003 s 58(1), (8)). As to the Secretary of State see PARA 15 note 1. As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. As from a day to be appointed, the power of the Welsh Ministers to make regulations under the Water Industry Act 1991 s 89 (as so substituted) is exercisable by statutory instrument: s 213(1B) (prospectively added by the Water Act 2003 s 58(1), (8)); Government of Wales Act 2006 Sch 11 para 30. At the date at which this volume states the law no such day had been appointed. As to the Welsh Ministers see PARA 16 note 5.

In order to consult and ascertain opinion before taking any step concerning fluoridation arrangements that falls within the Water Industry Act 1991 s 89(2) (see heads (a)-(d) in the text), a strategic health authority must: (1) publish details of the step it proposes to take, and the manner in which individuals who would be affected by it and bodies with an interest can make representations regarding the proposal in one or more newspapers circulating within the area to which the arrangements relate and in such other media accessible within that area

as the Authority considers appropriate for the purpose of bringing the proposal to the attention of individuals affected and bodies with an interest; (2) give notice of the proposal to every local authority whose area falls wholly or partly within the area to which the arrangements relate: Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, reg 3(1)(a). The details so published must include: (a) the nature of the step the authority proposes to take; (b) the reasons for the proposal; (c) the area affected by the proposal; and (d) the period, being a period of not less than three months from the date on which the details are first published, within which representations can be made to the authority: reg 3(1)(b). The Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, apply in respect of fluoridation arrangements relating to water supplied to premises within an area which is wholly in England other than in a case to which the Water Industry Act 1991 s 89(5)(a) (see note 4) applies: Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, reg 1(2). As to strategic health authorities see **HEALTH SERVICES** vol 54 (2008) PARA 94. As to the meaning of 'month' see PARA 23 note 10. 'Fluoridation arrangements' means arrangements under the Water Industry Act 1991 s 87(1) (see PARA 413): Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, reg 2(1). References to individuals who would be affected by a step concerning fluoridation arrangements are to those individuals who live in the area to which the arrangements relate, or work in that area on a regular basis: reg 2(2). 'Local authority' means a county council, a district council, the Greater London Authority, a London borough council or the Common Council of the City of London: reg 2(1). As to local government areas and authorities in England see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the Greater London Authority see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 34, 79 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

4 Water Industry Act 1991 s 89(1)(a) (as substituted: see note 3). 'Appropriate authority': (1) in a case where two or more relevant authorities (one of which is the Welsh Ministers) propose to request a particular water undertaker to take a step mentioned in s 89(2)(a), (b) or (c) (see heads (a)-(c) in the text) in respect of arrangements in adjoining areas, means the Secretary of State and the Welsh Ministers acting jointly (s 89(5)(a) (as so substituted)); (2) in relation to England (except in a case to which head (1) applies), means the Secretary of State (s 89(5)(b) (as so substituted)); and (3) in relation to Wales (except in a case to which head (1) applies), means the Welsh Ministers (s 89(5)(c) (as so substituted)).

5 Water Industry Act 1991 s 89(1)(b) (as substituted: see note 3). Regulations under this provision must include provision about the requirements which must be satisfied (with respect to the outcome of that process or otherwise) before a step mentioned in s 89(2) (see heads (a)-(d) in the text) may be taken: s 89(3)(b) (as so substituted). A strategic health authority must not proceed with any step regarding fluoridation arrangements that falls within s 89(2) unless, having regard to the extent of support for the proposal and the cogency of the arguments advanced, the authority is satisfied that the health arguments in favour of proceeding with the proposal outweigh all arguments against proceeding: Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, reg 5.

6 As to the meaning of 'water undertaker' see PARA 137 note 4.

7 In arrangements under the Water Industry Act 1991 s 87(1): see PARA 413.

8 Water Industry Act 1991 s 89(2)(a) (as substituted: see note 3).

9 Water Industry Act 1991 s 89(2)(b) (as substituted: see note 3). 'Prescribed' means prescribed by regulations: see s 219(1). Requesting a water undertaker to vary fluoridation arrangements is a step falling within s 89(2) if the variation concerns the boundary of the area to which the arrangements relate, and the number of houses that would be affected by the variation, either by being brought within the area or by being excluded from it, exceeds 20% of the number of houses within the area at the time that the request is made: Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, reg 4(1). 'House' means any building or part of a building which is occupied as a dwelling-house, whether or not a private dwelling-house, or which, if unoccupied, is likely to be so occupied: reg 2(1).

10 In under the Water Industry Act 1991 s 87C(7): see PARA 413.

11 Water Industry Act 1991 s 89(2)(c) (as substituted: see note 3).

12 Water Industry Act 1991 s 89(2)(d) (as substituted: see note 3). Maintaining fluoridation arrangements is a step falling within s 89(2) if it involves the upgrading or replacement of fluoridation plant, otherwise than for the purpose of meeting operational or health and safety standards: Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005/921, reg 4(2).

13 As to the meaning of 'writing' see PARA 22 note 1.

14 Water Industry Act 1991 s 89(4) (as substituted: see note 3).

15 Water Industry Act 1991 s 87(11) (substituted by the Water Act 2003 s 58(1) (2)).



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#### **412. Fluoridation of water supplies at request of health authorities.**

Until a day to be appointed the following provisions continue to have effect in relation to Wales only<sup>1</sup>.

Where a health authority<sup>2</sup> has applied in writing<sup>3</sup> to a water undertaker<sup>4</sup> for the water supplied within an area<sup>5</sup> specified in the application to be fluoridated, that undertaker may, while the application remains in force<sup>6</sup>, increase the fluoride content<sup>7</sup> of the water supplied by the undertaker within that area<sup>8</sup>. Any health authority making arrangements with a water undertaker following such an application to fluoridate must ensure that those arrangements include provisions designed to ensure that the concentration of fluoride in the water supplied to consumers<sup>9</sup> in the area in question is, so far as reasonably practicable, maintained at one milligram per litre<sup>10</sup>. Water to which fluoride has been added by a water undertaker in exercise of the power so conferred<sup>11</sup>, with a view to its supply in any area, may be supplied by that or any other undertaker to consumers in any other area if the undertaker or undertakers concerned<sup>12</sup> consider that it is necessary to do so for the purpose of dealing with any serious deficiency in supply<sup>13</sup>, or in connection with the carrying out of any works, including cleaning or maintenance, by the undertaker or any of the undertakers concerned<sup>14</sup>.

Where a health authority proposes to make or withdraw an application under the above provisions it must publicise the proposals and consult certain bodies in relation thereto<sup>15</sup>.

1 At the date at which this volume states the law, the Water Industry Act 1991 ss 87, 89 are substituted in relation to England only: see the Water Act 2003, ss 58(1), (2), (5), 105(3), (6); Water Act 2003 (Commencement No 3) (England) Order 2005, SI 2005/344, art 2; Water Act 2003 (Commencement No 8) Order 2008, SI 2008/1922, art 2(b)-(d); Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, arts 1(2), 2(a); and PARAS 411, 413. The Water Industry Act 1991 ss 87, 89 (as originally enacted) continue to apply in relation to Wales. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2 As to the meaning of 'health authority', and as to the transfer of functions of health authorities to local health boards, see PARA 410 note 14.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 The area specified in the application may be the whole, or any part of, the area of the authority making the application: see the Water Industry Act 1991 s 87(3) (as originally enacted; s 87(1)-(3), (5) amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 120(1), (2); and SI 2002/2469).

6 An application remains in force until the health authority, after giving reasonable notice to the water undertaker, withdraws it: see the Water Industry Act 1991 s 87(2) (as originally enacted and amended: see note 5). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

7 Where under this power the fluoride content of any water is increased, the increase may be effected only by the addition of one or more of the following compounds of fluorine: hexafluorosilicic acid (H<sub>2</sub>SiF<sub>6</sub>) or disodium hexafluorosilicate (Na<sub>2</sub>SiF<sub>6</sub>): Water Industry Act 1991 s 87(4) (as originally enacted). The Welsh Ministers may by order amend s 87(4) by adding a reference to another compound of fluorine, or removing any reference to a compound of fluorine: see s 88(1). At the date at which this title states the law, no such order had been made. Functions under the Water Industry Act 1991 s 88, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

8 See the Water Industry Act 1991 s 87(1) (as originally enacted and amended: see note 5). Note that, in contrast to the position once the Water Act 2003 s 58 is brought into force (see PARA 413) the undertaker has a discretion whether to comply with a fluoridation request. In making its decision whether or not to do so, the undertaker must exercise its powers in accordance with its commercial obligation to its shareholders and in compliance with any statutory duties: *R v Northumbrian Water Ltd, ex p Newcastle and North Tyneside Health Authority* [1999] JPL 704. As to indemnities in respect of fluoridation see PARA 414.

9 As to the meaning of 'consumer' see PARA 122 note 35.

10 Water Industry Act 1991 s 87(5) (as originally enacted and amended: see note 5).

11 This reference to water to which fluoride has been added by a water undertaker includes water to which fluoride has been added by a water authority (within the meaning of the Water (Scotland) Act 1980) in exercise of the power conferred by the Water (Fluoridation) Act 1985 s 1 (amended in relation to Scotland and repealed in relation to England and Wales by the Water Consolidation (Consequential Provisions) Act 1991 ss 2(1), 3(1), Sch 1 para 42, Sch 3 Pt I): Water Industry Act 1991 s 87(7)(a) (as originally enacted).

12 In relation to a supply of water by a water undertaker of water to which fluoride has been added by a water authority in Scotland, references to the water undertakers concerned have effect as references to the water undertaker and the water authority concerned: Water Industry Act 1991 s 87(7)(b) (as originally enacted).

13 Water Industry Act 1991 s 87(6)(a) (as originally enacted). 'Serious deficiency in supply' means any existing or threatened serious deficiency in the supply of water (whether in quantity or quality) caused by an exceptional lack of rain or by any accident or unforeseen circumstances: s 87(8) (as originally enacted).

14 Water Industry Act 1991 s 87(6)(b) (as originally enacted).

15 See the Water Industry Act 1991 s 89 (as originally enacted; and amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 120; SI 2002/2469).



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#### **413. Fluoridation of water supplies at request of relevant authorities.**

At the date at which this volume states the law the following provisions have effect in relation to England only<sup>1</sup>.

If requested in writing<sup>2</sup> to do so by a relevant authority<sup>3</sup>, a water undertaker<sup>4</sup> must enter into arrangements with the relevant authority to increase the fluoride content<sup>5</sup> of the water supplied by that undertaker<sup>6</sup> to premises within the area specified in the arrangements<sup>7</sup>. A water undertaker is not, however, required to enter into any such arrangements until an indemnity with respect to the arrangements has been given<sup>8</sup> to the water undertaker and to any licensed water supplier which is entitled to one<sup>9</sup>.

The relevant authority must consult the Water Services Regulation Authority<sup>10</sup> in relation to the terms to be included in any such arrangements, in particular terms which affect the operation of the water undertaker's supply system<sup>11</sup>. The arrangements must be on such terms as may be agreed between the relevant authority and the water undertaker or, in the absence of agreement, determined<sup>12</sup> in accordance with the provisions set out below<sup>13</sup>. Those terms must include provision: (1) requiring the relevant authority to meet the reasonable capital and operating costs incurred by the water undertaker in giving effect to the arrangements<sup>14</sup>; (2) specifying circumstances in which the requirement to increase the fluoride content may be temporarily suspended<sup>15</sup>; and (3) for the variation of the arrangements at the request of the relevant authority<sup>16</sup>.

If two or more relevant authorities request a particular water undertaker to enter into arrangements in respect of adjoining areas, the authorities must co-operate with each other so as to secure that the arrangements, taken together, are operable and efficient<sup>17</sup>; and if suitable terms are not agreed for all the arrangements, a combined reference may be made by the relevant authorities<sup>18</sup> to enable the terms of each set of arrangements to be determined so that they are consistent<sup>19</sup>. If a relevant authority requests a water undertaker to vary arrangements, the authority must co-operate with any relevant authority for an adjoining area which has entered into arrangements with the same water undertaker so as to secure that following the variation the arrangements, taken together, will be operable and efficient<sup>20</sup>; and if suitable terms are not agreed for such a variation, a combined reference may be made by the relevant authorities<sup>21</sup> to enable the terms of the variation to be determined so that, following the variation, both sets of arrangements are consistent<sup>22</sup>.

If a relevant authority and a water undertaker fail to agree the terms of arrangements requested by the relevant authority<sup>23</sup>, or a variation in the terms of those arrangements following a request by the relevant authority pursuant to head (3) above, the following provisions apply<sup>24</sup>. Except where the Welsh Ministers are one of the relevant authorities which has made a combined reference<sup>25</sup>:

931 (a) in relation to areas in England, the relevant authority may refer the matter to the Secretary of State for determination<sup>26</sup> and following such a reference, the Secretary of State may:

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92. (i) determine the terms of the arrangements as he sees fit<sup>27</sup>; or

93. (ii) refer the matter for determination by such other person<sup>28</sup> as he considers appropriate<sup>29</sup>;

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932 and the determination of the Secretary of State or, as the case may be, the other person is final<sup>30</sup>;

933 (b) in relation to areas in Wales, the Welsh Ministers may determine the terms of the arrangements themselves as they see fit<sup>31</sup>, or refer the matter for determination by such other person as they consider appropriate<sup>32</sup>; and the determination of the Welsh Ministers or, as the case may be, the other person is final<sup>33</sup>.

Where the Welsh Ministers are one of the relevant authorities which has made a combined reference<sup>34</sup>, the terms of the arrangements must be determined by a person appointed by the Secretary of State and the Welsh Ministers acting jointly<sup>35</sup>, and the determination of that person is final<sup>36</sup>. Following determination of the terms to be included in any arrangements, the relevant authority must give notice<sup>37</sup> of the determination to the water undertaker in question<sup>38</sup>, and the undertaker is deemed to have entered into the arrangements on the terms so determined with effect from the day after the date of the notice<sup>39</sup>.

It is the duty of each water undertaker to comply with any arrangements entered into by it under the above provisions<sup>40</sup>. Arrangements so entered into remain in force until the relevant authority, after giving reasonable notice to the water undertaker, terminates them<sup>41</sup>; but, except where it is reasonably practicable to terminate the arrangements separately, arrangements entered into in respect of adjoining areas at the request of two or more relevant authorities<sup>42</sup> may only be terminated by the relevant authorities acting jointly<sup>43</sup>.

Where, pursuant to any such arrangements, the fluoride content of any water is increased, the increase may be effected only by the addition of one or more of the specified compounds of fluorine<sup>44</sup>. Water to which fluoride has been added pursuant to any such arrangements<sup>45</sup> entered into by a water undertaker, with a view to its supply in an area, may be supplied by that or any other undertaker to premises in any other area, whether or not that other area is the subject of such arrangements<sup>46</sup>; but this applies if, and only if, the undertaker or undertakers concerned<sup>47</sup> consider that it is necessary for the water to be supplied in the other area for the purpose of dealing with any serious deficiency in supply<sup>48</sup>, or in connection with the carrying out of any works, including cleaning and maintenance, by the undertaker concerned or, as the case may be, by the undertakers concerned, or by a licensed water supplier supplying water using its or their supply system<sup>49</sup>.

1 The Water Industry Act 1991 s 87 is substituted, and ss 87A-87C, 88A are added, by the Water Act 2003 s 58(1), (2), (4): see s 105(3), (5), (6). At the date at which this volume states the law these provisions as substituted and added apply in relation to England only: see the Water Act 2003 (Commencement No 8) Order 2008, SI 2008/1922, art 2(a), (d); Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, art 1(2). Until a day to be appointed the Water Industry Act 1991 s 87 (as originally enacted) (see PARA 412) continues to apply in relation to Wales. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2 As to the meaning of 'writing' see PARA 22 note 1. As to publicity and consultation prior to the making of a request see PARA 411.

3 As to the meaning of 'relevant authority' see PARA 410 note 21.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 Note that the reference is to increasing the fluoride content as fluoride occurs naturally in some water. Arrangements under the Water Industry Act 1991 s 87(1) must include provision for securing that, so far as reasonably practicable, the concentration of fluoride in the water supplied to premises in the specified area is maintained at the general target concentration of one milligram per litre (s 87A(1) (as added: see note 1)); but the arrangements may provide for the concentration in the specified area (or any part of it) to be lower than that if the relevant authority considers that it is not reasonably practicable to achieve the general target concentration in the specified area (or that part of it) (s 87A(2) (as so added)). Any such lower concentration must still be as high as is reasonably practicable in the circumstances: s 87A(3) (as so added). If, in relation to any area ('area A'), an order under s 88A(1) (see below) specifies a general target concentration lower than that for which any arrangements effective there provide (or, by the previous operation of this provision, are taken to

provide), the arrangements have effect from the coming into force of the order as if they provided for the general target concentration specified in the order (subject to the operation again of s 87A(2), (3)): s 87A(4) (as so added). If the result of the operation of s 87A(4) in relation to arrangements in area A is that in an area adjoining area A ('area B') it is not reasonably practicable to maintain the concentration of fluoride in the water supplied by virtue of arrangements made in area B with the same water undertaker, the order must be taken to extend also to area B so far as those arrangements are concerned, and s 87A(4) applies accordingly: s 87A(5) (as so added). An order under s 88A(1) which in relation to any area specifies a general target concentration higher than that for which any arrangements effective there provide (or are taken to provide by virtue of s 87A(4) or (5)) does not have effect to increase the concentration for which the arrangements provide (or are taken to provide): s 87A(6) (as so added). 'Specified area' means the area specified in arrangements under s 87(1): s 87A(7) (as so added).

The appropriate authority may by order made by statutory instrument provide that s 87A(1) is to have effect as if for 'one milligram per litre' there were substituted a lower concentration specified in the order: s 88A(1) (as added: see note 1). Such an order may make different provision for different geographical areas, or for some such areas and not others: s 88A(2) (as so added). For these purposes, 'appropriate authority' (1) in relation to an area which is partly in England and partly in Wales, means the Secretary of State and the Welsh Ministers acting jointly; (2) in relation to an area which is wholly in England, means the Secretary of State; and (3) in relation to an area which is wholly in Wales, means the Welsh Ministers: s 88A(4) (as so added). A statutory instrument containing an order under s 88A(1) must not be made by the Secretary of State (or by the Secretary of State and the Welsh Ministers acting jointly) unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 88A(3) (as so added). An order amending or revoking an order under s 88A(1) made by virtue of s 88A(4)(a) (see head (1) above) must also be made by the Secretary of State and the Welsh Ministers acting jointly: s 88A(5) (as so added). As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. Functions under the Water Industry Act 1991 ss 87, 87B, 88A were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 For the purposes of the Water Industry Act 1991 Pt III Ch IV (ss 87-91), references to water supplied by a water undertaker are to water supplied, whether by a water undertaker or a licensed water supplier, to premises using the supply system of that undertaker: s 87(3)(b) (as substituted: see note 1). As to the meaning of 'licensed water supplier' see PARA 152. As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

7 Water Industry Act 1991 s 87(1) (as substituted: see note 1). The area specified in such arrangements may be: (1) in relation to England, the whole or any part of the area of the strategic health authority in question; (2) in relation to Wales, such area comprising the whole or any part of Wales as the Welsh Ministers may determine: s 87(4) (as so substituted); Government of Wales Act 2006 Sch 11 para 32. References in Pt III Ch IV (ss 87-91) to arrangements entered into under s 87(1) include: (a) arrangements deemed to have been entered into under s 87 by virtue of s 87B(5)(b) (see the text to note 39) (s 87B(6) (as so substituted)); (b) arrangements treated as entered into by a water undertaker by virtue of s 91(1) (see PARA 410) (s 91(5)). As to the review of fluoridation arrangements see PARA 415.

With effect from the commencement day, any relevant application will have effect for these purposes as a request made by a relevant authority under the Water Industry Act 1991 s 87(1), and any other application made before the commencement day will cease to have effect on that day: Water Act 2003 s 58(11), (12). 'Commencement day' means the day when s 58 comes into force; and 'relevant application' means an application which was made before the passing of the Water Act 2003 (ie 20 November 2003), has not been withdrawn and has not been rejected in writing by the water undertaker to which it was made: s 58(13). In s 58(12), (13) 'application' means an application made under the Water Industry Act 1991 s 87 (see PARA 412) as it was in force at the time when the application was made (and includes an application made under the Water (Fluoridation) Act 1985 s 1 (repealed) and having effect as if made under the Water Industry Act 1991 s 87): Water Act 2003 s 58(14). Section 58(11)-(14) are in force except in relation to pre-1985 arrangements: see the Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, art 2(e). As to the meaning of 'pre-1985 arrangements' see PARA 410 note 2.

8 Ie under the Water Industry Act 1991 s 90: see PARA 414.

9 Water Industry Act 1991 s 87(2) (as substituted: see note 1).

10 As to the Water Services Regulation Authority see PARA 109. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 Water Industry Act 1991 s 87(7) (as substituted: see note 1).

12 Ie determined in accordance with the Water Industry Act 1991 s 87B: see the text to notes 23-39.

- 13 Water Industry Act 1991 s 87(5) (as substituted: see note 1).
- 14 Water Industry Act 1991 s 87(6)(a) (as substituted: see note 1).
- 15 Water Industry Act 1991 s 87(6)(b) (as substituted: see note 1).
- 16 Water Industry Act 1991 s 87(6)(c) (as substituted: see note 1).
- 17 Water Industry Act 1991 s 87(8)(a) (as substituted: see note 1).
- 18 le under the Water Industry Act 1991 s 87B: see the text to notes 23-39.
- 19 Water Industry Act 1991 s 87(8)(b) (as substituted: see note 1).
- 20 Water Industry Act 1991 s 87(9) (as substituted: see note 1).
- 21 le under the Water Industry Act 1991 s 87B: see the text to notes 23-39.
- 22 Water Industry Act 1991 s 87(10) (as substituted: see note 1).
- 23 le pursuant to the Water Industry Act 1991 s 87(1): see the text to notes 2-7.
- 24 Water Industry Act 1991 s 87B(1) (as added: see note 1).
- 25 le subject to the Water Industry Act 1991 s 87B(4): see the text to notes 34-36.
- 26 Water Industry Act 1991 s 87B(2)(a) (as added: see note 1).
- 27 Water Industry Act 1991 s 87B(2)(b)(i) (as added: see note 1).
- 28 As to the meaning of 'person' see PARA 13 note 29.
- 29 Water Industry Act 1991 s 87B(2)(b)(ii) (as added: see note 1).
- 30 Water Industry Act 1991 s 87B(2)(c) (as added: see note 1). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.
- 31 Water Industry Act 1991 s 87B(3)(a)(i) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.
- 32 Water Industry Act 1991 s 87B(3)(a)(ii) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.
- 33 Water Industry Act 1991 s 87B(3)(b) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.
- 34 le under the Water Industry Act 1991 s 87(8)(b) (see the text to notes 18-19) or s 87(10) (see the text to notes 21-22).
- 35 Water Industry Act 1991 s 87B(4)(a) (as added: see note 1); Government of Wales Act 2006 Sch 11 para 32.
- 36 Water Industry Act 1991 s 87B(4)(b) (as added: see note 1).
- 37 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 38 Water Industry Act 1991 s 87B(5)(a) (as added: see note 1).
- 39 Water Industry Act 1991 s 87B(5)(b) (as added: see note 1).
- 40 Water Industry Act 1991 s 87C(1) (as added: see note 1).
- 41 Water Industry Act 1991 s 87C(7) (as added: see note 1).
- 42 le arrangements to which the Water Industry Act 1991 s 87(8)(a) or (b) applied: see the text to notes 17-19.
- 43 Water Industry Act 1991 s 87C(8) (as added: see note 1).

44 Water Industry Act 1991 s 87C(2) (as added: see note 1). Those compounds are hexafluorosilicic acid ( $\text{H}_2\text{SiF}_6$ ) or disodium hexafluorosilicate ( $\text{Na}_2\text{SiF}_6$ ): s 87C(2) (as so added). The Secretary of State or, in relation to Wales, the Welsh Ministers may by order amend s 87C(2) by adding a reference to another compound of fluorine or removing any reference to a compound of fluorine: s 88(1) (amended by the Water Act 2003 s 58(1), (3)). At the date at which this volume states the law such amendment applies in relation to England only: see the Water Act 2003 (Commencement No 9 and Saving Provisions) (England) Order 2009, SI 2009/359, arts 1(2), 2(b). The power of the Secretary of State to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Water Industry Act 1991 s 88(2). The functions of the Secretary of State under the Water Industry Act 1991 s 88, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions will now be exercisable by the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

45 This reference to water to which fluoride has been added pursuant to arrangements includes a reference to water to which fluoride has been added by Scottish Water in exercise of the power conferred by the Water (Fluoridation) Act 1985 s 1 (repealed in relation to England and Wales): Water Industry Act 1991 s 87C(5)(a) (as added: see note 1).

46 Water Industry Act 1991 s 87C(3) (as added: see note 1).

47 In relation to a supply of water to which fluoride has been added pursuant to arrangements by a water undertaker, this reference to the water undertakers concerned has effect as references to the water undertaker and Scottish Water: see the Water Industry Act 1991 s 87C(5)(b) (as added: see note 1).

48 Water Industry Act 1991 s 87C(4)(a) (as added: see note 1). 'Serious deficiency in supply' means any existing or threatened serious deficiency in the supply of water (whether in quantity or quality) caused by an exceptional lack of rain or by any accident or unforeseen circumstances: s 87C(6) (as so added).

49 Water Industry Act 1991 s 87C(4)(b) (as added: see note 1).

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#### **414. Indemnities in respect of fluoridation.**

Until a day to be appointed the following provisions have effect<sup>1</sup>.

The Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> may, with the consent of the Treasury<sup>4</sup>, agree to indemnify any water undertaker<sup>5</sup> in respect of such of any of the following as the Secretary of State or, as appropriate, the Welsh Ministers think fit, that is to say:

- 934 (1) liabilities incurred by the undertaker in connection with anything done by the undertaker for the purpose of increasing the fluoride content of any water supplied by the undertaker<sup>6</sup>;
- 935 (2) costs or expenses which are incurred by the undertaker, or for which the undertaker is liable, in connection with any proceedings which have been or may be brought by any person<sup>7</sup> with respect to (a) things done for the purpose of increasing the fluoride content of any water<sup>8</sup>; or (b) a proposal to increase the fluoride content of any water<sup>9</sup>;
- 936 (3) expenditure incurred by the undertaker in complying with an order made in any such proceedings<sup>10</sup>;
- 937 (4) liabilities transferred to the undertaker<sup>11</sup> which, in relation to the person from whom they were transferred, were liabilities falling within head (1) above or liabilities in respect of costs, expenses or other expenditure mentioned in head (3) or (4) above<sup>12</sup>.

As from a day to be appointed the above provisions are replaced by the following provisions<sup>13</sup>.

The Secretary of State, or in relation to Wales, the Welsh Ministers<sup>14</sup> may, with the consent of the Treasury, agree to indemnify any water undertaker in respect of liabilities which it may incur in complying with arrangements entered into by it<sup>15</sup> for increasing the fluoride content of water<sup>16</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may also, with the consent of the Treasury, agree to indemnify any licensed water supplier<sup>17</sup> in respect of liabilities which it may incur: (i) in supplying water to which fluoride has been added by a water undertaker by virtue of any such arrangements<sup>18</sup>; (ii) if the licensee is introducing water into the water undertaker's supply system<sup>19</sup>, in complying with any obligation imposed on it by the undertaker in consequence of the arrangements<sup>20</sup>. The Secretary of State or the Welsh Ministers may by regulations<sup>21</sup> make provision with respect to: (A) the matters in respect of which an indemnity may be so given<sup>22</sup>; (B) the form and terms of any such indemnity<sup>23</sup>; and (C) such ancillary matters as the Secretary of State or the Welsh Ministers see fit<sup>24</sup>.

1 As from a day to be appointed the Water Industry Act 1991 s 90 is substituted by the Water Act 2003 s 58(1), (6): see s 105(3), (5), (6). At the date at which this title states the law, no such day had been appointed. As to the provisions as prospectively substituted see the text to notes 13-24.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Industry Act 1991 s 90, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to

intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the meaning of 'Treasury' see PARA 108 note 6.

5 As to the meaning of 'water undertaker' see PARA 137 note 4.

6 Water Industry Act 1991 s 90(a). As to arrangements for increasing the fluoride content of water relevant for these purposes see PARA 412.

7 As to the meaning of 'person' see PARA 13 note 29.

8 Water Industry Act 1991 s 90(b)(i).

9 Water Industry Act 1991 s 90(b)(ii).

10 Water Industry Act 1991 s 90(c).

11 In accordance with a scheme under the Water Act 1989 Sch 2 (see PARA 108) or the Water Industry Act 1991 Sch 2 (see PARA 141).

12 Water Industry Act 1991 s 90(d).

13 See note 1. The Water Industry Act 1991 s 90(3) (see the text to notes 21-24) is in force: see the Water Act 2003 (Commencement No 3) (England) Order 2005, SI 2005/344, art 2.

14 See note 3.

15 In pursuant to the Water Industry Act 1991 s 87(1): see PARA 413.

16 Water Industry Act 1991 s 90(1) (as prospectively substituted: see note 1).

17 As to the meaning of 'licensed water supplier' see PARA 152.

18 Water Industry Act 1991 s 90(2)(a) (as prospectively substituted: see note 1).

19 As to the meaning of 'supply system of a water undertaker' see PARA 319 note 8.

20 Water Industry Act 1991 s 90(2)(b) (as prospectively substituted: see note 1).

21 As to the making of regulations see PARA 21.

22 Water Industry Act 1991 s 90(3)(a) (as substituted: see notes 1, 13).

23 Water Industry Act 1991 s 90(3)(b) (as substituted: see notes 1, 13). Where the Secretary of State agrees to indemnify a water undertaker under s 90(1) (see the text to notes 15-16), the form of that indemnity and its terms must be those set out in the Water Supply (Fluoridation Indemnities) (England) Regulations 2005, SI 2005/920, Sch 1: reg 2(1). Where the Secretary of State agrees to indemnify a licensed water supplier under the Water Industry Act 1991 s 90(2) (see the text to notes 17-20), the form of the indemnity and its terms must be those set out in the Water Supply (Fluoridation Indemnities) (England) Regulations 2005, SI 2005/920, Sch 1, subject to the modifications set out in Sch 2: reg 2(2). The Water Supply (Fluoridation Indemnities) (England) Regulations 2005, SI 2005/920, apply to agreements to indemnify water undertakers and licensed water suppliers whose areas are situated wholly in England: reg 1(2). As to the meaning of 'England' see PARA 19 note 8.

24 Water Industry Act 1991 s 90(3)(c) (as substituted: see notes 1, 13).

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#### **415. Review of fluoridation.**

As from a day to be appointed the following provisions have effect<sup>1</sup>.

A relevant authority<sup>2</sup> which has entered into arrangements<sup>3</sup> to increase the fluoride content of water must: (1) monitor the effects of the arrangements on the health of persons living in the area specified in the arrangements<sup>4</sup>; and (2) publish reports containing an analysis of those effects<sup>5</sup>. The relevant authority must make available any information<sup>6</sup> collected by it for these purposes<sup>7</sup>, or summaries of that information<sup>8</sup>.

These provisions cease to apply in relation to any such arrangements if those arrangements are terminated<sup>9</sup>.

1 As from a day to be appointed, the Water Industry Act 1991 s 90A is added by the Water Act 2003 s 58(1), (6): see s 105(3), (5), (6). At the date at which this volume states the law no such day had been appointed.

2 As to the meaning of 'relevant authority' see PARA 410 note 21.

3 Ie arrangements under the Water Industry Act 1991 s 87(1): see PARA 413.

4 Water Industry Act 1991 s 90A(1)(a) (as added: see note 1).

5 Water Industry Act 1991 s 90A(1)(b) (as added: see note 1). The relevant authority must publish such a report within the period of four years beginning with the date on which the arrangements come into force (unless s 91(1) (see PARA 410) applies in relation to the arrangements): s 90A(3) (as so added). Where s 91(1) applies in relation to the arrangements, the relevant authority must publish such a report within the period of four years beginning with the date on which the Water Act 2003 s 58 came into force: Water Industry Act 1991 s 90A(4) (as so added). The relevant authority must publish a further report under s 90A(1)(b) within each period of four years beginning with the date on which its last such report was published: s 90A(5) (as so added).

6 As to the meaning of 'information' see PARA 117 note 13.

7 Water Industry Act 1991 s 90A(2)(a) (as added: see note 1).

8 Water Industry Act 1991 s 90A(2)(b) (as added: see note 1).

9 Water Industry Act 1991 s 90A(6) (as added: see note 1).



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## **(6) WATER SUPPLY IN THE LONDON AREA**

### **416. In general.**

Statutory water undertakers<sup>1</sup> are generally regulated by the Water Industry Act 1991<sup>2</sup>, but local statutory provisions<sup>3</sup> having effect in the metropolitan area<sup>4</sup> before 1 April 1974 may continue to apply to the statutory undertaker<sup>5</sup>. Such local provisions are particularly relevant in determining the required pressure of the water supply, and the ownership of service pipes<sup>6</sup>. Local provisions also apply to the laying of pipes and mains in streets, domestic and non-domestic supplies and the expenses of disconnections<sup>7</sup>.

Whilst many local statutory provisions applied to the former metropolitan water companies generally, the special legislation of each of the former companies, where it continues to apply, applies only in relation to the limits of supply of the company concerned. In so far as they have not been superseded by later enactments, the Waterworks Clauses Acts 1847 and 1863 continue to have effect in the metropolitan area to the extent that they are incorporated in unrepealed special Acts<sup>8</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 See PARA 137 et seq. Subject to any provision to the contrary which is contained in the Water Act 1989 Sch 26 or in the Water Consolidation (Consequential Provisions) Act 1991, nothing in any local statutory provision passed or made before 1 September 1989 is to be construed as relieving the undertaker from any liability arising by virtue of the Water Industry Act 1991 in respect of any act or omission occurring on or after that date: Water Industry Act 1991 s 220. As to the meaning of 'local statutory provision' see PARA 14 note 24.

3 As to the power to amend or repeal such provisions in order to bring them into line with general legislation see PARA 14.

4 The metropolitan area is the area comprising the limits of supply of the former Metropolitan Water Board: see the Metropolis Water Act 1902 s 1(1), Sch 2.

5 See the Water Act 1973 s 34(2), Sch 6 Pt II (prospectively repealed by the Water Act 1989 s 190(3), Sch 27 Pt II); and the Water (Local Statutory Provisions) (Consequential Amendments) Order 1989, SI 1989/1380. Local statutory provisions which are continued, continue to apply only to the area to which they applied before 1 April 1974.

6 See eg the Metropolis Water Act 1871 s 7 (amended by the Statute Law Revision (No 2) Act 1893); the Metropolitan Water Board Act 1932; and **LONDON GOVERNMENT**.

7 See note 6. See also the Metropolitan Water Board Act 1927 ss 16, 18; and **LONDON GOVERNMENT**.

8 The Waterworks Clauses Acts 1847 and 1863 were repealed by the Water Act 1945 s 62, Sch 5 (repealed). The special Acts of the former metropolitan water companies incorporated provisions of the Waterworks Clauses Act 1847 and extended those provisions to the whole of their undertakings. The Waterworks Clauses Act 1863 was applied and extended to the undertaking of the former Metropolitan Water Board by the Metropolitan Water Board Act 1913 s 4. See further **LONDON GOVERNMENT**.

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## **(7) WATER CHARGES AND METERING**

### **(i) In general**

#### **417. Powers to make charges.**

Relevant undertakers<sup>1</sup> have power to make charges for any services provided in the course of carrying out their statutory functions in relation to water<sup>2</sup>. Charges made by persons who make private supplies of water and are not appointed as relevant undertakers are not regulated by specific statutory provisions and would appear to be entirely a matter for agreement between the persons concerned and their consumers<sup>3</sup>.

<sup>1</sup> As to the meaning of 'relevant undertaker' see PARA 137 note 8.

<sup>2</sup> See PARA 419 et seq. For the purposes of the charge to value added tax, the supply of water is treated as a supply of goods and not as a supply of services, in so far as it would not otherwise be a supply of goods: see the Value Added Tax Act (Water) Order 1989, SI 1989/1114, art 2; and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 27. Supplies of domestic sewerage services and most supplies of water are zero-rated supplies for VAT purposes: see the Value Added Tax Act 1994 s 30(2), Sch 8 Pt II Group 2; and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 176.

<sup>3</sup> The quality of private water supplies is, however, subject to statutory regulation: see the Water Industry Act 1991 ss 80-83 (PARAS 404-406); and the Private Water Supplies Regulations 1991, SI 1991/2790; and PARAS 377, 379, 407.

### **UPDATE**

#### **417 Powers to make charges**

NOTE 3--SI 1991/2790 replaced, in relation to England, by the Private Water Supplies Regulations 2009, SI 2009/3101, and in relation to Wales, by the Private Water Supplies (Wales) Regulations 2010, SI 2010/66 (amended by SI 2010/147, SI 2010/1384).

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#### **418. Free water or fixed price agreements.**

In the past a water authority or undertaker<sup>1</sup> sometimes agreed to give a free or fixed price water supply to a particular customer or group of customers, often by way of compensation<sup>2</sup>. Generally if the supply was granted free of charge the relevant undertaker must continue providing the supply subject to the terms of the agreement<sup>3</sup>. If the agreement provides for a fixed price water supply in perpetuity a term may be implied into the agreement to the effect that the agreement is terminable by either side on reasonable notice<sup>4</sup>.

1 As to the former water authorities see PARA 108. As to water undertakers see PARA 137.

2 Eg in respect of pipelaying or other works carried out in the land belonging to the persons affected. As to compensation for works see generally PARA 469 et seq.

3 As to the transfer of liabilities etc on privatisation see PARA 108.

4 *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 3 All ER 769, [1978] 1 WLR 1387, CA; *Dwr Cymru Cyfyngedig v Edgar* [2004] All ER (D) 05 (Nov).

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## **(ii) Charges for Services Provided by Water Undertakers**

### **A. INTRODUCTION**

#### **419. Undertakers' powers to charge.**

The powers of every relevant undertaker<sup>1</sup> include power to fix charges for any services<sup>2</sup> provided in the course of carrying out its functions<sup>3</sup>, and to demand and recover charges so fixed from any persons<sup>4</sup> to whom the undertaker provides services<sup>5</sup>. These powers are exercisable:

- 938 (1) by or in accordance with a charges scheme<sup>6</sup>; or
- 939 (2) except in relation to charges for the supply of water to a dwelling<sup>7</sup>, or charges for the provision of sewerage services in respect of a dwelling<sup>8</sup>, by or in accordance with agreements<sup>9</sup> with the persons to be charged<sup>10</sup>.

Except as otherwise provided<sup>11</sup>, a relevant undertaker may fix such charges by reference to such matters, and may adopt such methods and principles for the calculation and imposition of the charges, as appear to the undertaker to be appropriate<sup>12</sup>; but these charging powers may not be exercised so as to contravene<sup>13</sup> any local statutory provision<sup>14</sup> which expressly provides that no charge may be made for a particular service<sup>15</sup>.

The use of limiting devices in relation to a person's principal dwelling and certain other specified premises with the intention of enforcing payment of charges is expressly prohibited<sup>16</sup>.

Where a temporary hosepipe ban is imposed by a water undertaker, charges made by the undertaker for the use of a hosepipe or similar apparatus are subject to a reasonable reduction, and, in the case of a charge paid in advance, the undertaker must make any necessary repayment or adjustment<sup>17</sup>.

1 Nothing in the Water Industry Act 1991 s 142(1)-(5) or in any charges scheme under s 143 (see PARA 421) affects any power of a relevant undertaker to fix charges under any power conferred otherwise than by virtue of Pt V Ch I (ss 142-150B): s 142(6). As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the meaning of 'services' see PARA 129 note 7. See also, for the interpretation of the expression 'services provided' in the Water Industry Act 1991 s 142(1), *Ministry of Defence v Thames Water Utilities Ltd* [2006] EWCA Civ 1620, [2006] All ER (D) 391 (Nov).

3 See the Water Industry Act 1991 s 142(1)(a). As to the meaning of 'functions' see PARA 133 note 5. In the case of a sewerage undertaker, it also has power to fix charges to be paid in connection with the carrying out of its trade effluent functions (ie its functions under Pt IV Ch III (ss 118-141) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1047 et seq)): s 142(1)(a), (7).

4 As to the meaning of 'person' see PARA 13 note 29.

5 Water Industry Act 1991 s 142(1)(b). A sewerage undertaker may also demand and recover charges so fixed from any persons in relation to whom it carries out trade effluent functions: s 142(1)(b). As to general restrictions on charging see PARA 420.

6 Water Industry Act 1991 s 142(2)(a). A charges scheme is one made under s 143: see PARA 421.

7 Water Industry Act 1991 s 142(2A)(a) (s 142(2A), (2B) added, s 142(2) amended, by the Water Industry Act 1999 s 3(1)). As to the meaning of 'dwelling' see PARA 358 note 3: definition applied by the Water Industry Act 1991 s 142(2B) (as so added).

8 Water Industry Act 1991 s 142(2A)(b) (as added: see note 7). As to charges for sewerage services see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1038.

9 A sewerage undertaker's power to make such agreements is subject to further statutory restrictions: see the Water Industry Act 1991 s 142(3), (3A) (s 143(3A) added by the Environment Act 1995 s 120(1), Sch 22 para 114(1), (3)); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1038.

10 See the Water Industry Act 1991 s 142(2)(b) (as amended: see note 7). As to termination of an agreement whereby a third party will pay the charges see *Thames Water Utilities Ltd v Richardson* [2000] All ER (D) 2197, CA.

11 Ie by the other provisions in the Water Industry Act 1991 Pt V Ch I (ss 142-150B): see PARA 420 et seq.

12 Water Industry Act 1991 s 142(4).

13 As to the meaning of 'contravene' see PARA 20 note 5.

14 As to the meaning of 'local statutory provision' see PARA 14 note 24.

15 Water Industry Act 1991 s 142(5).

16 See the Water Industry Act 1991 s 63A; and PARA 361.

17 See the Water Industry Act 1991 s 76(4); and PARA 316.

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#### **420. General restrictions on charging.**

A relevant undertaker<sup>1</sup> is not entitled<sup>2</sup> to fix, demand or recover an initial charge for becoming, or for taking steps for the purpose of becoming, the provider of a supply of water for domestic purposes<sup>3</sup> to any premises<sup>4</sup>, or the provider of sewerage services<sup>5</sup> for the purposes of the drainage for domestic sewerage purposes<sup>6</sup> of any premises<sup>7</sup>. Nothing in this provision, however, or in any other enactment is to be construed as prohibiting the fixing, demand or recovery by a relevant undertaker of:

- 940 (1) a charge for connection to a water supply of premises which have never at any previous time been connected to a supply of water provided for domestic purposes by a water undertaker<sup>8</sup> or by any other authority or body which at that time provided supplies of water in the course of carrying out functions under any enactment<sup>9</sup>; or
- 941 (2) a charge for the connection to a public sewer<sup>10</sup> of premises which have never at any previous time whatsoever been connected to a sewer used for the drainage for domestic sewerage purposes of those premises by a sewerage undertaker<sup>11</sup> or by any other authority or body which at that time provided sewerage services in the course of carrying out functions under any enactment<sup>12</sup>.

So far as these provisions restrict the making of certain charges, they are without prejudice to enactments by virtue of which a relevant undertaker may recover expenses incurred by it in carrying out works<sup>13</sup>, and to the power of the undertaker<sup>14</sup> to fix the amount of any of its other charges by reference to such matters as it thinks appropriate<sup>15</sup>.

Notwithstanding anything in the statutory provision for compensation to be paid by a fire and rescue authority<sup>16</sup>, or anything in the general powers to charge<sup>17</sup> or in any charges scheme<sup>18</sup>, or anything in any agreement as to charges in respect of any supply of water, no charge may be made by any water undertaker in respect of:

- 942 (a) water taken for the purpose of extinguishing fires or taken by a fire and rescue authority for any other emergency purpose<sup>19</sup>;
- 943 (b) water taken for the purpose of testing apparatus installed or equipment used for extinguishing fires or for the purpose of training persons for fire-fighting<sup>20</sup>; or
- 944 (c) the availability of water for any such purpose<sup>21</sup>.

These restrictions on charging do not prevent the making of charges in respect of work carried out at the request of, or for the benefit of, any person<sup>22</sup> receiving a supply of water for the purposes mentioned in head (a) or head (b) above<sup>23</sup>; nor do they have the effect, where any water is used or made available for any of those purposes, of requiring a reduction in the charges imposed in respect of the provision for other purposes of the supply from which that water is taken<sup>24</sup>.

<sup>1</sup> As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 le by virtue of anything in the Water Industry Act 1991 Pt V Ch I (ss 142-150B) (see PARA 419, PARA 421 et seq) or in any other enactment. As to the meaning of 'enactment' see PARA 14 note 31.

3 As to the meaning of 'domestic purposes' see PARA 334.

4 See the Water Industry Act 1991 s 146(1)(a).

5 As to the meaning of 'sewerage services' see PARA 129 note 7.

6 As to the meaning of 'domestic sewerage purposes' see the Water Industry Act 1991 s 117; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1018: definition applied by s 146(6).

7 See the Water Industry Act 1991 s 146(1)(b).

8 As to the meaning of 'water undertaker' see PARA 137 note 4.

9 Water Industry Act 1991 s 146(2)(a). These are the charges usually referred to as 'infrastructure charges' and were introduced for the first time by the Water Act 1989: see s 79 (repealed).

Generally, three types of charges need to be distinguished: (1) charges payable in respect of a requisitioned water main (see PARA 332) which are only payable if a main is requisitioned or if capacity in an earlier oversized main (requisitioned in the previous 12 years) is used; (2) charges payable for connection to a water main (see PARA 335) which are in respect of the physical connection of the customer's pipe to the water main; and (3) charges under head (1) in the text in respect of the relevant undertaker's infrastructure costs in supplying the new connection. The Water Industry Act 1991 s 146(2) is concerned with the connection to the water and sewerage systems of premises which have not previously been so connected, and includes new premises which are likely to place an additional burden on the system as a whole; where existing buildings are converted, it is a question of fact and degree whether the result is, or includes, the construction and connection of premises which have never previously been connected, or whether the conversion retains the identity of premises which existed and were connected before the conversion took place: see *Thames Water Utilities Ltd v Hampstead Homes (London) Ltd* [2002] EWCA Civ 1487, [2003] 3 All ER 1304, [2003] 1 WLR 198.

10 As to the meaning of 'public sewer' see PARA 138 note 11.

11 As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

12 Water Industry Act 1991 s 146(2)(b). A sewerage undertaker is not, however, authorised to require any payment to be made to it in respect of its making any declaration of vesting under Pt IV Ch II (ss 98-117) or in respect of any agreement to make such a declaration; nor is a sewerage undertaker authorised to require any payment to be made to it by a highway authority in respect of the drainage of any highway or the disposal of the contents of any drain or sewer used for draining any highway: see s 146(3), (4); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1039. As to the meanings of 'sewer' and 'drain' see PARA 138 note 11. As to the meaning of 'highway' see PARA 350 note 8. As to the meaning of 'highway authority' see PARA 350 note 3.

13 Water Industry Act 1991 s 146(5)(a). See eg the power in s 45(6) enabling a relevant undertaker to recover the cost of making a connection to a water main; and PARA 335.

14 le by virtue of the Water Industry Act 1991 s 142(4): see PARA 419.

15 Water Industry Act 1991 s 146(5)(b).

16 le anything in the Fire and Rescue Services Act 2004 s 38(2): see **FIRE SERVICES**. As to fire and rescue authorities see **FIRE SERVICES**.

17 le in the provisions of the Water Industry Act 1991 s 142: see PARA 419.

18 le any charges scheme under the Water Industry Act 1991 s 143: see PARA 421.

19 Water Industry Act 1991 s 147(1)(a) (amended by the Fire and Rescue Services Act 2004 s 53(1), Sch 1 paras 75, 77). As to the duty to provide a supply of water for fire-fighting see PARA 348.

20 Water Industry Act 1991 s 147(1)(b).

21 Water Industry Act 1991 s 147(1)(c).

22 As to the meaning of 'person' see PARA 13 note 29.

23 Water Industry Act 1991 s 147(2).

24 Water Industry Act 1991 s 147(3). In practice, if the supply is for purposes other than domestic purposes, the conditions of supply may require water used for fire-fighting to be taken from a separate system of pipes from that used for other purposes. As to the power to impose conditions on a supply for non-domestic purposes see PARA 347.



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## **B. CHARGES SCHEMES**

### **421. Charges schemes.**

A relevant undertaker<sup>1</sup> may make a charges scheme which has effect in relation to a specified period of 12 months<sup>2</sup> and fixes the charges to be paid for any services provided by the undertaker in the course of carrying out its functions<sup>3</sup>, and which also, or alternatively, makes provision with respect to the times and methods of payment of the charges fixed by the scheme<sup>4</sup>. A charges scheme may make different provision for different cases, including different provision in relation to different circumstances or localities, and contain supplemental, consequential and transitional provision for the purposes of the scheme, and may revoke or amend a previous charges scheme<sup>5</sup>. Nothing in any charges scheme, however, affects any power of a relevant undertaker, in a case other than the supply of water or sewerage services to a dwelling<sup>6</sup>, to enter into such an agreement with any person<sup>7</sup> in any particular case as determines the charges to be made for the services provided to that person by the undertaker<sup>8</sup>.

A charges scheme does not take effect unless it has been approved by the Water Services Regulation Authority<sup>9</sup>. The Authority may not exercise this power for the purpose of limiting the total revenues of relevant undertakers from charges fixed by or in accordance with charges schemes<sup>10</sup>. The Secretary of State<sup>11</sup> or, in relation to Wales, the Welsh Ministers<sup>12</sup> may give guidance to the Authority on the exercise of this power and the Authority must have regard to that guidance in the exercise of the power<sup>13</sup>. The Secretary of State or the Welsh Ministers must arrange for any such guidance to be published in such manner as he or they consider appropriate<sup>14</sup>.

The provisions of any charges scheme must comply with any requirements prescribed by the Secretary of State or, as the case may be, the Welsh Ministers by regulations<sup>15</sup>. Such regulations may<sup>16</sup>:

- 945 (1) prescribe items with respect to which a consumer<sup>17</sup> is, or is not, to be liable to pay a charge<sup>18</sup>;
- 946 (2) make provision as to the matters by reference to which charges may be fixed and as to methods and principles to be adopted in calculating and imposing charges<sup>19</sup>;
- 947 (3) require alternative bases of charging to be made available to consumers<sup>20</sup>; and
- 948 (4) require special provision, including exemption from specified charges, to be made for the purpose of assisting individuals who are or would be liable to pay any charges and who fall within any class of individuals appearing to the Secretary of State or, as appropriate, the Welsh Ministers to require special provision<sup>21</sup>.

Regulations imposing requirements for the purpose mentioned in head (4) above may:

- 949 (a) prescribe the classes of persons for whom special provision is to be made in relation to any premises by reference to matters such as age, ill-health or disability, the age, ill-health or disability of any of their dependants or of any other persons who have their homes in the premises, or their financial circumstances<sup>22</sup>;

- 950 (b) make provision as to the method by which a person may establish his entitlement to assistance under the regulations<sup>23</sup>; and
- 951 (c) make provision as to responsibility for costs incurred for the purpose of establishing that entitlement<sup>24</sup>.

This power to make regulations may not be exercised for the purpose of limiting the total revenues of relevant undertakers from charges fixed by or in accordance with charges schemes<sup>25</sup>.

In addition to these statutory provisions, the conditions of a water undertaker's appointment will make further provision with regard to charges; and detailed provision is made in all such appointments to allow the Water Services Regulation Authority to limit increases in charges<sup>26</sup>.

- 1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.
- 2 As to the meaning of 'month' see PARA 23 note 10.
- 3 See the Water Industry Act 1991 s 143(1)(a) (s 143(1) amended by the Water Industry Act 1999 s 4(1), (2)). As to the meaning of 'functions' see PARA 133 note 5.
- 4 See the Water Industry Act 1991 s 143(1)(c). As to the additional provision which may be made in such a scheme by a sewerage undertaker see s 143(1)(b), (2), (3), (3A) (s 143(3A) added by the Environment Act 1995 s 120(1), Sch 22 para 115); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1038. A water undertaker is required under the conditions of its appointment to have a charges scheme which fixes the charges to be paid for supplies of water for domestic purposes and infrastructure charges. As to conditions of appointment see PARA 142. The instruments of appointment of the undertakers and information as to charges are available on the Water Services Regulation Authority website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 5 Water Industry Act 1991 s 143(4).
- 6 Ie in a case not falling within the Water Industry Act 1991 s 142(2A): see PARA 419.
- 7 As to the meaning of 'person' see PARA 13 note 29.
- 8 Water Industry Act 1991 s 143(5)(a) (amended by the Water Industry Act 1999 s 3(2)). Nor does anything in such a scheme affect the power of a sewerage undertaker to enter into any agreement under the Water Industry Act 1991 s 129 (disposal of trade effluent: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1053) on terms that provide for the making of payments to the undertaker: s 143(5)(b).
- 9 Water Industry Act 1991 s 143(6) (s 143(6)-(9) added by the Water Industry Act 1999 s 4(1), (3); Water Industry Act 1991 s 143(6), (7), (9) amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.
- 10 Water Industry Act 1991 s 143(9) (as added and amended: see note 9).
- 11 As to the Secretary of State see PARA 15 note 1.
- 12 The functions of the Secretary of State under the Water Industry Act 1991 ss 143, 143A, so far as exercisable in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water supplier), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.
- 13 Water Industry Act 1991 s 143(7) (as added and amended: see note 9). The Water Services Regulation Authority must enter the provisions of such guidance in the register maintained by it: see s 195; and PARA 178.
- 14 Water Industry Act 1991 s 143(8) (as added: see note 9).
- 15 Water Industry Act 1991 s 143A(1) (s 143A added by the Water Industry Act 1999 s 5). As to the making of regulations see PARA 21. As to the provision made see the Water Industry (Charges) (Vulnerable Groups)

Regulations 1999, SI 1999/3441 (amended by SI 2000/519; SI 2003/552; SI 2005/59; SI 2005/2035; SI 2008/1879). The Water Industry (Charges) (Vulnerable Groups) Regulations 1999, SI 1999/3441, do not apply to any water or sewerage undertaker whose area is wholly or mainly in Wales: reg 1(2). At the date at which this volume states the law no equivalent regulations had been made in relation to Wales.

16 le without prejudice to the generality of the Water Industry Act 1991 s 143A(1): see the text to note 15.

17 In the Water Industry Act 1991 Pt V Ch I (ss 142-150B) 'consumer' means: (1) in relation to the supply of water by a water undertaker to any premises, a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of that supply of water would fall; and (2) in relation to the provision of sewerage services in respect of any premises, a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of those services would fall: s 150B (added by the Water Industry Act 1999 s 15(1), Sch 3 para 3).

18 Water Industry Act 1991 s 143A(2)(a) (as added: see note 15).

19 Water Industry Act 1991 s 143A(2)(b) (as added: see note 15).

20 Water Industry Act 1991 s 143A(2)(c) (as added: see note 15).

21 Water Industry Act 1991 s 143A(2)(d) (as added: see note 15).

22 Water Industry Act 1991 s 143A(3)(a) (as added: see note 15).

23 Water Industry Act 1991 s 143A(3)(b) (as added: see note 15).

24 Water Industry Act 1991 s 143A(3)(c) (as added: see note 15).

25 Water Industry Act 1991 s 143A(4) (as added: see note 15).

26 As to conditions of appointment see PARA 142.

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#### **422. Occupier's liability for charges.**

Subject as set out below, and except in so far as provision to the contrary is made by any agreement to which the undertaker is a party, supplies of water provided by a water undertaker<sup>1</sup> are treated<sup>2</sup> as services provided to the occupiers<sup>3</sup> for the time being of any premises supplied<sup>4</sup>. Sewerage services<sup>5</sup> provided by a sewerage undertaker<sup>6</sup> are treated as provided to the occupiers for the time being of any premises which are drained by a sewer or drain<sup>7</sup> connecting, either directly or through an intermediate sewer or drain, with such a public sewer<sup>8</sup> of the sewerage undertaker as is provided for foul water or surface water<sup>9</sup> or both<sup>10</sup>, or are premises the occupiers of which have the benefit of facilities which drain to a drain or sewer so connecting<sup>11</sup>.

Charges which are fixed<sup>12</sup> in relation to any premises by reference to volume<sup>13</sup>, may be imposed so that a person is made liable, in relation to those premises, to pay charges for services provided by a relevant undertaker<sup>14</sup> after that person has ceased to be the occupier of the premises<sup>15</sup>. A person may not, however, be made liable by virtue of this provision for any charges fixed in relation to any premises by any relevant undertaker, except where he fails to inform the undertaker of the ending of his occupation of the premises at least two working days<sup>16</sup> before he ceases to occupy them<sup>17</sup>, and the charges are in respect of a period ending no later than with the first relevant day<sup>18</sup>.

Where any person who is the occupier of any premises to which a supply of water is provided by a water undertaker has served notice<sup>19</sup> on the undertaker requesting disconnection<sup>20</sup>, and that notice is given otherwise than in connection with that person's ceasing to be the occupier of the premises in a case in which provision is made<sup>21</sup> for him to be liable for charges fixed in relation to volume as mentioned above<sup>22</sup>, then, notwithstanding that that person continues to be the occupier of those premises, he is not liable to the undertaker, otherwise than in pursuance of a demand for a supply made since the service of the notice, for any charges in respect of any supply of water to those premises after the appropriate time<sup>23</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 Ie for the purposes of the Water Industry Act 1991 Pt V Ch I (ss 142-150B): see PARAS 419-421, 423 et seq.

3 Where, in the case of any premises: (1) the person who was liable, immediately before 1 September 1989, to pay charges in respect of a supply of water to those premises was the owner of those premises rather than the occupier; (2) that person was so liable, under the Water Act 1945 Sch 3 s 54 (repealed) or any other local statutory provision, otherwise than by virtue of an agreement; and (3) the person who was in fact the occupier of the premises on that date has not ceased to be the occupier before 1 December 1991, then the person who is the owner from time to time of those premises continues, until the person mentioned in head (3) does cease to be the occupier of the premises, to be the person liable and, accordingly, is treated for these purposes as if he were the occupier of the premises: Water Industry Act 1991 s 144(8). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'owner' see PARA 22 note 9. As to the meaning of 'local statutory provision' see PARA 14 note 24. As to the meaning of 'occupier' see PARA 339 note 8.

4 Water Industry Act 1991 s 144(1)(a).

5 As to the meaning of 'sewerage services' see PARA 129 note 7.

6 As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

7 As to the meanings of 'sewer' and 'drain' see PARA 138 note 11.

8 As to the meaning of 'public sewer' see PARA 138 note 11.

9 'Surface water' includes water from roofs: Water Industry Act 1991 s 219(1).

10 Water Industry Act 1991 s 144(1)(b)(i).

11 Water Industry Act 1991 s 144(1)(b)(ii).

12 Ie under the Water Industry Act 1991 ss 142, 143: see PARAS 419, 421.

13 As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

14 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

15 Water Industry Act 1991 s 144(2).

16 In the Water Industry Act 1991 s 144, any reference to two working days is a reference to a period of 48 hours calculated after disregarding any time falling on a Saturday or Sunday, or a Christmas Day, Good Friday or any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321): Water Industry Act 1991 s 144(7).

17 Water Industry Act 1991 s 144(3)(a).

18 Water Industry Act 1991 s 144(3)(b). 'First relevant day', in relation to a case in which a person has ceased to be the occupier of any premises in relation to which charges are fixed by a relevant undertaker, means whichever of the following first occurs after he ceases to occupy the premises, ie: (1) where that person informs the undertaker of the ending of his occupation of the premises less than two working days before, or at any time after, he ceases to occupy them, the twenty-eighth day after he so informs the undertaker (s 144(4)(a)); (2) any day on which any meter would normally have been read in order for the amount of the charges to be determined (s 144(4)(b)); (3) any day on which any other person informs the undertaker that he has become the new occupier of the premises (s 144(4)(c)). As to the meaning of 'meter' see PARA 337 note 11.

19 Ie notice for the purposes of the Water Industry Act 1991 s 62: see PARA 359. As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

20 Water Industry Act 1991 s 144(5)(a).

21 Ie by virtue of the Water Industry Act 1991 s 144(2): see the text to notes 12-15.

22 Water Industry Act 1991 s 144(5)(b).

23 Water Industry Act 1991 s 144(5). 'Appropriate time', in relation to a case in which a notice has been served for the purposes of s 62 (see PARA 359), means whichever is the later of the expiry of the notice (s 144(6)(a)), and the end of two working days beginning with the service of the notice (s 144(6)(b)).

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#### **423. Maximum charges for services provided by others with the help of undertakers' services.**

The Water Services Regulation Authority<sup>1</sup> may from time to time by order<sup>2</sup> fix maximum charges which a person who is not a relevant undertaker<sup>3</sup> may recover from another such person in respect of water supplies or sewerage services<sup>4</sup> provided to that other person with the help of services provided by a relevant undertaker<sup>5</sup>. However, this provision does not apply to water supplies provided<sup>6</sup> by a licensed water supplier<sup>7</sup> to premises of customers<sup>8</sup>.

Such an order may require the person providing the supplies or services to furnish the person who is provided with them with such information<sup>9</sup> as may be specified or described in the order<sup>10</sup>; and an order containing such a requirement may also provide that, in the event of the failure of the person providing the supplies or services to furnish that information, the maximum charges he is entitled to recover from the person provided with them in respect of those supplies or services is to be such as may be fixed by the order<sup>11</sup>.

It is the duty of the Water Services Regulation Authority to publish any order under these provisions in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the order<sup>12</sup>.

Where a person pays a charge in respect of anything to which such an order relates and the amount paid exceeds the maximum charge fixed by the order, the amount of the excess<sup>13</sup> and, if the order so provides, interest on that amount at a rate specified or described in the order<sup>14</sup>, is recoverable by that person from the person to whom he paid the charge<sup>15</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 Such an order may make different provision for different cases, including different provision in relation to different persons, circumstances or localities, and may fix a maximum charge either by specifying the maximum amount of the charge or by specifying a method of calculating that amount: Water Industry Act 1991 s 150(4). Such orders, not being required to be made by statutory instrument, are not recorded in this work. As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

4 As to the meaning of 'sewerage services' see PARA 129 note 7.

5 Water Industry Act 1991 s 150(1) (amended by the Water Act 2003 s 36(2)). For these purposes, water supplies or sewerage services are provided to a person with the help of services provided by a relevant undertaker if: (1) a facility for that person to have access to a supply of water provided by a relevant undertaker in pipes, or to make use of sewerage services provided by a sewerage undertaker, is made available to that person otherwise than by the undertaker (Water Industry Act 1991 s 150(2)(a)); (2) that person is provided with a supply of water in pipes by a person to whom the water is supplied, directly or indirectly, by a water undertaker (s 150(2)(b)); or (3) that person is provided with sewerage services by a person who, for the purpose of providing those services, makes use of sewerage services provided, directly or indirectly, by a sewerage undertaker (s 150(2)(c)). In practice, orders under this provision would be designed to prevent owners of eg rented property or caravan sites who pay water charges direct to the relevant undertaker overcharging the occupants of those premises for water supplies. As to the meaning of 'pipe' see PARA 138 note 11. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the Water Services Regulation Authority's general control over price increases by a relevant undertaker see PARA 421.

6 In accordance with the Water Industry Act 1991 Pt II Ch 1A (ss 17A-17R): see PARA 152 et seq.

- 7 As to the meaning of 'licensed water supplier' see PARA 152.
- 8 Water Industry Act 1991 s 150(1A) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 34). As to the meaning of 'customer' see PARA 118 note 7.
- 9 As to the meaning of 'information' see PARA 117 note 13.
- 10 Water Industry Act 1991 s 150(2A) (s 150(2A), (2B) added by the Water Act 2003 s 59(1), (2)).
- 11 Water Industry Act 1991 s 150(2B) (as added: see note 10).
- 12 Water Industry Act 1991 s 150(3) (amended by the Water Act 2003 s 36(2)). Such orders are accessible on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).
- 13 Water Industry Act 1991 s 150(5)(a) (s 150(5) amended by the Water Act 2003 s 59(1), (3)).
- 14 Water Industry Act 1991 s 150(5)(b) (as amended: see note 13).
- 15 Water Industry Act 1991 s 150(5) (as amended: see note 13).

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### ***C. METERING***

#### **(A) IN GENERAL**

#### **424. Metering trials.**

Provision was made in the Public Utility Transfers and Water Charges Act 1988<sup>1</sup> for metering trials. That provision was later repealed<sup>2</sup>, but transitional provisions in relation to metering trials are still in force<sup>3</sup> whereby those 1988 provisions continue to apply, with the necessary modifications, to so much of any charges scheme made by a water undertaker<sup>4</sup> as amends or revokes any metering trial scheme which was made before 1 September 1989 and which was either in force immediately before that date or due to come into force after that date and which continues in force as a charges scheme<sup>5</sup> by virtue of those transitional provisions<sup>6</sup>.

1 See the Public Utility Transfers and Water Charges Act 1988 s 4 (repealed with savings: see notes 2-3).

2 See the Water Act 1989 s 190(3), Sch 27. Transitional provisions were contained in s 190(2), Sch 26 para 16(5) (repealed).

3 See the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 11(1); and the text to notes 4-6.

4 Ie under the Water Industry Act 1991 s 143: see PARA 421. As to the meaning of 'water undertaker' see PARA 137 note 4.

5 Ie under the Water Industry Act 1991 s 143: see PARA 421.

6 Water Consolidation (Consequential Provisions) Act 1991 Sch 2 para 11(1).



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#### **425. Power to make regulations as to charging by volume.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may by regulations<sup>3</sup> make such provision supplementing the statutory provisions relating to charges<sup>4</sup> and, so far as they relate to works for purposes connected with the fixing of charges in relation to any premises by reference to volume<sup>5</sup>, the statutory provisions as to works powers<sup>6</sup>, as the Secretary of State or the Welsh Ministers consider appropriate with respect to the installation of meters<sup>7</sup>, the connection, disconnection, use, maintenance, authentication and testing of meters and with respect to any related matters<sup>8</sup>. Such regulations may<sup>9</sup>:

- 952 (1) regulate the positioning, whether inside or outside the building or other premises to which the meter relates, of any meter or of any pipes<sup>10</sup> or apparatus appearing to any relevant undertaker<sup>11</sup> to be required for the purpose of facilitating the use of any meter<sup>12</sup>;
- 953 (2) require a relevant undertaker who, for the purposes of meeting the needs of a disabled person, alters the position of any meter, installs an additional meter or does any other work in connection with any meter, to bear any expenses incurred by the undertaker in doing so<sup>13</sup>;
- 954 (3) make any other provision which appears to the Secretary of State or, as the case may be, the Welsh Ministers to be appropriate with respect to any such pipes or apparatus<sup>14</sup>;
- 955 (4) provide for a reading from a meter to be proved in the prescribed<sup>15</sup> manner and for a reading from a meter to be such evidence as may be prescribed of the volume of water supplied to, or of effluent<sup>16</sup> discharged from, any premises<sup>17</sup>;
- 956 (5) fix the method of determining the amount of the charges to be paid where it appears that a meter has, or may have, given an incorrect reading<sup>18</sup>;
- 957 (6) require a person<sup>19</sup> who is not a relevant undertaker to pay the expenses incurred by such an undertaker in doing anything under the regulations or to pay contributions towards those expenses<sup>20</sup>;
- 958 (7) provide for the payment of compensation in respect of anything done by a relevant undertaker under the regulations<sup>21</sup>;
- 959 (8) require disputes arising under the regulations to be referred to arbitration<sup>22</sup>;
- 960 (9) repeal or amend any local statutory provision<sup>23</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 149, so far as exercisable in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water suppliers), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(x)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the making of regulations see PARA 21. The Water (Meters) Regulations 1988, SI 1988/1048 (which have effect as if made under the Water Industry Act 1991 s 149 by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2)), have been made: see PARAS 435, 437-439, 441.

- 4    le the Water Industry Act 1991 Pt V Ch I (ss 142-150B): see PARAS 419-423, 426 et seq.
- 5    As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.
- 6    le the Water Industry Act 1991 Pt VI (ss 155-192): see PARAS 453 et seq, 433 et seq.
- 7    As to the meaning of 'meter' see PARA 337 note 11.
- 8    Water Industry Act 1991 s 149(1).
- 9    le without prejudice to the generality of the Water Industry Act 1991 s 149(1) (see the text to notes 1-8): s 149(2).
- 10   As to the meaning of 'pipe' see PARA 138 note 11.
- 11   As to the meaning of 'relevant undertaker' see PARA 137 note 8.
- 12   Water Industry Act 1991 s 149(2)(a) (amended by the Water Industry Act 1999 s 15(1), Sch 3 para 2).
- 13   Water Industry Act 1991 s 149(2)(aa) (added by the Competition and Service (Utilities) Act 1992 s 53(4)). As to the discrimination in the provision of goods, facilities and services to disabled persons see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 582 et seq.
- 14   Water Industry Act 1991 s 149(2)(b).
- 15   'Prescribed' means prescribed by the regulations: see the Water Industry Act 1991 s 219(1).
- 16   As to the meaning of 'effluent' see PARA 262 note 31.
- 17   Water Industry Act 1991 s 149(2)(c). In practice, sewerage from domestic properties is rarely, if ever, measured. When water supply charges are fixed by reference to volume, sewerage undertakers usually calculate charges for sewerage services to domestic premises by reference to the volume of water supplied to the premises.
- 18   Water Industry Act 1991 s 149(2)(d).
- 19   As to the meaning of 'person' see PARA 13 note 29.
- 20   Water Industry Act 1991 s 149(2)(e).
- 21   Water Industry Act 1991 s 149(2)(f).
- 22   Water Industry Act 1991 s 149(2)(g).
- 23   Water Industry Act 1991 s 149(2)(h). As to the meaning of 'local statutory provision' see PARA 14 note 24.

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#### **426. Compulsory and optional metering.**

In certain circumstances, a water undertaker<sup>1</sup> may require the water supply to be supplied and charged on a measured basis<sup>2</sup>; or the customer may himself choose to have a measured water supply<sup>3</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 See eg PARA 337 (conditions which may be imposed on new connection to a water main); and PARA 433 (power to carry out works in connection with metering). As to the statutory restrictions on the power to make such a requirement see PARA 428.

3 See PARA 427. As to charges schemes generally see PARA 421; and as to charges schemes providing for metering trials etc see PARA 424.

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#### **427. Right of consumer to elect for charging by reference to volume.**

Where water is supplied by a water undertaker<sup>1</sup> to premises in which, or in any part of which, a person has his home<sup>2</sup>, and charges in respect of those premises are fixed by virtue of any charges scheme<sup>3</sup> without reference to the volume of water supplied<sup>4</sup>, the consumer<sup>5</sup> may at any time give the undertaker a notice (a 'measured charges notice')<sup>6</sup> requiring the undertaker to fix charges in respect of the supply by reference to the volume of water supplied<sup>7</sup>. A water undertaker must give effect to a measured charges notice before the end of a period determined in accordance with the undertaker's charges scheme<sup>8</sup>; but it is not obliged to give effect to a measured charges notice if: (1) it is not reasonably practicable to fix charges in respect of the premises by reference to the volume of water supplied<sup>9</sup>; or (2) to do so would involve the incurring by the undertaker of unreasonable expense<sup>10</sup>. Any dispute between a water undertaker and a consumer as to the application of head (1) or head (2) above may be referred to the Water Services Regulation Authority<sup>11</sup> for determination<sup>12</sup> by either party to the dispute<sup>13</sup>.

Where either the conditions specified in heads (a) and (b) below, or the conditions specified in heads (i) to (iii) below are satisfied in relation to premises in respect of which a measured charges notice has been given<sup>14</sup>, and such other conditions as may be prescribed<sup>15</sup> are also satisfied in relation to the premises<sup>16</sup>, the consumer may, at any time before the end of the period of 12 months<sup>17</sup> beginning with the day on which the supply began to be measured by volume for charging purposes, revoke the measured charges notice by notice to the water undertaker<sup>18</sup>. The first such specified conditions are:

- 961 (a) that the person who gave the measured charges notice had not given any previous measured charges notice in relation to the premises<sup>19</sup>; and
- 962 (b) that he remains the consumer in respect of the premises<sup>20</sup>.

The second such specified conditions are:

- 963 (i) that the person who gave the measured charges notice has, since the notice was given, ceased to be the consumer in respect of the premises<sup>21</sup>;
- 964 (ii) that neither he nor the person who has become the consumer had given any previous measured charges notice in respect of the premises<sup>22</sup>; and
- 965 (iii) that any person who was in occupation of the premises when the measured charges notice was given remains in occupation<sup>23</sup>.

Where a measured charges notice has been so revoked, the water undertaker must, if reasonably practicable, before the end of the period of 12 months referred to above<sup>24</sup>, or in any other case, as soon as reasonably practicable after the end of that period<sup>25</sup>, revert to fixing the charges for the supply in respect of the premises without reference to the volume of water supplied<sup>26</sup>.

If and so long as a water undertaker is obliged under the above provisions to fix charges for the supply of water in respect of any premises by reference to the volume of water supplied, a sewerage undertaker is under a corresponding obligation to fix charges in respect of foul water drainage provided by the sewerage undertaker in respect of those premises by reference to

that volume<sup>27</sup>; and if a water undertaker is obliged under the above provisions to fix charges without reference to volume, a sewerage undertaker is under a corresponding obligation in respect of charges for services provided by it<sup>28</sup>.

Any charges scheme<sup>29</sup> has effect subject to these provisions<sup>30</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 Water Industry Act 1991 s 144A(1)(a) (s 144A added by the Water Industry Act 1999 s 6).

3 In any charges scheme under the Water Industry Act 1991 s 143: see PARA 421.

4 Water Industry Act 1991 s 144A(1)(b) (as added: see note 2).

5 As to the meaning of 'consumer' see PARA 421 note 17.

6 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

7 Water Industry Act 1991 s 144A(1) (as added: see note 2). As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

8 Water Industry Act 1991 s 144A(2) (as added: see note 2). Any charges scheme under s 143 (see PARA 421) must contain provision for determining the period mentioned in s 144A(2): s 144A(11)(a) (as so added).

9 Water Industry Act 1991 s 144A(3)(a) (as added: see note 2).

10 Water Industry Act 1991 s 144A(3)(b) (as added: see note 2).

11 As to the Water Services Regulation Authority see PARA 109.

12 In under the Water Industry Act 1991 s 30A: see PARA 131.

13 Water Industry Act 1991 s 144A(4) (as added (see note 2); and amended by the Water Act 2003 s 36(2)).

14 Water Industry Act 1991 s 144A(5)(a) (as added: see note 2).

15 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see Water Industry Act 1991 s 219(1). As to the making of regulations see PARA 21. The functions of the Secretary of State under the Water Industry Act 1991 s 144A, so far as exercisable in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water suppliers), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(x)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

16 Water Industry Act 1991 s 144A(5)(b) (as added: see note 2). The prescribed conditions for these purposes, and for the purposes of s 144B(1)(c) (see PARA 428) are that: (1) in the case of premises which are not used solely as a person's home, that other use is not the principal use of the premises; (2) the water supplied to the premises is not used (a) for watering a garden, other than by hand, by means of any apparatus; (b) for automatically replenishing a pond, or a swimming pool, with a capacity greater than 10,000 litres; (c) in a bath with a capacity (measured to the centre line of overflow) greater than 230 litres; (d) in a shower unit of a type specified under the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 5, Table para 4(c) (see PARA 367); or (e) in a unit which incorporates reverse osmosis; (3) the premises are not in an area which has been determined by the Secretary of State to be an area of water scarcity for these purposes; and (4) the premises are not (a) in an area which has been determined by the Secretary of State to be an area of serious water stress for these purposes; and (b) subject to a programme for the fixing of charges by reference to volume, as specified in the water resources management plan of the relevant water undertaker published under the Water Industry Act 1991 s 37B(8)(a) (see PARA 322): Water Industry (Prescribed Conditions) Regulations 1999, SI 1999/3442, reg 2 (amended by SI 2007/2457).

The Secretary of State may, on the application of a water undertaker, determine an area to be an area of water scarcity for these purposes if he considers it appropriate to do so having regard to (i) the likely demand for water in that area over the period of ten years following the application; (ii) the water resources which are, or

could be made, available for meeting that demand; and (iii) the measures that the undertaker could take for meeting or managing that demand; and such a determination has effect for such period as may be specified by the Secretary of State and may be revoked by him: Water Industry (Prescribed Conditions) Regulations 1999, SI 1999/3442, reg 3(1), (2). Before making or revoking such a determination, the Secretary of State must consult the Water Services Regulation Authority, the Environment Agency and bodies appearing to him to be representative of the customers of water and sewerage services in the relevant area: reg 3(3) (amended by SI 2005/2035). The Secretary of State may, after consulting the Environment Agency, determine the whole or any part of a water undertaker's area to be an area of serious water stress for these purposes, where the Secretary of State considers that: (A) the current household demand for water in that area is a high proportion of the current effective rainfall which is available to meet that demand; or (B) the future household demand for water in that area is likely to be a high proportion of the effective rainfall which is likely to be available to meet that demand: Water Industry (Prescribed Conditions) Regulations 1999, SI 1999/3442, reg 4(1) (reg 4 added by SI 2007/2457). The Secretary of State may revoke or modify any such determination at any time; but any revocation or modification must not have the effect that the condition in head (4) above is satisfied in relation to premises that previously fell outside the scope of that condition: Water Industry (Prescribed Conditions) Regulations 1999, SI 1999/3442, reg 4(2), (3) (as so added). As to the Environment Agency see PARA 17. As to the meaning of 'customer' see PARA 118 note 7. As to the meaning of 'sewerage services' see PARA 129 note 7. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. As to water undertakers' areas see PARA 318.

The Water Industry (Prescribed Conditions) Regulations 1999, SI 1999/3442, do not apply to any water or sewerage undertaker whose area is wholly or mainly in Wales: reg 1(2). As to the equivalent provisions in relation to Wales see the Water Industry (Prescribed Conditions) (Undertakers Wholly or Mainly in Wales) Regulations 2004, SI 2004/701, which apply to any water or sewerage undertaker whose area is wholly or mainly in Wales (see reg 1(2)).

- 17 As to the meaning of 'month' see PARA 23 note 10.
- 18 Water Industry Act 1991 s 144A(5) (as added: see note 2).
- 19 Water Industry Act 1991 s 144A(6)(a) (as added: see note 2).
- 20 Water Industry Act 1991 s 144A(6)(b) (as added: see note 2).
- 21 Water Industry Act 1991 s 144A(7)(a) (as added: see note 2).
- 22 Water Industry Act 1991 s 144A(7)(b) (as added: see note 2).
- 23 Water Industry Act 1991 s 144A(7)(c) (as added: see note 2).
- 24 Water Industry Act 1991 s 144A(8)(a) (as added: see note 2).
- 25 Water Industry Act 1991 s 144A(8)(b) (as added: see note 2).
- 26 Water Industry Act 1991 s 144A(8) (as added: see note 2).
- 27 Water Industry Act 1991 s 144A(9) (as added: see note 2).
- 28 Water Industry Act 1991 s 144A(10) (as added: see note 2).
- 29 Ie any charges scheme under the Water Industry Act 1991 s 143: see PARA 421.
- 30 Water Industry Act 1991 s 144A(11)(b) (as added: see note 2).

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**428. Restriction on undertakers' power to require fixing of charges by reference to volume.**

Where:

- 966 (1) water is supplied to any premises in which, or in any part of which, a person has his home<sup>1</sup>;
- 967 (2) charges in respect of those premises have previously been fixed without reference to volume<sup>2</sup>; and
- 968 (3) such conditions as may be prescribed<sup>3</sup> are satisfied in relation to the premises<sup>4</sup>,

a relevant undertaker<sup>5</sup> may not by virtue of any charges scheme<sup>6</sup> begin to fix the charges in respect of those premises by reference to volume<sup>7</sup> unless either:

- 969 (a) the consumer<sup>8</sup> has given the undertaker a measured charges notice<sup>9</sup> which has not<sup>10</sup> been revoked<sup>11</sup>, or has consented to the charges in respect of the premises being so fixed and has not revoked<sup>12</sup> that consent<sup>13</sup>; or
- 970 (b) there has been a change in the occupation of the premises and no charges have yet been demanded from the person who has become the consumer<sup>14</sup>.

A change in the persons occupying any premises does not, however, constitute a change in the occupation of the premises for the purposes of head (b) above if any person who was in occupation of the premises before the change remains in occupation after the change<sup>15</sup>.

1 Water Industry Act 1991 s 144B(1)(a) (s 144B added by the Water Industry Act 1999 s 7).

2 Water Industry Act 1991 s 144B(1)(b) (as added: see note 1).

3 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Industry Act 1991 s 219(1). As to the making of regulations see PARA 21. As to the prescribed conditions see PARA 427 note 16. The functions of the Secretary of State under the Water Industry Act 1991 s 144B, so far as exercisable in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water suppliers), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003 s 100(2)(b)(x)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 Water Industry Act 1991 s 144B(1)(c) (as added: see note 1).

5 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

6 Ie any charges scheme under the Water Industry Act 1991 s 143: see PARA 421.

7 As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

8 As to the meaning of 'consumer' see PARA 421 note 17.

9 le under the Water Industry Act 1991 s 144A: see PARA 427.

10 le under the Water Industry Act 1991 s 144A: see PARA 427.

11 Water Industry Act 1991 s 144B(2)(a)(i) (as added: see note 1).

12 le under the Water Industry Act 1991 s 144A: see PARA 427.

13 Water Industry Act 1991 s 144B(2)(a)(ii) (as added: see note 1). Where a consumer gives consent for these purposes in relation to premises in which, or in any part of which, a person has his home, he is to be treated for the purposes of s 144A(5)-(8) (see PARA 427) as having given a measured charges notice under s 144A: s 144B(4) (as so added).

14 Water Industry Act 1991 s 144B(2)(b) (as added: see note 1).

15 Water Industry Act 1991 s 144B(3) (as added: see note 1).



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#### **429. Rights of tenants in relation to metering.**

Except where the tenancy is a fixed term tenancy<sup>1</sup> for a term of less than six months<sup>2</sup>, no express or implied term of any tenancy<sup>3</sup> is to be regarded:

- 971 (1) as excluding or restricting the exercise by the tenant of any right to give a measured charges notice<sup>4</sup> or any consent<sup>5</sup> which will be treated as the giving of such a notice<sup>6</sup>;
- 972 (2) as preventing the installation or connection, in pursuance of such a notice or consent given by the tenant, of a meter<sup>7</sup> for use in determining the charges which may be fixed in relation to water supplied to the premises comprised in the tenancy<sup>8</sup>; or
- 973 (3) as requiring any consent to be obtained in relation to such installation or connection<sup>9</sup>.

<sup>1</sup> 'Fixed term tenancy' means any tenancy other than a periodic tenancy: Water Industry Act 1991 s 209A(3) (s 209A added by the Water Industry Act 1999 s 11).

<sup>2</sup> See the Water Industry Act 1991 s 209A(1), (3) (as added: see note 1). As to the meaning of 'month' see PARA 23 note 10.

<sup>3</sup> For these purposes, 'tenancy' includes a licence which is treated as a tenancy by virtue of the Housing Act 1985 s 79(3); and references to a 'tenant' are to be construed accordingly: Water Industry Act 1991 s 209A(2) (as added: see note 1).

<sup>4</sup> Ie under the Water Industry Act 1991 s 144A: see PARA 427.

<sup>5</sup> Ie a consent for the purposes of the Water Industry Act 1991 s 144B(2)(a)(ii): see PARA 428.

<sup>6</sup> Water Industry Act 1991 s 209A(1)(a) (as added: see note 1).

<sup>7</sup> As to the meaning of 'meter' see PARA 337 note 11.

<sup>8</sup> Water Industry Act 1991 s 209A(1)(b) (as added: see note 1).

<sup>9</sup> Water Industry Act 1991 s 209A(1)(c) (as added: see note 1).

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**430. Code of practice and procedure on leakage.**

All water undertakers<sup>1</sup> are required by the conditions of their appointment to have a code of practice and procedure on leakage concerning liability for charges of domestic customers occupying metered premises where there is an unidentified leak on the supply pipe<sup>2</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to conditions of appointment see PARA 142. The instruments of appointment of the water undertakers and information relating to leakage are available on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

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## (B) TYPES OF METER

### **431. European Community requirements.**

The European Directive on measuring instruments<sup>1</sup> applies to devices and systems with a measuring function including water meters<sup>2</sup>. Member states may prescribe the use of measuring instruments (including water meters) for measuring tasks for reasons of public interest, public health, public safety, public order, protection of the environment, protection of consumers, levying of taxes and duties and fair trading, where they consider it justified<sup>3</sup>. The Directive establishes the requirements that such devices and systems have to satisfy with a view to their being placed on the market<sup>4</sup> and/or put into use<sup>5</sup> for those tasks<sup>6</sup>.

A water meter must meet the requirements laid down in the Directive<sup>7</sup>. Those requirements apply to water meters intended for the measurement of volumes of clean, cold or heated water in residential, commercial and light industrial use<sup>8</sup>. The conformity of a meter with the requirements of the Directive must be indicated by an approved marking<sup>9</sup>, and member states must take all appropriate measures to ensure that meters are placed on the market and/or put into use only if they satisfy the requirements of the Directive<sup>10</sup>.

1    The European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) on measuring instruments.

2    See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 1. A 'water meter' is an instrument designed to measure, memorise and display the volume at metering conditions of water passing through the measurement transducer: Annex M1-001.

3    See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 2(1). Where member states do not prescribe such use, they must communicate the reasons therefor to the Commission and the other member states: art 2(2). The Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, have been made for the purpose of implementing the Directive: see PARA 432.

4    'Placing on the market' means making available for the first time in the Community an instrument intended for an end user, whether for reward or free of charge: European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 4.

5    'Putting into use' means the first use of an instrument intended for the end user for the purposes for which it was intended: European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 4.

6    See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 3.

7    See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 6(1). The requirements are those laid down in Annex 1 (essential requirements), and Annex M1-001 (water meters).

8    See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) Annex M1-001.

9    See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) arts 7, 17.

10   See European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) art 8(2). By way of derogation from art 8(2), member states must permit, for measurement tasks for which they have prescribed the use of a legally controlled measuring instrument, the placing on the market and putting into use of measuring instruments that satisfy the rules applicable before 30 October 2006 until the expiry of the validity of the type approval of those measuring instruments or, in the case of a type approval of indefinite validity, for a period of a maximum of ten years from 30 October 2006: art 23. The rules applicable before 30 October 2006 were those under EC Council Directive 75/33 (OJ L14, 20.01.75, p 01) for the purpose of implementing which the

Measuring Equipment (Cold-water Meters) Regulations 1988, SI 1988/997, were made: see PARA 432 note 4. EC Council Directive 75/33 (OJ L14, 20.01.75, p 01) was repealed as from 30 October 2006 as concerns the meters defined in European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01) Annex MI-001: see art 22.

## **UPDATE**

### **431 European Community requirements**

NOTES 2, 7, 8--Directive 2004/22 Annex M1-001 amended: EC Commission Directive 2009/137 (OJ L294, 11.11.2009, p 7).

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#### **432. Compliance with United Kingdom requirements.**

No person<sup>1</sup> must place on the market<sup>2</sup> or put into use<sup>3</sup> a cold-water meter<sup>4</sup> unless the following requirements, or the corresponding requirements of the European Directive on measuring instruments<sup>5</sup> as implemented under the law of another member state, are met:

- 974 (1) the instrument<sup>6</sup> is compliant with the essential requirements<sup>7</sup>;
- 975 (2) the manufacturer has demonstrated its compliance with the essential requirements<sup>8</sup>; and
- 976 (3) the instrument has affixed to it the CE marking, the M marking<sup>9</sup> and the identification number of the notified body<sup>10</sup> which carried out the conformity assessment procedure<sup>11</sup> in respect of the instrument<sup>12</sup>.

A person who fails to comply with these requirements is guilty of an offence<sup>13</sup> and any cold-water meter to which the offence relates is liable to be forfeited<sup>14</sup>.

No person must use for trade a cold-water meter unless it is compliant with the essential requirements other than the provisions relating to maximum permissible errors<sup>15</sup>, it operates within the maximum permissible errors<sup>16</sup>, and the requirements as to manner of use<sup>17</sup> are complied with<sup>18</sup>.

It is the duty of every local weights and measures authority<sup>19</sup> to enforce these provisions within its area<sup>20</sup>. The Secretary of State may enforce the provisions relating to placing on the market and the putting into use of cold-water meters<sup>21</sup> and for that purpose may appoint any person to act on his behalf<sup>22</sup>. No proceedings for an offence may be instituted in England and Wales<sup>23</sup> except by or on behalf of an enforcement authority<sup>24</sup>. Where an enforcement authority establishes that, in the case of a cold-water meter that has been placed on the market or put into use, the CE marking or the M marking has, or both have, been affixed unduly, it may serve a compliance notice<sup>25</sup>; and provision is made for immediate enforcement action in certain circumstances<sup>26</sup>. Inspectors of weights and measures<sup>27</sup> are given powers to test cold-water meters<sup>28</sup> and to disqualify non-compliant meters for use for trade<sup>29</sup>. An enforcement officer<sup>30</sup> may inspect and test any cold-water meter in such manner as he considers appropriate, inspect and take copies of any document relating to a cold-water meter, and enter any premises at which he has reasonable cause to believe there to be a cold-water meter, not being premises used only as a private dwelling house<sup>31</sup>. An enforcement officer may also seize and detain a cold-water meter which he has reasonable cause to believe is liable to be forfeited under these provisions, and any document or goods which he has reason to believe may be required as evidence in proceedings for an offence thereunder<sup>32</sup>. It is an offence to obstruct an enforcement officer in the execution of any of his functions, or to fail to give that officer any assistance or information which he reasonably requires<sup>33</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 'Place on the market' means making available for the first time in a member state an instrument intended for an end user, whether for reward or free of charge: Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 2(1). A reference to a member state includes Norway, Iceland and Liechtenstein: reg 2(3). As to the meaning of 'member state' see the Interpretation Act 1978 s 5, Sch 1; European Communities Act 1972 s 1(2), Sch 1 Pt II.

3 'Put into use' means the first use of an instrument intended for the end user for the purposes for which it was intended: Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 2(1).

4 'Cold-water meter' means equipment designed to measure, memorise and display the volume at metering conditions of cold water passing through the measurement transducer; and 'cold water' means potable water in the temperature range from 0.1°C to and including 30°C: Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 2(1). Subject to reg 3(2), (3) and (4) below, the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, apply to a cold-water meter which is for use for trade for the supply of cold water to domestic premises and first placed on the market or put into use on or after 30 October 2006: reg 3(1). The regulations do not apply to a cold-water meter:

- 49 (1) in respect of which a certificate of approval has been granted before 30 October 2006 and is in force, and which is first passed as fit for use for trade and stamped under the Measuring Equipment (Cold-water Meters) Regulations 1988, SI 1988/997 (Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268 reg 3(2));
- 50 (2) in respect of a pattern of which EEC pattern approval was granted before 30 October 2006 and is in force, and which bears a mark of EEC initial verification or of EEC partial verification (reg 3(3));
- 51 (3) which is not compliant with the essential requirements and which is displayed or presented at a trade fair, exhibition or demonstration, if a sign displayed visibly on or near the instrument clearly indicates that the instrument (a) is not compliant with those requirements; and (b) cannot be acquired or used until it is made compliant with those requirements by the manufacturer (reg 3(4)).

For the purposes of head (1) above, 'domestic premises' means premises which are used for the purposes of living accommodation notwithstanding that such premises are used for other purposes as well as living accommodation: reg 3(5). For the purposes of head (3) above: (i) a grant of EEC pattern approval or the affixing of a mark of EEC initial verification must be in accordance with the Measuring Instruments (EEC Requirements) Regulations 1988, SI 1988/186 (the '1988 regulations') or, in the case of any other member state, in accordance with the measures in force which implement EC Council Directive 75/33 (OJ L14, 20.01.1975, p 01); and (ii) the affixing of a mark of EEC partial verification must be in accordance with the 1988 regulations or, in the case of any other member state, in accordance with the measures in force which implement EC Council Directive 71/316 (OJ L202, 6.9.1971, p 1) as amended by EC Council Directive 72/427 (OJ L291, 28.12.1972, p 156), EC Council Directive 83/575 (OJ L332, 28.11.1983, p 43), EC Council Directive 87/354 (OJ L192, 11.7.1987, p 43), EC Council Directive 87/355 (OJ L192, 11.7.1987, p 46) and EC Council Directive 88/665 (OJ L382, 31.12.1988, p 42): Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 3(6). 'Essential requirements' means the requirements set out in the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268 Sch 1: reg 2(1). 'Manufacturer' means a person responsible for the conformity of a cold-water meter with the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, with a view to either placing it on the market under his own name or putting it into use for his own purposes, or both: reg 2(1).

The Measuring Equipment (Cold-water Meters) Regulations 1988, SI 1988/997, and the Measuring Instruments (EEC Requirements) Regulations 1988, SI 1988/186, were made for the purpose of implementing the provisions of EC Council Directive 75/33 (OJ L14, 20.01.1975, p 01) on the approximation of the laws of the member states relating to cold-water meters. This Directive was repealed as concerns meters defined in European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01): see art 22; and PARA 431. However the regulations remain relevant in relation to meters approved prior to 30 October 2006.

5 le European Parliament and Council Directive 2004/22 (OJ L135, 30.04.2004, p 01): see PARA 431.

6 'Instrument' has the same meaning as cold-water meter (see note 4): Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 2(1).

7 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 4(1)(a).

8 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 4(1)(b). As to compliance with the essential requirements see reg 5.

9 As to the 'CE marking' and the 'M marking' see the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, regs 12, 13.

10 'Notified body' means the: (1) Secretary of State; or (2) a United Kingdom notified body; and (3) for the purposes of the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, regs 4(1)(c), 19(1)(b), 21(1)(c) and 24(6), a person designated by another member state, who has been notified to the European Commission and the other member states pursuant to the European Parliament and Council Directive 2004/22

(OJ L135, 30.04.2004, p 01) art 11.1: Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 2(1). As to the Secretary of State see PARA 15 note 1. 'United Kingdom notified body' means a person designated as such: see reg 2(1). As to the designation of such bodies see regs 7-10.

11 As to the 'conformity assessment procedure' see the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 6. As to fees in relation to such assessments see reg 11.

12 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 4(1)(c).

13 A person guilty of an offence under the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268 Pt II (regs 4-13) or Pt IV (regs 17-29) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: reg 27. As to the standard scale see PARA 141 note 18. Subject to certain exceptions, in proceedings against a person for an offence under the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence: see reg 28. Where the commission by a person of an offence under the regulations is due to the act or default of another person in the course of any business of his, that other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first person: reg 29(1). Where a body corporate commits an offence and it is proved that the offence was committed with the consent or connivance of an officer of the body corporate, or as a result of the negligence of an officer of the body corporate, the officer, as well as the body corporate, is guilty of the offence: reg 29(2). A reference to an officer of a body corporate includes a reference to (1) a director, manager, secretary or other similar officer of the body corporate; (2) a person purporting to act as a director, manager, secretary or other similar officer; and (3) if the affairs of the body corporate are managed by its members, a member: reg 29(3). References to a 'body corporate' include references to a partnership in Scotland, and in relation to such partnership, any reference to a director, manager, secretary or other similar officer of a body corporate is a reference to a partner: reg 29(4).

14 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 4(2).

15 Ie the provisions referred to in the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, Sch 1 para 15.

16 As to the maximum permissible errors see the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 15.

17 As to the requirements as to manner of use see the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 16.

18 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 14.

19 As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20.

20 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 17(1).

21 Ie the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, Pt II (regs 4-13): see the text to notes 1-14.

22 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 17(2).

23 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

24 Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 17(3). 'Enforcement authority' means any person who is, pursuant to reg 17, authorised to enforce the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268: reg 2(1). Nothing in the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, authorises an enforcement authority to bring proceedings in Scotland for an offence: reg 17(4).

25 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, regs 18, 20.

26 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, regs 19, 20. The unauthorised application of authorised marks is an offence: see reg 24.

27 As to inspectors of weights and measures see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 23.

28 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 23.

29 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, regs 21, 22.

30 'Enforcement officer' means an inspector of weights and measures, or a person appointed by the Secretary of State to act on his behalf to enforce the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, Pt II (regs 4-13) (see the text to note 22): reg 2(1).

31 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 25(1).

32 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 25(2).

33 See the Measuring Instruments (Cold-water Meters) Regulations 2006, SI 2006/1268, reg 26.

## **UPDATE**

### **432 Compliance with United Kingdom requirements**

NOTE 4--Head (ii). Directive 71/316 replaced: European Parliament and EC Council Directive 2009/34 (OJ L106, 28.4.2009, p 7); references to the repealed directive should be construed as references to Directive 2009/34: art 20, Annex IV.



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## (C) METERING WORKS

### **433. Power to carry out works in connection with metering.**

Where, in respect of any premises<sup>1</sup>:

- 977 (1) any relevant undertaker<sup>2</sup> has fixed any charges in relation to those premises by reference to volume<sup>3</sup>; or
- 978 (2) the undertaker is entitled so to fix any charges because the person<sup>4</sup> who is the consumer<sup>5</sup> in relation to the premises for the statutory purposes<sup>6</sup> has exercised his right to give a measured charges notice<sup>7</sup> or any consent which is treated as the giving of such a notice<sup>8</sup>, and has not revoked<sup>9</sup> the measured charges notice or that consent<sup>10</sup>; or
- 979 (3) the undertaker has given notice<sup>11</sup> of its intention of so fixing any charges within the period specified in the notice, or in a case where it is not for the time being entitled so to fix the charges, if and when it becomes entitled to do so<sup>12</sup>; or
- 980 (4) a licensed water supplier<sup>13</sup> supplies water to those premises using the undertaker's supply system<sup>14</sup>,

and there is either (a) a service pipe<sup>15</sup> which is connected with a water undertaker's water main<sup>16</sup> and by which a supply of water is or could be provided to those premises or to any building in which those premises are contained<sup>17</sup>; or (b) a drain or private sewer<sup>18</sup> which connects those premises with a public sewer<sup>19</sup>, the undertaker has power<sup>20</sup> to carry out any of the following works<sup>21</sup>. The works are, in relation to any premises:

- 981 (i) works consisting in the installation and connection of any meter<sup>22</sup> for use in determining the amount of any charges which have been or may be fixed in relation to the premises<sup>23</sup>;
- 982 (ii) where the premises comprise a house<sup>24</sup> which is one of two or more houses to which the supply of water is wholly or partly by the same service pipe, works consisting in the installation and connection, for any purpose connected with the installation or connection of such a meter, of a separate service pipe for that house<sup>25</sup>;
- 983 (iii) works for the purpose of maintaining, repairing, disconnecting or removing any meter which has been installed for use in determining the amount of any charges which have been or may be fixed in relation to the premises, or any pipes<sup>26</sup> or apparatus installed in the course of any specified works<sup>27</sup>; and
- 984 (iv) any other works appearing to the undertaker to be necessary or expedient for any purpose connected with the carrying out of any works specified in head (i), (ii) or (iii) above, including the installation and connection of any pipes or other apparatus on the premises and the alteration or removal of any of the plumbing of the premises<sup>28</sup>.

Nothing in these provisions prevents the exercise by a water undertaker of its statutory power<sup>29</sup> to impose a condition relating to the installation and connection of a meter<sup>30</sup> in a case where it has required the provision of a separate service pipe to any premises<sup>31</sup>.

Any dispute between a relevant undertaker and any other person (including another such undertaker) as to the exercise of any power under the above provisions to carry out any works on any premises must be referred to arbitration<sup>32</sup>.

Where, in relation to a relevant undertaker, the powers conferred on it under the above provisions are in relation to streets<sup>33</sup>, it is the duty of every relevant undertaker to do as little damage as possible in the exercise of those powers<sup>34</sup>, and to pay compensation for any loss caused or damage done in the exercise of those powers<sup>35</sup>. Where a person authorised by any relevant undertaker carries out any works by virtue of the above provisions on any premises, the undertaker must make good, or pay compensation for, any damage caused by that person or by any person accompanying him by or in connection with the carrying out of the works<sup>36</sup>.

Water meters that are let on hire by a relevant undertaker and are suitably marked belong to that relevant undertaker<sup>37</sup>.

1 See the Water Industry Act 1991 s 162(1)(a) (substituted by the Water Industry Act 1999 s 10(1), (2)).

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 Water Industry Act 1991 s 162(1A)(a) (s 162(1A) added by the Water Industry Act 1999 s 10(1), (3); Water Industry Act 1991 s 162(1A)(a) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 37(1), (2)). As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'consumer' see PARA 421 note 17.

6 Ie for the purposes of the Water Industry Act 1991 Pt V Ch I (ss 142-150B).

7 Ie under the Water Industry Act 1991 s 144A: see PARA 427.

8 Ie a consent under the Water Industry Act 1991 s 144B(2)(a)(ii): see PARA 428.

9 Ie under the Water Industry Act 1991 s 144A: see PARA 427.

10 Water Industry Act 1991 s 162(1A)(b) (as added: see note 3).

11 A notice given for these purposes may relate to particular premises or to any description of premises and must be given by publishing it in the locality in which the premises to which it relates are situated in such a manner as the undertaker considers appropriate for bringing it to the attention of the persons likely to be affected by it (Water Industry Act 1991 s 162(4)(a) (s 162(4) amended by the Water Industry Act 1999 s 10(1), (4))); and by serving a copy of it on the Secretary of State or, in relation to Wales, on the Welsh Ministers (Water Industry Act 1991 s 162(4)(b)). The functions of the Secretary of State under the Water Industry Act 1991 s 162, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the service of documents see PARA 22.

12 Water Industry Act 1991 s 162(1A)(c) (as added: see note 3).

13 As to the meaning of 'licensed water supplier' see PARA 152.

14 Water Industry Act 1991 s 162(1A)(d) (as added (see note 3); and amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 37(1), (3)). As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 162(1B) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 37(1), (4)).

15 As to the meaning of 'service pipe' see PARA 179 note 8.

16 As to when a service pipe is connected with a water main see PARA 335 note 9. As to the meaning of 'water main' see PARA 138 note 11. As to the meaning of 'water undertaker' see PARA 137 note 4.

- 17 Water Industry Act 1991 s 162(1)(b)(i).
- 18 As to the meanings of 'drain' and 'private sewer' see PARA 138 note 11.
- 19 Water Industry Act 1991 s 162(1)(b)(ii). As to the meaning of 'public sewer' see PARA 138 note 11.
- 20 Ie in accordance with the Water Industry Act 1991 s 172 (see PARA 434) or otherwise: s 162(1).
- 21 Water Industry Act 1991 s 162(1). This power includes power to carry out any such works in a street; and the power conferred by virtue of s 158(1)(c), (6) (see PARA 462) applies in relation to the power so conferred as it applies in relation to the powers conferred by s 158: s 162(2). Without prejudice to s 162(2), however, nothing in s 158, s 159 (see PARA 463) or s 161 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) authorises the installation of any apparatus for measuring or showing the volume of water supplied to, or of effluent discharged from, any premises where that apparatus is to be used for the purpose only of determining the amount of any charges fixed, or to be fixed, in relation to those premises wholly or partly by reference to the volume of that water or effluent: s 162(9). As to the meaning of 'street' see PARA 308 note 19. As to the meaning of 'effluent' see PARA 262 note 31. Subject to s 162(6) (see the text to notes 29-31), any works carried out by a water undertaker by virtue of s 162 are necessary works for the purposes of Pt III Ch II (ss 40-66) (see PARA 330 et seq): s 162(5). As to the meaning of 'necessary works' see PARA 339 note 2.
- 22 As to the meaning of 'meter' see PARA 337 note 11.
- 23 Water Industry Act 1991 s 162(3)(a).
- 24 As to the meaning of 'house' see PARA 133 note 5.
- 25 Water Industry Act 1991 s 162(3)(b).
- 26 As to the meaning of 'pipe' see PARA 138 note 11.
- 27 Water Industry Act 1991 s 162(3)(c). The specified works are those specified in s 162.
- 28 Water Industry Act 1991 s 162(3)(d).
- 29 Ie by virtue of the Water Industry Act 1991 s 64(3)(b): see PARA 352.
- 30 Ie to impose a condition by virtue of the Water Industry Act 1991 s 47(2)(c) or (d): see PARA 337.
- 31 Water Industry Act 1991 s 162(6).
- 32 See the Water Industry Act 1991 s 162(8); and PARA 445.
- 33 See the Water Industry Act 1991 Sch 12 para 1(1).
- 34 Water Industry Act 1991 Sch 12 para 1(2)(a).
- 35 Water Industry Act 1991 Sch 12 para 1(2)(b). Any dispute as to whether compensation should be so paid, or as to the amount of any such compensation, must be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, by the Water Services Regulation Authority: Sch 12 para 1(3) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109. The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.
- 36 Water Industry Act 1991 Sch 12 para 5(1). This provision is expressed to be without prejudice to s 148 (see PARA 436), Sch 6 para 11 (see PARA 485) or Sch 12 para 1 (see the text to notes 33-35): Sch 12 para 5(1). Any dispute between a relevant undertaker and any other person, including another such undertaker, as to whether the undertaker should pay any such compensation or as to its amount must be referred to the arbitration of a single arbitrator appointed by agreement between the undertaker and that person or, in default of agreement, by the Water Services Regulation Authority: Sch 12 para 5(2) (amended by the Water Act 2003 s 36(2)). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see note 35.
- 37 See the Water Industry Act 1991 s 179(4); and PARA 464. Customers may have their own sub-meters; these belong to the customer. In practice, sub-meters are not generally used by a relevant undertaker for calculating water supply charges, but where two or more properties are supplied through one meter there may be (but need not necessarily be, as all charges schemes are different) provision in the undertaker's charges scheme that the reading on the sub-meter should be taken into account. As to charges schemes see PARA 421.



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#### **434. Entry for metering purposes.**

Where the statutory conditions<sup>1</sup> are satisfied in relation to any premises, any person designated in writing<sup>2</sup> for the purpose by the relevant undertaker<sup>3</sup> in question may enter those premises, or any land<sup>4</sup> occupied with those premises, for any of the following purposes<sup>5</sup>:

- 985 (1) the carrying out of any survey or tests for the purpose of determining (a) whether the carrying out of works for the installation and connection of a meter<sup>6</sup> or a separate service pipe<sup>7</sup> is practicable<sup>8</sup>; (b) whether it is necessary or expedient for any purpose connected with the carrying out of any such works for any other works to be carried out<sup>9</sup>; or (c) how any specified works<sup>10</sup> should be carried out<sup>11</sup>;
- 986 (2) the carrying out of any works so specified<sup>12</sup>;
- 987 (3) the inspection, examination or testing of any meter which is on those premises or any pipes<sup>13</sup> or apparatus installed in the course of any works which were carried out for any purpose that is connected with the installation, connection, testing, maintenance or repair of any such meter<sup>14</sup>;
- 988 (4) the ascertainment from any meter of the volume of water supplied to, or of effluent<sup>15</sup> discharged from, those premises<sup>16</sup>.

1    Ie the conditions set out in the Water Industry Act 1991 s 162(1): see PARA 433.

2    As to the meaning of 'writing' see PARA 22 note 1.

3    As to the meaning of 'relevant undertaker' see PARA 137 note 8.

4    As to the meaning of 'land' see PARA 14 note 21.

5    Water Industry Act 1991 s 172(1). The provisions of Sch 6 Pt II (paras 6-13) (see PARAS 482-485) apply both to the powers conferred by s 162 (see PARA 433) and in relation to the rights and powers conferred by s 172(1), (2) (see heads (1)-(4) in the text): s 172(3).

6    Ie works by virtue of the Water Industry Act 1991 s 162(3)(a): see PARA 433. As to the meaning of 'meter' see PARA 337 note 11.

7    Ie works by virtue of the Water Industry Act 1991 s 162(3)(b): see PARA 433. As to the meaning of 'service pipe' see PARA 179 note 8.

8    Water Industry Act 1991 s 172(2)(a)(i).

9    Water Industry Act 1991 s 172(2)(a)(ii).

10   Ie any works specified in the Water Industry Act 1991 s 162(3): see PARA 433.

11   Water Industry Act 1991 s 172(2)(a)(iii).

12   Water Industry Act 1991 s 172(2)(b).

13   As to the meaning of 'pipe' see PARA 138 note 11.

14   Water Industry Act 1991 s 172(2)(c).

15   As to the meaning of 'effluent' see PARA 262 note 31.

16 Water Industry Act 1991 s 172(2)(d). A sewerage undertaker may exercise alternative powers of entry under s 171: see s 172(4); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1027.

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#### **435. Installation and positioning of meters and outreading apparatus.**

Subject to the following requirements, the undertakers<sup>1</sup> may determine where any meter<sup>2</sup> or outreading apparatus should be positioned in relation to any premises<sup>3</sup>. Meters must be so installed<sup>4</sup> as to ensure that they are reasonably accessible for reading, inspection, testing and maintenance<sup>5</sup>. A meter installed outside a building: (1) must be installed as near as is reasonably practicable either to the boundary of the premises to which it relates or to the point where the supply pipe<sup>6</sup> enters the building<sup>7</sup>; and (2) must, together with any associated pipes and fittings, be adequately protected against damage from frost<sup>8</sup>. A meter installed inside a building must be installed as near as is reasonably practicable to the point where the supply pipe enters the building or to the stop-tap<sup>9</sup>.

Outreading apparatus must be installed in a position in which it is reasonably accessible for inspection, testing and maintenance, and must, so far as reasonably practicable, be in an unobtrusive position<sup>10</sup>. Such apparatus, other than apparatus designed to transmit signals to other premises, must be installed either in a position where it can be read by or on behalf of the undertakers without entering a building or, where a number of meters are installed inside a building, in an entrance hall or lobby to which all the customers<sup>11</sup> in that building have access<sup>12</sup>.

The undertakers must notify<sup>13</sup> the occupier<sup>14</sup> of the location in which it proposes to install a meter or outreading apparatus<sup>15</sup>. The occupier may request<sup>16</sup> the undertakers to install the meter or outreading apparatus in a position other than that proposed by the undertakers<sup>17</sup> or, where the meter or outreading apparatus has already been installed, to reposition the meter or outreading apparatus<sup>18</sup>. Where the undertakers agree to the occupier's request, they must notify the occupier in writing of the effect of the statutory provision<sup>19</sup> requiring him to bear the expenses of complying with the request, and give an estimate of the expenses likely to be borne by the occupier under that provision<sup>20</sup>. Where the undertakers do not agree with the occupier's request, they must notify him in writing of their reasons<sup>21</sup>.

Planning permission for meters placed underground is given by the appropriate general development order<sup>22</sup>.

1 'Undertakers' means water undertakers: Water (Meters) Regulations 1988, SI 1988/1048, reg 1(3). As to the meaning of 'water undertaker' see PARA 137 note 4. The Water (Meters) Regulations 1988, SI 1988/1048, have effect, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Water Industry Act 1991 s 149: see PARA 425.

2 'Meter' means any apparatus for measuring and showing the volume of water supplied to any premises, but does not include outreading apparatus; and 'outreading apparatus' means any apparatus connected to a meter for the purpose of showing or transmitting signals showing the volume measured by that meter and installed on or adjoining premises to which that meter relates: Water (Meters) Regulations 1988, SI 1988/1048, reg 1(3).

3 Water (Meters) Regulations 1988, SI 1988/1048, reg 5(1).

4 In practice a water meter may be combined in the same unit as a stopcock. As to the positioning of stopcocks see PARA 463.

5 Water (Meters) Regulations 1988, SI 1988/1048, reg 3(1). Nothing in Pt II (regs 2-5) applies to the repositioning or replacement of a meter or outreading apparatus installed before 11 July 1988: reg 2(2).

6 'Supply pipe' is not a term used in the Water Industry Act 1991; the Act refers instead to a 'service pipe'. As to the meaning of 'service pipe' see PARA 179 note 8.

7 Water (Meters) Regulations 1988, SI 1988/1048, reg 3(2).

8 Water (Meters) Regulations 1988, SI 1988/1048, reg 3(4).

9 Water (Meters) Regulations 1988, SI 1988/1048, reg 3(3). 'Stop-tap' means a tap fitted on a supply pipe inside a building to permit the flow of water in that pipe to be stopped: reg 1(3).

10 Water (Meters) Regulations 1988, SI 1988/1048, reg 4(1).

11 'Customer' in relation to a supply of water provided by an undertaker to any premises, means the person on whom liability to pay charges to the undertaker in respect of that supply of water would fall: Water (Meters) Regulations 1988, SI 1988/1048, reg 1(3) (definition substituted by SI 2005/2035). As to the meaning of 'person' see PARA 13 note 29. As to charges see PARA 417 et seq.

12 Water (Meters) Regulations 1988, SI 1988/1048, reg 4(2).

13 'Notify' is not defined for these purposes, and except where expressly stated does not necessarily imply notification in writing.

14 As to the meaning of 'occupier' see PARA 339 note 8.

15 Water (Meters) Regulations 1988, SI 1988/1048, reg 5(2).

16 The request must be in writing and giving reasons for the request: Water (Meters) Regulations 1988, SI 1988/1048, reg 5(4). As to the meaning of 'writing' see PARA 22 note 1.

17 Water (Meters) Regulations 1988, SI 1988/1048, reg 5(3)(a).

18 Water (Meters) Regulations 1988, SI 1988/1048, reg 5(3)(b).

19 le of the Water Industry Act 1991 s 148: see PARA 436.

20 Water (Meters) Regulations 1988, SI 1988/1048, reg 5(5).

21 Water (Meters) Regulations 1988, SI 1988/1048, reg 5(6). As to the settlement of disputes arising under these provisions see PARA 445.

22 See **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 339-340.



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#### **436. Restriction on charging for metering works.**

Subject to certain exceptions<sup>1</sup>, where any meter<sup>2</sup> capable of being used in determining the amount of any charges is installed by or at the request of any relevant undertaker<sup>3</sup> then, notwithstanding the provisions of any enactment<sup>4</sup> or any agreement to the contrary between the undertaker and any other person<sup>5</sup>, the undertaker must bear<sup>6</sup>:

- 989 (1) the expenses<sup>7</sup> of installing and connecting the meter<sup>8</sup>;
- 990 (2) any expenses incurred in maintaining, repairing, disconnecting or removing the meter in accordance with any requirements of the undertaker<sup>9</sup>; and
- 991 (3) any expenses incurred in carrying out any works for purposes connected with the installation and connection of the meter or with the maintenance, repair, disconnection or removal of the meter in accordance with any such requirements<sup>10</sup>.

These provisions do not, however, require any relevant undertaker to bear, or prevent that undertaker from recovering from any other person<sup>11</sup>:

- 992 (a) any expenses incurred for the purpose of enabling a condition relating to the installation and connection of a meter<sup>12</sup> to be satisfied<sup>13</sup>;
- 993 (b) any sums which it is entitled to recover under any terms or conditions determined<sup>14</sup> in respect of a supply of water for non-domestic purposes<sup>15</sup>;
- 994 (c) in the case of premises which do not consist of or include any building or part of a building which is occupied as a private dwelling-house, any sums which it is entitled to recover<sup>16</sup> from that person<sup>17</sup>;
- 995 (d) any sums which it is entitled to recover under an agreement<sup>18</sup> with a licensed water supplier<sup>19</sup>;
- 996 (e) any expenses incurred in relation to a meter which is or is to be used in determining the amount of trade effluent charges<sup>20</sup>;
- 997 (f) in the case of premises which do not consist of or include any building or part of a building which is occupied as a private dwelling-house, any expenses incurred in consequence of the exercise by the consumer<sup>21</sup> of any option to be charged by the undertaker in relation to those premises by reference to volume<sup>22</sup> rather than by reference to other matters<sup>23</sup>.

Moreover, the occupier of any premises where any relevant undertaker installs or has installed a meter must in all cases<sup>24</sup> bear so much of the expenses referred to in heads (1) to (3) above as is attributable to compliance with a request made by him<sup>25</sup> for the positioning, in a place other than that reasonably proposed by the undertaker, either of the meter or of any pipe<sup>26</sup> or other apparatus installed for the purpose of facilitating the use of the meter<sup>27</sup>.

<sup>1</sup> ie subject to the Water Industry Act 1991 s 148(2)-(4) (see the text to notes 11-27) and s 177 (see PARAS 442, 445): s 148(1).

<sup>2</sup> As to the meaning of 'meter' see PARA 337 note 11.

3 As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to undertakers' powers to impose a condition that a customer accepts metering on a reconnection at the customer's expense see PARA 337; and as to metering trials see PARA 424.

4 As to the meaning of 'enactment' see PARA 14 note 31.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Water Industry Act 1991 s 148(1) (amended by the Water Industry Act 1999 s 15(1), Sch 3 para 1).

7 For these purposes, references to expenses include references to expenses incurred in meeting the needs of a disabled person: Water Industry Act 1991 s 148(1A) (added by the Competition and Service (Utilities) Act 1992 s 53(2)). As to the recovery of expenses generally see PARA 131 note 6. As to the prohibition against discrimination in the provision of goods, facilities and services to disabled persons see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 582 et seq.

8 Water Industry Act 1991 s 148(1)(a).

9 Water Industry Act 1991 s 148(1)(b).

10 Water Industry Act 1991 s 148(1)(c).

11 The expenses which an undertaker may require someone else to bear, or which it may recover from another, by virtue of the Water Industry Act 1991 s 148(2) do not include any expenses incurred for the purpose of enabling conditions such as are mentioned in head (a) in the text to be satisfied in a case in which the conditions could not have been imposed but for the exercise by the undertaker of its power by virtue of s 64(2) (a), (b), (d) or (e) (see PARA 352) to require the provision of a separate service pipe to any premises: s 148(3). As to the meaning of 'service pipe' see PARA 179 note 8.

12 Is a condition imposed by virtue of the Water Industry Act 1991 s 47(2)(c) or (d): see PARA 337.

13 Water Industry Act 1991 s 148(2)(a).

14 Is determined under the Water Industry Act 1991 s 56: see PARA 347.

15 Water Industry Act 1991 s 148(2)(b).

16 Is by virtue of the Water Industry Act 1991 s 64(3)(b): see PARA 352.

17 Water Industry Act 1991 s 148(2)(c) (s 148(2)(c), (e) substituted by the Water Industry Act 1999 s 9).

18 Is an agreement under the Water Industry Act 1991 s 66D: see PARA 341.

19 Water Industry Act 1991 s 148(2)(cc) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 33). As to the meaning of 'licensed water supplier' see PARA 152.

20 Water Industry Act 1991 s 148(2)(d). The charges referred to are: (1) any charges which are to be paid in connection with the carrying out of a sewerage undertaker's functions under Pt IV Ch III (ss 118-141) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1047 et seq); or (2) any charges provision for which is contained in an agreement entered into in accordance with s 129 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1053): s 148(2)(d). As to the meaning of 'functions' see PARA 133 note 5. As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

21 As to the meaning of 'consumer' see PARA 421 note 17.

22 As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

23 Water Industry Act 1991 s 148(2)(e) (as substituted: see note 17).

24 Is subject to any regulations made by virtue of the Water Industry Act 1991 s 149(2)(aa): see PARA 425.

25 Is in accordance with any regulations under the Water Industry Act 1991 s 149: see PARA 425. As to such regulations see the Water (Meters) Regulations 1988, SI 1988/1048, reg 5; and PARA 435.

26 As to the meaning of 'pipe' see PARA 138 note 11.

27 Water Industry Act 1991 s 148(4).



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## (D) TESTING AND READING OF METERS

### 437. Meter tests.

The undertakers<sup>1</sup> or any person<sup>2</sup> duly authorised by them may at any time, and must if so requested in writing<sup>3</sup> by the customer<sup>4</sup>, test the accuracy of any meter<sup>5</sup> which has been installed<sup>6</sup>. The undertakers or any person duly authorised by them may remove a meter from premises where it is necessary to do so for the purpose of testing<sup>7</sup>. The undertakers must provide the customer with a copy of the results of the test<sup>8</sup>.

Where a test is carried out in accordance with these provisions at the request of the customer, and the meter on being tested falls within the prescribed limits of error, the undertakers may recover from the customer the expenses reasonably incurred by them in carrying out the test<sup>9</sup>. In the case of a meter which is connected to a supply of water to a house<sup>10</sup>, however, the expenses so recoverable may not exceed £70 where the test is carried out by removing the meter from the premises<sup>11</sup>, and £20 in any other case<sup>12</sup>.

1 As to the meaning of 'undertakers' see PARA 435 note 1.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 As to the meaning of 'customer' see PARA 435 note 11.

5 As to the meaning of 'meter' see PARA 435 note 2.

6 Water (Meters) Regulations 1988, SI 1988/1048, reg 6(1). The meter must be tested in accordance with the Measuring Equipment (Cold-water Meters) Regulations 1988, SI 1988/997, reg 6(2), (4) (see PARA 432) in order to determine whether it falls within the prescribed limits of error, whether or not the meter is one to which those regulations apply: Water (Meters) Regulations 1988, SI 1988/1048, reg 6(2). The equipment used for testing must comply with BS 5750: Pt 3 clause 4.6 (29 May 1987; ISBN 0 580 15946 0): Water (Meters) Regulations 1988, SI 1988/1048, reg 6(4). 'Prescribed limits of error' means the prescribed limits of error in relation to the obliteration of the stamp or mark set out in the Measuring Equipment (Cold-water Meters) Regulations 1988, SI 1988/997, reg 10, Schedule: Water (Meters) Regulations 1988, SI 1988/1048, reg 1(3).

The Water (Meters) Regulations 1988, SI 1988/1048, have effect, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Water Industry Act 1991 s 149: see PARA 425.

7 Water (Meters) Regulations 1988, SI 1988/1048, reg 6(3).

8 Water (Meters) Regulations 1988, SI 1988/1048, reg 6(5). As to the settlement of disputes arising under these provisions see PARA 445.

9 Water (Meters) Regulations 1988, SI 1988/1048, reg 7(1) (reg 7 substituted by SI 1988/1288).

10 As to the meaning of 'house' see PARA 133 note 5.

11 Water (Meters) Regulations 1988, SI 1988/1048, reg 7(2)(a) (as substituted: see note 9).

12 Water (Meters) Regulations 1988, SI 1988/1048, reg 7(2)(b) (as substituted: see note 9).

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#### **438. Method of proof and effect of meter reading.**

Where undertakers<sup>1</sup> fix charges payable by the customer<sup>2</sup> in relation to any premises by reference to volume<sup>3</sup>, a proved reading from the meter<sup>4</sup> installed in relation to those premises is evidence of the volume of water supplied to those premises, unless the meter is shown to register incorrectly<sup>5</sup>. A meter is regarded as registering incorrectly if on being tested<sup>6</sup> it is found to exceed the prescribed limits of error<sup>7</sup>. Except where the meter is proved to have begun to register incorrectly on some later date, a meter which is found to exceed the prescribed limits of error is deemed to have done so since the last occasion but one on which the undertaker or any person duly authorised by that undertaker last read the meter for the purpose of ascertaining the volume of water supplied to the premises in relation to which it is installed<sup>8</sup>.

1 As to the meaning of 'undertakers' see PARA 435 note 1.

2 As to the meaning of 'customer' see PARA 435 note 11.

3 As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

4 A reading from a meter may be proved by producing the certificate of a person duly authorised by the undertakers to read the meter and certify the reading: Water (Meters) Regulations 1988, SI 1988/1048, reg 8(2). As to the meaning of 'meter' see PARA 435 note 2. As to the meaning of 'person' see PARA 13 note 29.

5 Water (Meters) Regulations 1988, SI 1988/1048, reg 8(1) (amended by SI 2005/2035). The Water (Meters) Regulations 1988, SI 1988/1048, have effect, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Water Industry Act 1991 s 149: see PARA 425.

6 As to meter tests see PARA 437.

7 Water (Meters) Regulations 1988, SI 1988/1048, reg 8(3). As to the meaning of 'prescribed limits of error' see PARA 437 note 6.

8 Water (Meters) Regulations 1988, SI 1988/1048, reg 8(4). As to the adjustment of charges for any period when a meter has registered incorrectly see PARA 439. As to the settlement of disputes arising under these provisions see PARA 445.

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#### **439. Adjustment of charges following testing.**

An account must be taken of the sums payable by the undertakers<sup>1</sup> to the customer<sup>2</sup> or by the customer for any period during which the meter<sup>3</sup> has or is deemed to have registered incorrectly<sup>4</sup>; and the balance must be paid or allowed by the undertakers or paid by the customer, as the case may be<sup>5</sup>.

Where, however, a meter which is connected to a supply of water to a house<sup>6</sup> is proved to have registered less than the volume of water supplied to that house, the balance payable by the customer must not exceed an amount reflecting the charge for the volume of water which would ordinarily have been supplied to the house during the six months<sup>7</sup> preceding the last occasion on which the undertakers or any person<sup>8</sup> duly authorised by the undertakers last read the meter for the purpose of ascertaining the volume of water supplied to the house, less any sums already paid in respect of that period<sup>9</sup>.

1 As to the meaning of 'undertakers' see PARA 435 note 1.

2 As to the meaning of 'customer' see PARA 435 note 11.

3 As to the meaning of 'meter' see PARA 435 note 2.

4 As to when a meter is regarded as registering incorrectly see PARA 438.

5 Water (Meters) Regulations 1988, SI 1988/1048, reg 9(1) (amended by SI 2005/2035). The Water (Meters) Regulations 1988, SI 1988/1048, have effect, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Water Industry Act 1991 s 149: see PARA 425.

6 As to the meaning of 'house' see PARA 133 note 5.

7 As to the meaning of 'month' see PARA 23 note 10.

8 As to the meaning of 'person' see PARA 13 note 29.

9 Water (Meters) Regulations 1988, SI 1988/1048, reg 9(2). As to the settlement of disputes arising under these provisions see PARA 445.

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**440. Exchange of metering information between service providers.**

Where:

- 998 (1) different services are provided in relation to the same premises by different service providers<sup>1</sup>;
- 999 (2) one of those providers has obtained a reading from a meter<sup>2</sup> used in determining the amount of any charges fixed in relation to those premises<sup>3</sup>;
- 1000 (3) the charges in relation to those premises of another of those providers are fixed by reference to any matter to which the reading is relevant<sup>4</sup>; and
- 1001 (4) that other provider has agreed to bear a reasonable proportion of the expenses of obtaining the reading together with the reasonable expenses of the disclosure of the reading to it<sup>5</sup>,

it is the duty of the provider who obtained the reading to disclose the reading to the other provider<sup>6</sup>.

The duties of a service provider under these provision are enforceable<sup>7</sup> by the Water Services Regulation Authority<sup>8</sup>.

1 Water Industry Act 1991 s 205(1)(a) (s 205(1) amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 46(1), (2)). For these purposes, the following are service providers: (1) any relevant undertaker; and (2) any licensed water supplier: Water Industry Act 1991 s 205(4) (s 205(3) substituted, (4) added, by the Water Act 2003 s 101(1), Sch 8 paras 2, 46(1), (4)). As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the meaning of 'licensed water supplier' see PARA 152.

2 As to the meaning of 'meter' see PARA 337 note 11.

3 Water Industry Act 1991 s 205(1)(b) (as amended: see note 1).

4 Water Industry Act 1991 s 205(1)(c) (as amended: see note 1).

5 Water Industry Act 1991 s 205(1)(d) (as amended: see note 1).

6 Water Industry Act 1991 s 205(1) (as amended: see note 1). As to the settlement of disputes in relation to these provisions see PARA 445.

7 ie under the Water Industry Act 1991 s 18: see PARA 163.

8 Water Industry Act 1991 s 205(3) (as substituted: see note 1). As to the Water Services Regulation Authority see PARA 109.

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#### **441. Information to be provided with bills.**

Where charges payable by the customer<sup>1</sup> are fixed in relation to any premises by reference to volume<sup>2</sup>, the undertaker<sup>3</sup> must provide, with every demand for payment of charges<sup>4</sup>, information as to any code of practice adopted by the undertaker relating to payment of charges<sup>5</sup>, and information as to the availability of, facilities for, and any amount payable in respect of, the testing of meters<sup>6</sup>. The undertaker must also provide a statement of, or of the effect of, the statutory provisions relating to the method of proof and effect of meter reading<sup>7</sup>, to liability for charges after ceasing to occupy metered premises in certain cases<sup>8</sup>, and to offences of tampering with meters and related matters<sup>9</sup>.

1 As to the meaning of 'customer' see PARA 435 note 11.

2 As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

3 As to the meaning of 'undertaker' see PARA 435 note 1.

4 Water (Meters) Regulations 1988, SI 1988/1048, reg 10 (amended by SI 2005/2035). The Water (Meters) Regulations 1988, SI 1988/1048, have effect, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Water Industry Act 1991 s 149: see PARA 425. As to charges see PARA 417 et seq.

5 Water (Meters) Regulations 1988, SI 1988/1048, reg 10(a). As to codes of practice see PARAS 329, 430.

6 Water (Meters) Regulations 1988, SI 1988/1048, reg 10(b). As to the meaning of 'meter' see PARA 435 note 2. As to the testing of meters see PARA 437.

7 Ie of the Water (Meters) Regulations 1988, SI 1988/1048, reg 8: see PARA 438.

8 See the Water Industry Act 1991 s 144(2); and PARA 422.

9 Water (Meters) Regulations 1988 SI 1988/1048, reg 10(c). As to offences of tampering with meters etc see PARA 442.



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## (E) OFFENCES IN RELATION TO METERING

### 442. Tampering with meter.

If any person<sup>1</sup>, without the appropriate consent<sup>2</sup>:

1002 (1) so interferes with a meter used by any relevant undertaker or licensed water supplier in determining the amount of any charges fixed in relation to any premises<sup>3</sup> as intentionally or recklessly to prevent the meter from showing, or from accurately showing, the volume of water supplied to, or of effluent<sup>4</sup> discharged from, those premises<sup>5</sup>; or

1003 (2) carries out any works which he knows are likely to affect the operation of such a meter or which require the disconnection of such a meter<sup>6</sup>,

he is guilty of an offence<sup>7</sup>.

Where an application is made to any relevant undertaker for a consent for the purposes of the above provisions, the undertaker must give notice<sup>8</sup> of its decision with respect to the application as soon as reasonably practicable after receiving it<sup>9</sup>; and may make it a condition of giving any consent that the undertaker itself should carry out so much of any works to which the application relates as is specified in the notice of its decision<sup>10</sup>. On such an application a relevant undertaker must not refuse its consent, or impose any such condition, unless it is reasonable to do so<sup>11</sup>.

A person who sustains any loss or damage in consequence of any failure by any relevant undertaker to comply with any obligation imposed on it by the provisions above<sup>12</sup> relating to consent<sup>13</sup>, or to exercise reasonable care in carrying out works<sup>14</sup> it has decided to carry out itself<sup>15</sup>, is entitled to recover compensation from the undertaker<sup>16</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 A person is not guilty of an offence under the Water Industry Act 1991 s 175 in respect of anything done by him with the appropriate consent: s 175(2) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 40(1), (3)). 'Appropriate consent' means: (1) if the meter is used by one relevant undertaker, the consent of that undertaker; (2) if the meter is used by one licensed water supplier, the consent of that supplier; (3) if the meter is used by two or more of the following persons, ie (a) a relevant undertaker; (b) a licensed water supplier, the consent of each of those persons: Water Industry Act 1991 s 175(3) (s 175(3), (4) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 40(1), (4)). References to the consent of a relevant undertaker are references to consent under the Water Industry Act 1991 s 176 (see the text to notes 8-11): s 175(4) (as so added). As to the meaning of 'meter' see PARA 337 note 11. As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the meaning of 'licensed water supplier' see PARA 152.

3 As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11. As to meter readings see PARA 438.

4 As to the meaning of 'effluent' see PARA 262 note 31.

5 Water Industry Act 1991 s 175(1)(a) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 40(1), (2)).

6 Water Industry Act 1991 s 175(1)(b). As to the powers of a relevant undertaker to disconnect or remove a meter see s 162; and PARA 433.

7 Water Industry Act 1991 s 175(1). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 175(1). As to the standard scale see PARA 141 note 18. A relevant undertaker which carries out any works made necessary by the commission of such an offence is entitled to recover any expenses reasonably incurred in carrying out those works from the person who committed the offence: s 177(1). As to the resolution of disputes as to liability for or the amount of such expenses see PARA 445. As to the recovery of expenses generally see PARA 131 note 6.

8 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

9 Water Industry Act 1991 s 176(1)(a).

10 Water Industry Act 1991 s 176(1)(b). Where any relevant undertaker has given a notice to any person imposing any such condition, the undertaker must carry out those works as soon as reasonably practicable after giving the notice (s 176(3)(a)); and may recover from that person any expenses reasonably incurred by it in doing so (s 176(3)(b)). Section 176(3) does not apply where the person who was given the notice notifies the undertaker that the carrying out of the works to which the condition relates is no longer required: s 176(5). As to the resolution of disputes relating to liability for or the amount of expenses under s 176(3) see PARA 445.

11 Water Industry Act 1991 s 176(2).

12 Ie imposed by the Water Industry Act 1991 s 176: see the text to notes 8-11.

13 Water Industry Act 1991 s 177(2)(a).

14 Ie in performance of the duty imposed by the Water Industry Act 1991 s 176(3)(a): see note 10.

15 Water Industry Act 1991 s 177(2)(b).

16 Water Industry Act 1991 s 177(2). As to the resolution of disputes as to liability for or the amount of such compensation see PARA 445.

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## ***D. DISPUTES AND QUERIES RELATING TO CHARGES AND METERING***

### **443. Billing disputes.**

As from a day to be appointed the following provisions have effect<sup>1</sup>.

The Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> may by regulations<sup>4</sup> make provision for billing disputes<sup>5</sup> to be referred to the Water Services Regulation Authority<sup>6</sup> for determination in accordance with the regulations<sup>7</sup>. Such regulations may only be made after consulting<sup>8</sup> the Water Services Regulation Authority and persons or bodies appearing to the Secretary of State or, as the case may be, the Welsh Ministers to be representative of persons likely to be affected by the regulations<sup>9</sup>. The regulations may provide that:

- 1004 (1) where a billing dispute is referred to the Authority, it may either determine the dispute or appoint an arbitrator to determine it<sup>10</sup>;
- 1005 (2) disputes may be referred to the Authority only by prescribed<sup>11</sup> persons<sup>12</sup>; and
- 1006 (3) any determination is to be final and enforceable as if it were a judgment of a county court<sup>13</sup>.

Except in such circumstances, if any, as may be prescribed, the Authority or an arbitrator appointed by it must not determine any billing dispute which is the subject of proceedings before, or with respect to which judgment has been given, by, any court<sup>14</sup>; and neither party to any billing dispute which has been referred to the Authority for determination in accordance with regulations made under these provisions may commence proceedings before any court in respect of that dispute pending its determination in accordance with the regulations<sup>15</sup>. Any person determining any billing dispute in accordance with the regulations must, in such manner as may be specified in the regulations, give his reasons for reaching his decision with respect to the dispute<sup>16</sup>.

No relevant undertaker may commence proceedings before any court in respect of any charge in connection with the supply of water for domestic purposes or, as the case may be, the provision of sewerage services other than by the carrying out of trade effluent functions, unless, not less than 28 days before doing so, the customer concerned was informed by it, in such form and manner as may be prescribed, of its intention to commence proceedings, of the customer's rights by virtue of these provisions, and of such other matters, if any, as may be prescribed<sup>17</sup>. Where a dispute is referred to the Authority in accordance with the regulations, it is the duty of the undertaker concerned to give the Authority such information<sup>18</sup> as the Authority may reasonably require for the purpose of assisting it in determining the dispute<sup>19</sup>.

1 The Water Industry Act 1991 s 150A is added by the Competition and Service (Utilities) Act 1992 s 36 as from a day to be appointed: see s 56(2). At the date at which this volume states the law no such day had been appointed.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Industry Act 1991 s 150A, so far as exercisable in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any

licensed water supplier), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by SI 2000/253). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152.

4 As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.

5 'Billing dispute' means a dispute between a relevant undertaker and a customer concerning the amount of the charge which the undertaker is entitled to recover from the customer in connection with the supply of water for domestic purposes, in the case of a water undertaker; and the provision of sewerage services other than by the carrying out of trade effluent functions, in the case of a sewerage undertaker: Water Industry Act 1991 s 150A(2) (as added: see note 1). 'Charge' means any charge fixed by a scheme made under the Water Industry Act 1991 s 143 (see PARA 421); and 'customer' means any person to whom the relevant undertaker provides services: s 150A(11) (as so added). References to a sewerage undertaker's trade effluent functions are references to its functions under Pt IV Ch III (ss 118-141) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1047 et seq): s 150A(11) (as so added). As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'sewerage services' see PARA 129 note 7. As to the meaning of 'person' see PARA 13 note 29.

6 As to the Water Services Regulation Authority see PARA 109.

7 Water Industry Act 1991 s 150A(1) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

8 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

9 Water Industry Act 1991 s 150A(3) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

10 Water Industry Act 1991 s 150A(4) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

11 'Prescribed' means prescribed by the regulations: see the Water Industry Act 1991 s 219(1).

12 Water Industry Act 1991 s 150A(6)(a) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

13 Water Industry Act 1991 s 150A(6)(b) (as added: see note 1). As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

14 Water Industry Act 1991 s 150A(7)(a) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

15 Water Industry Act 1991 s 150A(7)(b) (as added (see note 1); and amended by the Water Act 2003 s 36(2)).

16 Water Industry Act 1991 s 150A(5) (as added: see note 1).

17 Water Industry Act 1991 s 150A(8) (as added: see note 1).

18 As to the meaning of 'information' see PARA 117 note 13.

19 Water Industry Act 1991 s 150A(9) (as added (see note 1); and amended by the Water Act 2003 s 36(2)). The Water Industry Act 1991 s 202 (see PARA 182) has effect, with the necessary modifications, in relation to information which the Authority requires for that purpose as it has effect in relation to information which the Secretary of State requires for purposes mentioned in s 202(1): s 150A(10) (as so added and amended). As to the meaning of 'modifications' see PARA 141 note 20.

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#### **444. Account queries and requests about payment arrangements.**

Where a customer<sup>1</sup> of a relevant undertaker<sup>2</sup>: (1) queries, in writing<sup>3</sup>, the correctness of an account for the supply of water or the provision of sewerage services<sup>4</sup>; or (2) asks, in writing, for a change to payment arrangements<sup>5</sup>, the undertaker must provide a substantive reply to the customer in the case of a reply to a query, within ten working days<sup>6</sup>, or if the request is for a change to payment arrangements and the request cannot be met, within five working days<sup>7</sup>. If the undertaker does not comply these requirements, it must pay the customer £20<sup>8</sup>; and no application by the customer for the payment is necessary<sup>9</sup>. However, the undertaker need not pay the customer if:

- 1007 (a) the address that the customer wrote to was not a notified address of the undertaker for a query or request of that kind<sup>10</sup>;
- 1008 (b) the customer does not wish to pursue the query or request and has so informed the undertaker<sup>11</sup>;
- 1009 (c) it was impracticable for the undertaker to send a reply within the required period because of: (i) industrial action by employees of the undertaker<sup>12</sup>; or (ii) the act or default of a person<sup>13</sup> who is neither an officer, employee or agent of the undertaker<sup>14</sup>, nor a person acting on behalf of the undertaker or of an agent of the undertaker<sup>15</sup>; or
- 1010 (d) in the case of a reply to a query, the query was frivolous or vexatious<sup>16</sup>, or the undertaker reasonably considered that a visit was necessary before replying, and severe weather made that visit impracticable<sup>17</sup>.

1 As to the meaning of 'customer' see PARA 327 note 10.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(1)(b). As to the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, generally see PARA 327.

5 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(1)(c). 'Payment arrangements' means the arrangements by which a customer makes payments (including instalment payments) to the undertaker; and 'a change to payment arrangements' includes a change to the frequency of payments (including instalment payments): reg 7(9).

6 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(2)(a). The first day of the period for reply is the day after the day when the undertaker receives the complaint: reg 7(3). As to the meaning of 'working day' see PARA 328 note 19.

7 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(2)(b).

8 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(4). As to the making of payments, the effect of the making and acceptance of payments under the regulations, and the determination of disputes relating thereto see PARA 327.

9 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(5).

10 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(a). An address of an undertaker is a notified address of the undertaker for a query or request of a particular kind if the undertaker has notified that address to its customers as the appropriate address for a query or request of that kind by publishing it in a telephone directory, notifying it on the undertaker's website, or showing it on the undertaker's publicity material: reg 7(7).

11 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(b).

12 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(c)(i).

13 As to the meaning of 'person' see PARA 13 note 29.

14 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(c)(ii)(aa).

15 See the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(c)(ii)(bb).

16 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(d)(i).

17 Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008/594, reg 7(6)(d)(ii).

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#### **445. Disputes in relation to metering to be referred to arbitration.**

The following disputes are to be referred to the arbitration of a single arbitrator appointed by agreement between the parties:

- 1011 (1) any dispute between a relevant undertaker<sup>1</sup> and any other person<sup>2</sup> (including another such undertaker) as to the exercise of any power<sup>3</sup> to carry out metering works on any premises<sup>4</sup>;
- 1012 (2) any dispute between a relevant undertaker and any other person (including another such undertaker) as to whether the undertaker or that other person should bear any expenses for metering works<sup>5</sup>, or as to the amount of any such expenses to be borne by any person<sup>6</sup>;
- 1013 (3) any dispute between a relevant undertaker and any other person (including another such undertaker) as to whether the undertaker or that other person should bear any expenses in relation to works interfering with a meter<sup>7</sup> or as to the amount of any such expenses to be borne by that person<sup>8</sup>;
- 1014 (4) any dispute between a relevant undertaker and any other person (including another such undertaker) as to whether the undertaker or that other person should bear any expenses as a result of an offender having interfered with a meter<sup>9</sup> or as to the amount of any such expenses to be borne by any person<sup>10</sup>;
- 1015 (5) any dispute between a relevant undertaker and any other person (including another such undertaker) as to whether the undertaker or that other person should pay any compensation in relation to works interfering with a meter<sup>11</sup> and as to the amount of any such compensation<sup>12</sup>;
- 1016 (6) any dispute between a service provider<sup>13</sup> and any other person (including another such provider) as to the terms to be contained in any agreement for the purposes of exchanging metering information<sup>14</sup> or as to the amount of any expenses to be borne by any person under any such agreement<sup>15</sup>;
- 1017 (7) any dispute between an undertaker<sup>16</sup> and the customer<sup>17</sup> arising under the provisions relating to the positioning of meters and outreading apparatus<sup>18</sup>, the testing and reading of meters<sup>19</sup>, and information relating to meters to be provided<sup>20</sup> with bills<sup>21</sup>.

In default of agreement between the parties as to the appointment of the arbitrator, he must, in the case of a dispute falling within heads (1) to (6) above, be appointed by the Water Services Regulation Authority<sup>22</sup>; and in the case of a dispute falling within head (7) above, be appointed by the Secretary of State<sup>23</sup> or, in the case of an undertaker whose area is wholly or mainly in Wales, by the Welsh Ministers<sup>24</sup>.

The provisions of the Arbitration Act 1996<sup>25</sup> apply to any such arbitration<sup>26</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the meaning of 'person' see PARA 13 note 29.

3 ie any power under the Water Industry Act 1991 s 162: see PARA 433.

- 4 See the Water Industry Act 1991 s 162(8).
- 5 le expenses under the Water Industry Act 1991 s 148: see PARA 436.
- 6 Water Industry Act 1991 s 148(5).
- 7 le under the Water Industry Act 1991 s 176(3): see PARA 442.
- 8 Water Industry Act 1991 s 176(4).
- 9 le expenses under the Water Industry Act 1991 s 177: see PARA 442.
- 10 Water Industry Act 1991 s 177(3)(a), (c).
- 11 le under the Water Industry Act 1991 s 177(2): see PARA 442.
- 12 Water Industry Act 1991 s 177(3)(b), (c).
- 13 As to the meaning of 'service provider' see PARA 440 note 1.
- 14 le for the purposes of the Water Industry Act 1991 s 205(1)(d): see PARA 440.
- 15 Water Industry Act 1991 s 205(2) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 46(1), (3)).
- 16 As to the meaning of 'undertaker' see PARA 435 note 1.
- 17 As to the meaning of 'customer' see PARA 435 note 11.
- 18 le arising under the Water (Meters) Regulations 1988, SI 1988/1048, Pt II (regs 2-5): see PARA 435.
- 19 le arising under the Water (Meters) Regulations 1988, SI 1988/1048, Pt III (regs 6-9): see PARAS 437-439.
- 20 le under the Water (Meters) Regulations 1988, SI 1988/1048, reg 10: see PARA 441.
- 21 Water (Meters) Regulations 1988, SI 1988/1048, reg 11 (amended by SI 2005/2035).
- 22 See the Water Industry Act 1991 ss 148(5), 162(8), 176(4), 177(3), 205(2) (all amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.
- 23 Water (Meters) Regulations 1988, SI 1988/1048, reg 11. As to the Secretary of State see PARA 15 note 1.
- 24 The Water (Meters) Regulations 1988, SI 1988/1048, have effect, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Water Industry Act 1991 s 149: see PARA 425. The functions of the Secretary of State under s 149 and regulations made thereunder, in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water suppliers), were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 3, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.
- 25 le the Arbitration Act 1996 Pt I (ss 1-84).
- 26 See the Arbitration Act 1996 s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.



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## **E. RECOVERY OF CHARGES**

### **446. In general.**

The water charge<sup>1</sup> payable by any person may be recovered from him by the water undertaker<sup>2</sup> as a civil debt<sup>3</sup>. There is no longer any express statutory provision relating to discount for prompt payment<sup>4</sup>, but a charges scheme<sup>5</sup> may contain provision for discount<sup>6</sup>.

Where there is an interruption or diminution of the supply of water during a drought, nothing in any drought order or drought permit<sup>7</sup> affects an undertaker's right to recover any fixed or minimum charge which might have been recovered from any person if there had been no such interruption or diminution<sup>8</sup>. Where a temporary hosepipe ban is imposed by a water undertaker, charges made by the undertaker for the use of a hosepipe or similar apparatus are subject to a reasonable reduction, and, in the case of a charge paid in advance, the undertaker must make any necessary repayment or adjustment<sup>9</sup>.

Water charges owing to a water undertaker which is a subsidiary of a company which supplies electricity may not be recovered through the latter's prepayment meter for electricity charges<sup>10</sup>.

1 Under the Water Industry Act 1991 s 61(1) the power of disconnection is only available when charges are due in respect of water supply charges: see PARA 357. As to premises that are not to be disconnected under this power see PARA 358.

2 As to the meaning of 'water undertaker' see PARA 137 note 4. The statutory powers of recovery applying to the former water authorities were repealed and not replaced by the Water Act 1989, such powers and restrictions not being appropriate to the companies at present appointed as water undertakers. As to the appointment of water undertakers see PARA 137 et seq.

3 A bankruptcy notice can be issued on the failure to pay even though the order provides for distress in default of payment (*Re A Debtor (No 48 of 1952), ex p Amptill RDC v Debtor* [1953] Ch 335, [1953] 1 All ER 545, CA) but water charges, being a payment for a commodity or service and not a matter of taxation, do not have priority in bankruptcy (see *Re Baker, ex p Eastbourne Waterworks Co v Official Receiver* [1954] 2 All ER 790, [1954] 1 WLR 1144). As to the debts upon which a bankruptcy petition may be based, and their priority, see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 124 et seq.

4 Under the Water Act 1945 Sch 3 s 57(1) (repealed), statutory provision was made for discounts or rebates in consideration of prompt payment of water charges, but these discounts or rebates were to be at the same rate under like circumstances to all persons, and were not in any case to exceed 5%.

5 As to charges schemes see PARA 421.

6 See the Water Industry Act 1991 s 143A; and PARA 421.

7 As to drought orders and drought permits see PARA 303 et seq.

8 See the Water Resources Act 1991 s 79(3), s 79A(9); and PARA 314.

9 See the Water Industry Act 1991 s 76(4); and PARA 316.

10 See *South Wales Electricity plc v Director General of Electricity Supply* [1999] All ER (D) 1152.

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## **(8) SALE AND SUPPLY OF BOTTLED WATER**

### **447. European Community requirements.**

The European Directive on the approximation of the laws of the member states relating to the exploitation and marketing of natural mineral waters<sup>1</sup> provides for the recognition of natural mineral waters by the responsible authorities of the member states<sup>2</sup> and for the conditions that must be satisfied for such recognition<sup>3</sup>. Member states must take the measures necessary to ensure that only the waters recognised by the responsible authority as waters satisfying those conditions are marketed as natural mineral waters<sup>4</sup>; and natural mineral water springs may be exploited and their waters bottled only in accordance with the conditions laid down in the Directive<sup>5</sup>. The Directive also makes provision as to the packaging and labelling of such mineral waters<sup>6</sup>, their treatment<sup>7</sup> and wholesomeness<sup>8</sup>. The Directive does not apply to natural mineral waters intended for export outside the European Economic Area<sup>9</sup>.

A further Directive<sup>10</sup> establishes the list of constituents of natural mineral waters which may present a risk to public health, the limits for admissible levels of those constituents, the deadlines for application of those limits and the labelling requirements for certain constituents<sup>11</sup>. Those constituents must be present in the water naturally and may not result from contamination at source<sup>12</sup>. The Directive also defines the conditions for using ozone-enriched air for separating compounds of iron, manganese, sulphur and arsenic from natural mineral waters or spring waters, and the labelling requirements for waters which have undergone such treatment<sup>13</sup>. Natural mineral waters must, at the time of packaging, comply with the maximum concentration limits set out in the Directive<sup>14</sup>. For the purposes of official controls, the member states must comply with the listed specifications for analysing the harmful constituents<sup>15</sup>. Provision is made for the labelling of natural mineral waters with a fluoride concentration higher than that suitable for infants and young children<sup>16</sup>, for the conditions applying to the ozone-enriched air treatment of natural mineral waters<sup>17</sup> and for the labelling of such mineral waters<sup>18</sup>, and for such treatment and labelling of spring waters<sup>19</sup>. The member states must take the necessary measures to permit the marketing of products complying with the Directive<sup>20</sup>.

Of relevance also, in relation to spring water and bottled drinking water, is the Drinking Water Directive<sup>21</sup>.

Regulations have been made for the purpose of implementing these Directives. These are, in relation to England, the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007<sup>22</sup> and, in relation to Wales, the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007<sup>23</sup>.

1    le EC Council Directive 80/777 (OJ L229, 30.08.80, p 01).

2    See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) art 1 (amended by European Parliament and EC Council Directive 96/70 (OJ L299, 23.11.96, p 26)).

3    See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) Annex I.

4    See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) art 2.

5    See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) art 3, Annex II.

6 See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) arts 6-9 (arts 7, 9 amended by European Parliament and EC Council Directive 96/70 (OJ L299, 23.11.96, p 26)).

7 See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) art 4 (replaced by European Parliament and EC Council Directive 96/70 (OJ L299, 23.11.96, p 26)).

8 See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) arts 5, 11 (amended by European Parliament and EC Council Directive 96/70 (OJ L299, 23.11.96, p 26)).

9 See EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) art 14. As to the European Economic Area see the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183).

10 *le* EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) establishing the list, concentration limits and labelling requirements for the constituents of natural mineral waters and the conditions for using ozone-enriched air for the treatment of natural mineral waters and spring waters.

11 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 1.

12 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 1.

13 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 1.

14 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 2, Annex I.

15 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 3, Annex II.

16 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 4.

17 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 5.

18 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 6.

19 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 7.

20 See EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 8.

21 *le* EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) on the quality of water intended for human consumption: see PARA 371. The Directive does not apply to natural mineral waters recognised as such by the competent national authorities, in accordance with EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) (see the text to notes 1-9): EC Council Directive 98/83 (OJ L330, 05.12.98, p 32) art 3(1)(a).

22 *le* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785: see PARAS 448-452.

23 *le* the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165: see PARAS 448-452.

## **UPDATE**

### **447-452 Sale and supply of bottled water**

SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

### **447 European Community requirements**

TEXT AND NOTES 1-9--Directive 80/777 replaced: European Parliament and EC Council Directive 2009/54 on the exploitation and marketing of natural mineral waters.

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#### **448. Recognition of water as natural mineral water.**

Water is recognised as natural mineral water<sup>1</sup> where:

- 1018 (1) in the case of water extracted from the ground in England, recognition is granted<sup>2</sup> by the relevant authority<sup>3</sup>;
- 1019 (2) in the case of water extracted from the ground in another part of the United Kingdom<sup>4</sup>, it is recognised there pursuant to the European Directive on the approximation of the laws of the member states relating to the exploitation and marketing of natural mineral waters<sup>5</sup> by a responsible authority of that part of the United Kingdom<sup>6</sup>;
- 1020 (3) in the case of water extracted from the ground in an EEA state other than the United Kingdom, it is recognised there pursuant to that Directive by a responsible authority of that EEA state<sup>7</sup>; and
- 1021 (4) in the case of water extracted from the ground in a country other than an EEA state (a) it is recognised<sup>8</sup> by the Food Standards Agency<sup>9</sup>; or (b) it has an equivalent recognition, given by a responsible authority of another part of the United Kingdom or an EEA state other than the United Kingdom<sup>10</sup>.

The relevant authority or, as the case may be, the Food Standards Agency, may withdraw recognition under head (1) or (4)(a) above if certain requirements are not met<sup>11</sup>; and a person<sup>12</sup> who exploits a spring from which there is extracted water which is recognised as a natural mineral water in accordance with those heads, may apply to the relevant authority or the Agency, as appropriate, to have that recognition withdrawn<sup>13</sup>. Where the relevant authority declines to grant or withdraws recognition of a water, or the Agency declines to grant or withdraws recognition of a water, the person who exploits or wishes to exploit the spring from which that water emerges or, if different, the person who owns the land<sup>14</sup> on which that spring is situated, may apply to the Agency for a review of that decision<sup>15</sup>.

Where the relevant authority: (i) grants, restores or withdraws recognition, it must immediately inform the Agency of that fact<sup>16</sup>; (ii) is notified of any change to the trade description of a natural mineral water or to the name of a spring from which natural mineral water has been extracted, it must immediately inform the Agency of that change<sup>17</sup>; or (iii) is directed by the Agency<sup>18</sup> to grant or restore recognition, it must immediately comply with that direction<sup>19</sup>.

1 'Natural mineral water' means water which: (1) is microbiologically wholesome; (2) originates in an underground water table or deposit and emerges from a spring tapped at one or more natural or bore exits; (3) can be clearly distinguished from ordinary drinking water on account of the following characteristics having been preserved intact because of the underground origin of the water, which origin must have been protected from all risk of pollution (a) its nature, which is characterised by its mineral content, trace elements or other constituents and, where appropriate, by certain effects; (b) its original state; and (4) is for the time being recognised pursuant to and in accordance with the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4: reg 2(1). 'Drinking water' means water which is intended for sale for drinking by humans other than natural mineral water, or water bottled in a bottle marked or labelled 'spring water' in accordance with reg 11 (see PARA 450): reg 2(1). 'Bottle', the noun, means a closed container of any kind in which water is sold for drinking by humans or from which water sold for drinking by humans is derived; and 'bottle', the verb, and cognate expressions, must be construed accordingly: reg 2(1). Any reference to the marking or labelling of a bottle includes both marking or labelling done before any water is bottled and marking or labelling done after bottling: reg 2(4).

The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, do not apply to any water which: (i) has a product licence issued under the provisions of the Medicines Act 1968 (see **MEDICINAL PRODUCTS AND DRUGS** vol 30(2) (Reissue) PARA 44), or a marketing authorisation within the meaning of the Medicines for Human Use (Marketing Authorisations etc) Regulations 1994, SI 1994/3144 (see **MEDICINAL PRODUCTS AND DRUGS** vol 30(2) (Reissue) PARA 20) or a marketing authorisation within the meaning of the Veterinary Medicines Regulations 2005, SI 2005/2745 (revoked) (see now the Veterinary Medicines Regulations 2008, SI 2008/2297; and **MEDICINAL PRODUCTS AND DRUGS**); (ii) is a natural mineral water which is used at source for curative purposes in thermal or hydromineral establishments; (iii) is not intended for sale for drinking by humans; or (iv) is a natural mineral water intended for export to a country other than an EEA state: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 3(1). The regulations do not apply to packaged ice portions intended for use in cooling food: reg 3(2). As to the meaning of 'EEA state' see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Legislative and Regulatory Reform Act 2006 s 26(1)). The provisions of the Food Safety Act 1990 s 2 (extended meaning of 'sale' etc: see **FOOD** vol 18(2) (Reissue) PARA 262); s 3 (presumptions that food intended for human consumption: see **FOOD** vol 18(2) (Reissue) PARA 282); s 20 (offences due to fault of another person: see **FOOD** vol 18(2) (Reissue) PARA 461); s 21 (defence of due diligence: see **FOOD** vol 18(2) (Reissue) PARA 465) as it applies for the purposes of s 14 or s 15; s 22 (defence of publication in the course of business: see **FOOD** vol 18(2) (Reissue) PARA 467); s 30(8) (which relates to documentary evidence: see **FOOD** vol 18(2) (Reissue) PARA 462); s 33(1) (obstruction etc of officers: see **FOOD** vol 18(2) (Reissue) PARA 271); s 33(2) (see **FOOD** vol 18(2) (Reissue) PARA 271) with modifications; s 35(1) (punishment of offences: see **FOOD** vol 18(2) (Reissue) PARA 468) in so far as it relates to offences under s 33(1); s 35(2), (3) (see **FOOD** vol 18(2) (Reissue) PARA 468) in so far as they relate to offences under s 33(2); s 36 (offences by bodies corporate: see **FOOD** vol 18(2) (Reissue) PARA 460); and s 44 (protection of officers acting in good faith: see **FOOD** vol 18(2) (Reissue) PARA 272), apply for the purposes of the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785: see reg 22(1).

The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, apply in relation to England only: see reg 1. As to the equivalent regulations in relation to Wales see the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2     In accordance with the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 3 Pt 1.

3     Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(1)(a). 'Relevant authority' means the council of a district or London Borough: reg 2(1). As to local government areas and authorities in England see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. Any recognition of water as a natural mineral water granted under the Natural Mineral Waters Regulations 1985, SI 1985/71 (revoked) or the Natural Mineral Water, Spring Water and Bottled Drinking Water Regulations 1999, SI 1999/1540 (revoked), and subsisting on 31 October 2007 (ie the date that the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, came into force) must, in the case of water extracted from the ground in England, be treated as if it were recognition granted by the relevant authority under reg 4(1)(a): reg 4(7)(a).

4     As to the meaning of 'United Kingdom' see PARA 22 note 5.

5     In EC Council Directive 80/777 (OJ L229, 30.08.80, p 01): see PARA 447. The publication in the Official Journal of the European Union of the name of any water as a natural mineral water recognised in the Community for the purposes of the Directive is, save where recognition was granted in accordance with the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 3, conclusive evidence that that water is recognised for the purposes of the Directive: reg 4(8).

6     Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(1)(b).

7     Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(1)(c).

8     In accordance with the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 3 Pt 2.

9     Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(1)(d)(i). As to the Food Standards Agency see **FOOD** vol 18(2) (Reissue) PARA 225 et seq. Any recognition of water as a natural mineral water granted under the Natural Mineral Waters Regulations 1985, SI 1985/71 (revoked) or the Natural Mineral Water, Spring Water and Bottled Drinking Water Regulations 1999, SI 1999/1540 (revoked) and subsisting on 31 October 2007 (ie the date that the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, came into force) must, in the case

of water extracted from the ground in a country other than an EEA state, be treated as if it were recognition granted by the Agency under reg 4(1)(d)(i): reg 4(7)(b).

10 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(1)(d)(ii).

11 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(2).

12 As to the meaning of 'person' see PARA 13 note 29.

13 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(5).

14 As to the meaning of 'land' see PARA 14 note 21.

15 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(3). Upon such an application for review of a decision being made, the Agency must make such inquiry into the matter as may seem to it to be appropriate and, having considered the results of that inquiry and any relevant facts elicited by it, must either confirm the decision (reg 4(4)(a)), or direct the relevant authority to grant or restore, or itself restore, as appropriate, recognition of the water in question (reg 4(4)(b)).

16 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(6)(a).

17 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(6)(b).

18 le under the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(4)(b): see note 15.

19 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 4(6)(c).

## **UPDATE**

### **447-452 Sale and supply of bottled water**

SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

### **448 Recognition of water as natural mineral water**

NOTE 1--In the definition of 'natural mineral water', now head (3)(b) its original purity: SI 2007/2785 reg 2(1) (definition replaced by SI 2009/1598). SI 2008/2297 replaced: Veterinary Medicines Regulations 2009, SI 2009/2297.

NOTE 5--Directive 80/777 replaced: European Parliament and EC Council Directive 2009/54 on the exploitation and marketing of natural mineral waters.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(8) SALE AND SUPPLY OF BOTTLED WATER/449. Regulations applying to natural mineral water.

#### **449. Regulations applying to natural mineral water.**

No person may<sup>1</sup>:

- 1022 (1) exploit any spring for the purpose of marketing the water from it as natural mineral water<sup>2</sup> unless the water extracted from that spring is natural mineral water<sup>3</sup>, the relevant authority<sup>4</sup> has given permission for that spring to be exploited<sup>5</sup>, and the statutory requirements<sup>6</sup> are met<sup>7</sup>;
- 1023 introduction or the reintroduction of carbon dioxide to produce effervescent natural mineral water<sup>10</sup>;
- 1024 (3) bottle any natural mineral water which, at the time of bottling, contains any listed substance<sup>11</sup> at a level which exceeds the maximum specified limit<sup>12</sup> in relation to that substance<sup>13</sup>;
- 1025 (4) bottle any natural mineral water which does not meet the statutory requirements<sup>14</sup>;
- 1026 (5) bottle any natural mineral water in any container other than a container which is fitted with closures designed to avoid any possibility of adulteration or contamination<sup>15</sup>;
- 1027 (6) cause a natural mineral water to be bottled in a bottle marked or labelled with a trade description, any designation, proprietary name, trade mark, brand name, illustration or other sign, any indication, or a sales description, that does not meet the statutory requirements<sup>16</sup>;
- 1028 (7) cause natural mineral water to be bottled in a bottle unless the bottle is marked or labelled in accordance with the statutory requirements<sup>17</sup>;
- 1029 (8) advertise<sup>18</sup> any natural mineral water under any designation, proprietary name, trade mark, brand name, illustration or other sign, whether emblematic or not, the use of which suggests a characteristic which the water does not possess<sup>19</sup>;
- 1030 (9) sell<sup>20</sup> any water bottled in a bottle the marking or labelling of which uses the name 'natural mineral water' in or as the name of the water unless that water is natural mineral water<sup>21</sup>;
- 1031 (10) sell any bottled natural mineral water which contains the prescribed matter<sup>22</sup>;
- 1032 (11) sell any bottled natural mineral water which has been extracted from a spring which is exploited in contravention of head (1) above, which has been subjected to any treatment or addition in contravention of head (2) above, which is marked or labelled in contravention of head (6) above<sup>23</sup>, or is not appropriately marked or labelled<sup>24</sup>;
- 1033 (12) sell any natural mineral water from one and the same spring under more than one trade description<sup>25</sup>.

1 As to the meaning of 'person' see PARA 13 note 29. As to enforcement and offences see PARA 452.

2 As to the meaning of 'natural mineral water' see PARA 448 note 1.

3 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 5(1)(a). The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, apply in relation to England only: see reg 1. As to the equivalent regulations in relation to Wales see the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA

16 note 2. Various provisions of the Food Safety Act 1990 apply for the purposes of the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785: see reg 22(1); and PARA 448 note 1.

4 As to the meaning of 'relevant authority' see PARA 448 note 3.

5 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 5(1)(b).

6 The statutory requirements are: (1) equipment for exploiting the water must be so installed as to avoid any possibility of contamination and to preserve the properties corresponding to those ascribed to it which the water possesses at source (Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 4 para 1); (2) the spring or outlet must be protected against the risks of pollution (Sch 4 para 2); (3) the catchment, pipes and reservoirs must be of materials suitable for water and so built as to prevent any chemical, physico-chemical or microbiological alteration of the water (Sch 4 para 3); (4) the conditions of exploitation, particularly at the washing and bottling plant, must meet hygiene requirements (and in particular, the containers must be so treated or manufactured as to avoid adverse effects on the microbiological and chemical characteristics of the natural water) (Sch 4 para 4); (5) water must not be transported in containers other than those authorised for distribution to the ultimate consumer, but (a) natural mineral water may be transported from the spring to the bottling plant in a container which is not for distribution to the ultimate consumer if on or before 17 July 1980 water from that spring was so transported; (b) water distributed to the ultimate consumer in a bottle marked or labelled with the description 'spring water' may be transported from the spring to the bottling plant in a container which is not for distribution to the ultimate consumer if on or before 23 November 1996 water from that spring was so transported (Sch 4 para 5); (6) the revivable total colony count of the water at source, determined as set out below, must conform to the normal viable colony count of that water and must not show that the source of that water is contaminated. The colony count is that determined per ml of water (a) at 20 to 22°C in 72 hours on agar-agar or an agar-gelatine mixture; and (b) at 37°C in 24 hours on agar-agar (Sch 4 para 6); (7) after bottling, the total colony count of the water at source may not exceed 100 per ml at 20 to 22°C in 72 hours on agar-agar or an agar-gelatine mixture; and 20 per ml at 37°C in 24 hours on agar-agar. The total colony count must be measured within the period of 12 hours following bottling, the water being maintained at 4°C +/- 1°C during the period before which it is measured (Sch 4 para 7); (8) water must be free from (a) parasites and pathogenic micro-organisms; (b) *escherichia coli* and other coliforms and faecal streptococci in any 250 ml sample examined; (c) sporulated sulphite-reducing anaerobes in any 50 ml sample examined; and (d) *pseudomonas aeruginosa* in any 250 ml sample examined (Sch 4 para 8). As to the meaning of 'bottling' see PARA 448 note 1. As to the meanings of 'marking' and 'labelling' see PARA 448 note 1.

7 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 5(1)(c). Where it is found during exploitation that natural mineral water is polluted and that bottling of the water would contravene Sch 4 para 6, 7 or 8 (see heads (6), (7) and (8) in note 6), no person may exploit the spring from which the water is extracted until the cause of the pollution is eradicated and the bottling of the water would comply with those paragraphs: reg 5(2).

8 The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 6(1) does not prevent the use of natural mineral water in the manufacture of soft drinks: reg 6(2).

9 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 6(1)(a). The authorised treatments are: (1) an authorised ozone-enriched air oxidation technique; (2) the separation of its unstable elements, such as iron and sulphur compounds, by filtration or decanting, whether or not preceded by oxygenation, in so far as the treatment does not alter the composition of the water as regards the essential constituents which give it its properties; or (3) the total or partial elimination of free carbon dioxide by exclusively physical methods: reg 6(1)(a)(i)-(iii). 'Authorised ozone-enriched air oxidation technique' means: (a) a treatment with ozone-enriched air authorised and carried out in accordance with Sch 1; or (b) in the case of water brought into England from other parts of the United Kingdom or from another EEA state a treatment which complies with EC Commission Directive 2003/40 (OJ L126, 22.05.2003, p 34) art 5 (see PARA 447) as implemented in that part of the United Kingdom or that EEA state: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 2(1). As to the meaning of 'United Kingdom' see PARA 22 note 5. As to the meaning of 'EEA state' see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Legislative and Regulatory Reform Act 2006 s 26(1)).

10 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 6(1)(b). 'Effervescent natural mineral water' means natural mineral water which, at source or after bottling, gives off carbon dioxide spontaneously and in a clearly visible manner under normal conditions of temperature and pressure: reg 2(1).

11 Is any substance listed in the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 6.



12 le the maximum limit specified in the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 6.

13 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 7(1). The methods used for detection of the substances listed in Sch 6 must conform to the performance characteristics for analysis specified in Sch 7: reg 7(2).

14 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 7(3). The statutory requirements are those of Sch 4: see note 6.

15 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 7(4).

16 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 8(1), (3), (5). The Food Labelling Regulations 1996, SI 1996/1149, reg 38 (intelligibility: see **FOOD** vol 18(2) (Reissue) PARA 405) applies to any name, description, indication, information or other wording with which water is required or permitted by the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, to be marked or labelled, as it applies to particulars required to be labelled under the Food Labelling Regulations 1996, SI 1996/1149: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(2).

17 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 8(2). See also reg 22(2); and note 16.

18 'Advertisement' includes any notice, circular, invoice or other document, and any public announcement made orally or by any means of producing or transmitting light or sound, but does not include any form of labelling; and 'advertise' must be construed accordingly: Food Labelling Regulations 1996, SI 1996/1499, reg 2(1); definition applied by the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 2(1).

19 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 8(4).

20 'Sell' includes possess for sale and offer, expose or advertise for sale, and 'sale' must be construed accordingly: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 2(1). See also the Food Safety Act 1990 s 2 (extended meaning of 'sale': see **FOOD** vol 18(2) (Reissue) PARA 262): applied by the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(1).

21 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 9(1).

22 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 9(2).

23 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 9(3).

24 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(3).

25 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 9(4).

## **UPDATE**

### **447-452 Sale and supply of bottled water**

SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

### **449 Regulations applying to natural mineral water**

NOTE 6--SI 2007/2785 Sch 4 paras 4, 8 substituted, Sch 4 para 5 amended: SI 2009/1598.

NOTES 16, 19, 22--SI 2007/2785 regs 8(1), 9(2) amended, reg 8(4) substituted: SI 2009/1598.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(8) SALE AND SUPPLY OF BOTTLED WATER/450. Regulations applying to spring water.

#### **450. Regulations applying to spring water.**

No person may<sup>1</sup>:

- 1034 (1) cause any water to be bottled in a bottle<sup>2</sup> marked or labelled<sup>3</sup> with the description 'spring water' unless that water has been extracted from a spring<sup>4</sup> and meets the statutory requirements<sup>5</sup>;
- 1035 (2) cause any water which has been treated with ozone-enriched air to be bottled in a bottle marked or labelled 'spring water', unless that treatment is an authorised ozone-enriched air oxidation technique<sup>6</sup>;
- 1036 (3) where it is found during exploitation that spring water is polluted and that bottling of the water would contravene the statutory requirements<sup>7</sup>, exploit the spring from which the water is extracted until the cause of the pollution is eradicated and the bottling of the water would comply with those requirements<sup>8</sup>;
- 1037 (4) cause any bottle to be marked or labelled with the description 'spring water' unless the water contained in it is bottled as specified in heads (1) to (3) above<sup>9</sup> and is intended for consumption in its natural state<sup>10</sup>;
- 1038 (5) cause any bottle containing water and marked or labelled with the description 'spring water' to be marked or labelled with a trade description that does not meet the statutory requirements<sup>11</sup>;
- 1039 (6) cause any water to be bottled in a bottle marked or labelled with the description 'spring water' unless the bottle is also marked or labelled with the name of the place where the spring in question is exploited and the name of the spring<sup>12</sup>;
- 1040 (7) advertise<sup>13</sup> any spring water in contravention of the prescribed requirements<sup>14</sup>;
- 1041 (8) sell<sup>15</sup> any water bottled in a bottle marked or labelled with the description 'spring water' which has not been bottled in accordance with heads (1) to (3) above<sup>16</sup>, which is not marked or labelled in accordance with head (4), (5) or (6) above<sup>17</sup>, or otherwise not appropriately marked or labelled<sup>18</sup>;
- 1042 (9) sell water from one and the same spring, bottled in a bottle marked or labelled with the description 'spring water', under more than one trade description<sup>19</sup>.

1 As to the meaning of 'person' see PARA 13 note 29. As to enforcement and offences see PARA 452.

2 As to the meanings of 'bottled' and 'bottle' see PARA 448 note 1.

3 As to the meanings of 'marked' and 'labelled' see PARA 448 note 1.

4 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 10(1)(a). The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, apply in relation to England only: see reg 1. As to the equivalent regulations in relation to Wales see the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. Various provisions of the Food Safety Act 1990 apply for the purposes of the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785: see reg 22(1); and PARA 448 note 1.

5 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 10(1)(b). As to the statutory requirements see Schs 2 and 4.

6 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 10(2). As to the meaning of 'authorised ozone-enriched air oxidation technique' see PARA 449 note 9.

7 It would contravene the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 4 para 6, 7 or 8: see PARA 449 note 6.

8 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 10(3).

9 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 11(1)(a).

10 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 11(1)(b).

11 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 11(2), (4). The Food Labelling Regulations 1996, SI 1996/1149, reg 38 (intelligibility: see **FOOD** vol 18(2) (Reissue) PARA 405) applies to any name, description, indication, information or other wording with which water is required or permitted by the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, to be marked or labelled, as it applies to particulars required to be labelled under the Food Labelling Regulations 1996, SI 1996/1149: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(2).

12 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 11(3)(a), (b). In any case where the water has undergone an authorised ozone-enriched air oxidation technique, the bottle must also be marked or labelled with the words 'water subjected to an authorised ozone-enriched air oxidation technique', which words must appear in proximity to the particulars referred to in reg 11(3)(a) and (b): reg 11(3)(c).

13 As to the meaning of 'advertise' see PARA 449 note 18.

14 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 11(5).

15 As to the meaning of 'sell' see PARA 449 note 20.

16 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 12(1)(a).

17 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 12(1)(b).

18 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(3).

19 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 12(2).

## **UPDATE**

### **447-452 Sale and supply of bottled water**

SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(8) SALE AND SUPPLY OF BOTTLED WATER/451. Regulations applying to bottled drinking water.

#### **451. Regulations applying to bottled drinking water.**

No person may<sup>1</sup>:

1043 (1) cause any drinking water<sup>2</sup> to be bottled<sup>3</sup> unless that water meets the statutory requirements<sup>4</sup>;

1044 (2) cause any drinking water which does not satisfy the provisions of the European Directive on the approximation of the laws of the member states relating to the exploitation and marketing of natural mineral waters<sup>5</sup> to be bottled in a bottle<sup>6</sup> marked or labelled<sup>7</sup> with any designation, proprietary name, trade mark, brand name, illustration or other sign, whether emblematic or not, the use of which is liable to cause confusion of the water with a natural mineral water<sup>8</sup>, or the description 'mineral water'<sup>9</sup>;

1045 (3) cause any bottled drinking water which does not satisfy those provisions of the Directive to be advertised<sup>10</sup> under any designation, proprietary name, trade mark, brand name, illustration or other sign, whether emblematic or not, the use of which is liable to cause confusion of the water with a natural mineral water<sup>11</sup>, or the description 'mineral water'<sup>12</sup>;

1046 (4) sell<sup>13</sup> any bottled drinking water which has not been bottled in accordance with head (1) above<sup>14</sup>, or has not been marked or labelled in accordance with head (2) above<sup>15</sup> or otherwise appropriately marked or labelled<sup>16</sup>.

1 As to the meaning of 'person' see PARA 13 note 29. As to enforcement and offences see PARA 452.

2 As to the meaning of 'drinking water' see PARA 448 note 1.

3 As to the meaning of 'bottled' see PARA 448 note 1.

4 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 13. The statutory requirements are those of Sch 2. The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, apply in relation to England only: see reg 1. As to the equivalent regulations in relation to Wales see the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. Various provisions of the Food Safety Act 1990 apply for the purposes of the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785: see reg 22(1); and PARA 448 note 1.

5 I.e. the provisions of EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) Annex I Section I. As to EC Council Directive 80/777 (OJ L229, 30.08.80, p 01) see PARA 447.

6 As to the meaning of 'bottle' see PARA 448 note 1.

7 As to the meanings of 'marked' and 'labelled' see PARA 448 note 1.

8 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 14(a)(i). As to the meaning of 'natural mineral water' see PARA 448 note 1. The Food Labelling Regulations 1996, SI 1996/1149, reg 38 (intelligibility: see **FOOD** vol 18(2) (Reissue) PARA 405) applies to any name, description, indication, information or other wording with which water is required or permitted by the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, to be marked or labelled, as it applies to particulars required to be labelled under the Food Labelling Regulations 1996, SI 1996/1149: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(2).

9 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 14(a)(ii).

10 As to the meaning of 'advertise' see PARA 449 note 18.

11 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 14(b)(i).

12 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 14(b)(ii).

13 As to the meaning of 'sell' see PARA 449 note 20.

14 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 15(a).

15 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 15(b).

16 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(3).

## **UPDATE**

### **447-452 Sale and supply of bottled water**

SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

### **451 Regulations applying to bottled drinking water**

NOTE 5--Directive 80/777 replaced: European Parliament and EC Council Directive 2009/54 on the exploitation and marketing of natural mineral waters.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/6. WATER SUPPLY/(8) SALE AND SUPPLY OF BOTTLED WATER/452. Enforcement and offences.

## **452. Enforcement and offences.**

Each relevant authority<sup>1</sup> must, within its area, carry out periodic checks on any water which has been recognised as a natural mineral water<sup>2</sup>, and carry out periodic checks on any ozone-enriched air oxidation technique<sup>3</sup> authorised by it<sup>4</sup>.

The Natural Mineral Water, Spring Water and Bottled Drinking Water Regulations<sup>5</sup> are to be enforced and executed, within its area, by each food authority<sup>6</sup>. Provision is made for the analysis of any sample<sup>7</sup> procured by an authorised officer of a food authority<sup>8</sup> who considers that it should be analysed for the purposes of the regulations<sup>9</sup>.

A person<sup>10</sup> is guilty of an offence<sup>11</sup> if he contravenes any of the following provisions:

- 1047 (1) the provisions regulating the exploitation of natural mineral water springs<sup>12</sup>;
- 1048 (2) the provisions regulating treatments and additions for natural mineral waters<sup>13</sup>;
- 1049 (3) the provisions regulating the bottling of natural mineral waters<sup>14</sup>;
- 1050 (4) the provisions regulating the marking, labelling and advertising of natural mineral waters<sup>15</sup>, and their sale<sup>16</sup>;
- 1051 (5) the provisions regulating the bottling of spring water and the exploitation of spring water springs<sup>17</sup>;
- 1052 (6) the provisions regulating the marking, labelling and advertising of spring mineral water<sup>18</sup>, and its sale<sup>19</sup>;
- 1053 (7) the provisions regulating the bottling of drinking water<sup>20</sup>;
- 1054 (8) the provisions regulating the marking, labelling and advertising of bottled drinking water<sup>21</sup>, and those regulating<sup>22</sup> its sale<sup>23</sup>.

In any proceedings for any such offence it is a defence for the accused<sup>24</sup> to show that the water was bottled<sup>25</sup> and marked or labelled<sup>26</sup> before 31 October 2007<sup>27</sup> and under the regulations then in force<sup>28</sup> no offence would have been committed by him<sup>29</sup>. In any proceedings for any such offence where it is alleged that water does not meet the requirements as to concentrations or values<sup>30</sup>, it is a defence for the person accused to show that the water in question was bottled or sold<sup>31</sup> in an EEA state<sup>32</sup> other than the United Kingdom<sup>33</sup> and the water complied with the law in that EEA state when it was bottled or sold<sup>34</sup>.

Certain provisions of the Food Safety Act<sup>35</sup> apply in respect of offences under the above provisions<sup>36</sup>.

1 As to the meaning of 'relevant authority' see PARA 448 note 3.

2 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 16(1). As to the meaning of 'natural mineral water' see PARA 448 note 1. The Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, apply in relation to England only: see reg 1. As to the equivalent regulations in relation to Wales see the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2007, SI 2007/3165. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. Various provisions of the Food Safety Act 1990 apply for the purposes of the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785: see reg 22(1); and PARA 448 note 1.

3 As to the meaning of 'authorised ozone-enriched air oxidation technique' see PARA 449 note 9.

- 4 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 16(2).
- 5 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785.
- 6 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 16(3). As to food authorities see **FOOD** vol 18(2) (Reissue) PARA 251 et seq.
- 7 'Sample' includes one or more bottles of any water: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 17(1). As to the meaning of 'bottle' see PARA 448 note 1.
- 8 *Ie* under the Food Safety Act 1990 s 29: see **FOOD** vol 18(2) (Reissue) PARA 262.
- 9 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, regs 17-19.
- 10 As to the meaning of 'person' see PARA 13 note 29.
- 11 The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 20. As to the standard scale see PARA 141 note 18.
- 12 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 5: see PARA 449.
- 13 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 6(1): see PARA 449.
- 14 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 7(1), (3), (4): see PARA 449.
- 15 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 8: see PARA 449.
- 16 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, regs 9, 22(3): see PARA 449.
- 17 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 10: see PARA 450.
- 18 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 11: see PARA 450.
- 19 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 12, 22(3): see PARA 450.
- 20 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 13: see PARA 451.
- 21 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 14: see PARA 451.
- 22 *Ie* the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, regs 15, 22(3): see PARA 451.
- 23 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 20.
- 24 As to the standard of proof on the accused see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1370-1371.
- 25 As to the meaning of 'bottled' see PARA 448 note 1.
- 26 As to the meanings of 'marked' and 'labelled' see PARA 448 note 1.



27 le before the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, came into force.

28 le under the Natural Mineral Water, Spring Water and Bottled Drinking Water Regulations 1999, SI 1999/1540 (revoked).

29 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 21(1).

30 le the requirements in the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, Sch 2 Pt 1 para 1(c).

31 As to the meaning of 'sell' see PARA 449 note 20.

32 As to the meaning of 'EEA state' see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Legislative and Regulatory Reform Act 2006 s 26(1)).

33 As to the meaning of 'United Kingdom' see PARA 22 note 5.

34 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 21(2).

35 le the Food Safety Act 1990 s 20 (offences due to fault of another person: see **FOOD** vol 18(2) (Reissue) PARA 461); s 21 (defence of due diligence: see **FOOD** vol 18(2) (Reissue) PARA 465) as it applies for the purposes of s 14 or s 15; s 22 (defence of publication in the course of business: see **FOOD** vol 18(2) (Reissue) PARA 467); s 30(8) (which relates to documentary evidence: see **FOOD** vol 18(2) (Reissue) PARA 462); s 33(1) (obstruction etc of officers: see **FOOD** vol 18(2) (Reissue) PARA 271); s 33(2) (see **FOOD** vol 18(2) (Reissue) PARA 271); s 35(1) (punishment of offences: see **FOOD** vol 18(2) (Reissue) PARA 468) in so far as it relates to offences under s 33(1) as applied above; s 35(2) and (3) (see **FOOD** vol 18(2) (Reissue) PARA 468) in so far as they relate to offences under s 33(2) as applied above; s 36 (offences by bodies corporate: see **FOOD** vol 18(2) (Reissue) PARA 460); and s 44 (protection of officers acting in good faith: see **FOOD** vol 18(2) (Reissue) PARA 272).

36 See the Natural Mineral Water, Spring Water and Bottled Drinking Water (England) Regulations 2007, SI 2007/2785, reg 22(1).

## **UPDATE**

### **447-452 Sale and supply of bottled water**

SI 2007/3165 amended: SI 2009/1897, SI 2010/748.

### **452 Enforcement and offences**

TEXT AND NOTES 1, 2--SI 2007/2785 reg 16(1) substituted: SI 2009/1598.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/7. GENERAL LAND AND WORKS POWERS/ (1) ACQUISITION AND DISPOSAL OF LAND/453. Powers of compulsory purchase.

## **7. GENERAL LAND AND WORKS POWERS**

### **(1) ACQUISITION AND DISPOSAL OF LAND**

#### **453. Powers of compulsory purchase.**

A relevant undertaker<sup>1</sup> or the Environment Agency<sup>2</sup> may be authorised by the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup>, to purchase compulsorily any land

anywhere in England and Wales which is required by the undertaker or, as the case may be, by the Agency, for the purposes of, or in connection with, the carrying out of its functions<sup>5</sup>. The power of the Secretary of State or, as the case may be, the Welsh Ministers to authorise such acquisition includes power to authorise the acquisition of interests in or rights over land, either by the creation of new interests and rights or by the acquisition of existing interests or rights to provide for their extinguishment<sup>6</sup>. The functions of the Secretary of State, the Welsh Ministers and the Agency under the land and works powers of the Water Resources Act 1991<sup>7</sup> must be exercised so as to secure compliance with the Water Framework Directive<sup>8</sup>.

Relevant undertakers and the Agency also have power to purchase land by agreement<sup>9</sup>; and the Agency may purchase land, or take it on lease, either by agreement, or, if so authorised, compulsorily, for certain fisheries purposes<sup>10</sup>. All the powers relating to land and works conferred on relevant undertakers<sup>11</sup> and on the Agency<sup>12</sup> are without prejudice to any powers conferred by any agreement<sup>13</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Environment Agency see PARA 17. The incidental functions of the Agency include joining with, or acting on behalf of, one or more relevant undertakers for the purpose of acquiring any land which at least one of the undertakers with which it joins, or on whose behalf it acts, is authorised to acquire for the purposes of any function of that undertaker under any enactment, or any function which is taken to be a function of that undertaker for the purposes to which the Water Industry Act 1991 s 217 (see PARA 133 note 5) applies: see the Environment Act 1995 s 10(1), (3); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 80. As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'enactment' see PARA 14 note 31.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under: (1) the Water Industry Act 1991 s 155 were transferred to the National Assembly for Wales as follows: (a) functions so far as relating to matters concerning the construction or enlargement of reservoirs were transferred to the Assembly in relation to Wales; (b) functions so far as relating to matters other than the construction or enlargement of reservoirs were transferred to the Assembly in relation to such parts of Wales as are outside the catchment areas of the rivers Dee, Wye and Severn; and (c) functions so far as relating to matters other than the construction or enlargement of reservoirs were, in relation to such parts of Wales as are within the catchment areas of the rivers Dee, Wye and Severn, exercisable by the Assembly concurrently with the Secretary of State; and (2) under the Water Resources Act 1991 s 154, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the meaning of 'England' see PARA 19 note 8.

5 Water Industry Act 1991 s 155(1); Water Resources Act 1991 s 154(1) (s 154(1)-(4) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'functions' in relation to a relevant undertaker see PARA 133 note 5. As to the Agency's functions see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

The land which a relevant undertaker, or the Agency, may be so authorised to purchase compulsorily may include land which is or will be required for the purpose of being given in exchange for, or for any right over, any other land which for the purposes of the Acquisition of Land Act 1981 is or forms part of a common, open space or fuel or field garden allotment (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 531): see the Water Industry Act 1991 s 155(3); Water Resources Act 1991 s 154(3) (as so amended). Subject to the Water Industry Act 1991 s 188 or, as the case may be, the Water Resources Act 1991 s 182 (mineral rights: see PARA 493 et seq), the Acquisition of Land Act 1981 applies to any such compulsory acquisition: see the Water Industry Act 1991 s 155(4); Water Resources Act 1991 s 154(4) (as so amended). As to the compulsory acquisition of land generally **COMPULSORY ACQUISITION OF LAND**.

6 See the Water Industry Act 1991 s 155(2); Water Resources Act 1991 s 154(2) (as amended: see note 5). Where the creation of a new interest or right is secured compulsorily, the enactments relating to compensation for the compulsory purchase have effect with the necessary modifications, and the Compulsory Purchase Act 1965 and the Acquisition of Land Act 1981 (see **COMPULSORY ACQUISITION OF LAND**), in their application to such compulsory acquisition, have effect with prescribed modifications: see the Water Industry Act 1991 s 155(5), Sch 9; the Water Resources Act 1991 s 154(5), Sch 18.

7 le under the Water Resources Act 1991 Pt VII (ss 154-186).

8 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(1), (3), Sch 2; and PARA 198. As to the Water Framework Directive (European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) see PARA 7.

9 See PARAS 609, 133 note 5.

10 Without prejudice to the Environment Act 1995 s 37 (incidental general powers of the Agency: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 73): (1) the powers conferred on the Agency by that provision and by the Water Resources Act 1991 s 154 (see the text to notes 1-6) include power to purchase or take on lease (either by agreement or, if so authorised, compulsorily) (a) any dam, fishing weir, fishing mill dam, fixed engine or other artificial obstruction and any fishery attached to or worked in connection with any such obstruction; (b) so much of the bank adjoining a dam as may be necessary for making or maintaining a fish pass for the purposes of the Salmon and Freshwater Fisheries Act 1975 s 10 (see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 860); and (c) for the purpose of erecting and working a fixed engine, any fishery land or foreshore together with any easement over any adjoining land necessary for securing access to the fishery land or foreshore so acquired; and (2) the Agency may (a) either alter or remove an obstruction acquired in the exercise of those powers; or (b) by itself or its lessees use or work in any lawful manner the obstruction for fishing purposes and exercise the right by any fishery so acquired, subject, in the case of an obstruction or fishery acquired by way of lease, to the terms of the lease: Water Resources Act 1991 s 156(1), (2) (both amended by the Environment Act 1995 Sch 22 paras 128, 158). Expressions used in the Water Resources Act 1991 s 156 and in the Salmon and Freshwater Fisheries Act 1975 have the same meanings for these purposes as in that Act: Water Resources Act 1991 s 156(3). See further **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 789 et seq.

11 le by the Water Industry Act 1991 Pt VI (ss 155-192).

12 le by the Water Resources Act 1991 Pt VII (ss 154-186).

13 Water Industry Act 1991 s 192(5); Water Resources Act 1991 s 186(3) (amended by the Environment Act 1995 Sch 22 para 128). The powers so conferred on relevant undertakers are cumulative: Water Industry Act 1991 s 192(5). The powers so conferred on the Agency are without prejudice to any powers conferred by any other enactment: s 186(3) (as so amended).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/7. GENERAL LAND AND WORKS POWERS/ (1) ACQUISITION AND DISPOSAL OF LAND/454. Restrictions on the disposal of land.

#### **454. Restrictions on the disposal of land.**

A company holding an appointment as a relevant undertaker<sup>1</sup> may not dispose of any of its protected land<sup>2</sup>, or of any interest or right in or over any of that land, except with the consent of, or in accordance with a general authorisation given by, the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup>; and the Environment Agency<sup>5</sup> must not dispose of any of its compulsorily acquired land<sup>6</sup>, or of any interest or right in or over any of that land, except with the consent of, or in accordance with a general authorisation given by, the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>7</sup>.

A consent or authorisation may be given on such conditions as the Secretary of State or, as the case may be, the Welsh Ministers when giving it considers appropriate<sup>8</sup>. A consent or authorisation must be set out in a notice served<sup>9</sup> by the Secretary of State or the Welsh Ministers on the company which is or may be authorised, by virtue of the provisions contained in the notice, to dispose of land or of interests or rights in or over land, or on every such company, or, as appropriate, on the Agency<sup>10</sup>. An authorisation for the disposal of land by a company holding an appointment as a relevant undertaker may be combined with an authorisation for the disposal of land by the Agency, and vice versa<sup>11</sup>.

The conditions of a consent or authorisation for these purposes may include a requirement that before there is any disposal, an opportunity of acquiring the land in question, or an interest or right in or over that land, is to be made available in such manner and on such terms as may be specified in or determined under provision contained in the notice setting out the consent or authorisation in question, and to such person<sup>12</sup> as may be so specified<sup>13</sup>. Additional requirements may be imposed in the case of a company holding an appointment as a relevant undertaker, namely:

- 1055 (1) that the company making the disposal has complied with such of the conditions of its appointment as relate to the disposal of its protected land or of any interest or right in or over that land<sup>14</sup>;
- 1056 (2) that before making a disposal in a case in which the land in question is situated in a National Park, in the Broads or in an area of outstanding natural beauty or special scientific interest, the company should do one or both of the following, that is to say (a) consult with Natural England (as respects land in England) or the Countryside Council for Wales (as respects land in Wales)<sup>15</sup>; and (b) enter into such management agreements<sup>16</sup> or such covenants<sup>17</sup> below as the Secretary of State or, as the case may be, the Welsh Ministers may determine<sup>18</sup>;
- 1057 (3) provision requiring determinations under or for the purposes of the consent or authorisation to be made, in such cases as are mentioned in head (2) above, either by Natural England or the Countryside Council for Wales or only after consultation with Natural England or the Countryside Council for Wales<sup>19</sup>.

1    le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq.

2    As to the meaning of 'disposal' see PARA 130 note 20. As to the meaning of 'protected land' see PARA 130 note 21.

3    As to the Secretary of State see PARA 15 note 1.

4 Water Industry Act 1991 s 156(1). The functions of the Secretary of State under the Water Industry Act 1991 s 156 were transferred to the National Assembly for Wales in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water supplier): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'licensed water supplier' see PARA 152. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to the Environment Agency see PARA 17.

6 'Compulsorily acquired land', in relation to the Agency, means any land of the Agency which: (1) was acquired by it compulsorily under the provisions of the Water Resources Act 1991 s 154 (see PARA 453) or of an order under s 168 (compulsory works orders: see PARA 455); (2) was acquired by it at a time when it was authorised under those provisions to acquire it compulsorily; (3) having been transferred to the Agency from the former National Rivers Authority under the Environment Act 1995 s 3 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 71), was acquired by the authority as mentioned in heads (1)-(2) or under the provisions of the Water Act 1989 s 151 (repealed) or of an order under s 155 (repealed); (4) has been so transferred, was transferred to the authority in accordance with a scheme under Sch 2 (repealed) and was acquired by a predecessor of the authority compulsorily under so much of any enactment in force at any time before 1 September 1989 as conferred powers of compulsory acquisition; or (5) has been and was so transferred as mentioned in head (4) and was acquired by such a predecessor at a time when it was authorised to acquire the land by virtue of any such powers as are mentioned in that head: Water Resources Act 1991 s 157(6) (substituted by the Environment Act 1995 s 120(1), Sch 22 para 159). As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'enactment' see PARA 14 note 31.

7 Water Resources Act 1991 s 157(1) (s 157(1), (2), amended by the Environment Act 1995 s 120, Sch 22 para 128). The functions of the Secretary of State under the Water Resources Act 1991 s 157, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

8 Water Industry Act 1991 s 156(3); Water Resources Act 1991 s 157(3).

9 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

10 See the Water Industry Act 1991 s 156(2)(a); Water Resources Act 1991 s 157(2)(a) (as amended: see note 7).

11 See the Water Industry Act 1991 s 156(2)(b); Water Resources Act 1991 s 157(2)(b).

12 As to the meaning of 'person' see PARA 13 note 29.

13 See the Water Industry Act 1991 s 156(4)(a); Water Resources Act 1991 s 157(4), (5). Such a condition may not be included in a consent or authorisation given to a company holding an appointment as a relevant undertaker except where the Secretary of State or, as appropriate, the Welsh Ministers are satisfied that the condition will have effect in relation only to land: (1) which, or any interest in or right over which, was acquired by the relevant undertaker in question, or any predecessor of that undertaker, either compulsorily or at a time when the undertaker or that predecessor was authorised to acquire it compulsorily; or (2) situated in a National Park, in the Broads or in an area of outstanding natural beauty or special scientific interest: Water Industry Act 1991 s 156(5). For these purposes, 'area of outstanding natural beauty or special scientific interest' means an area which (a) is for the time being designated as an area of outstanding natural beauty under the Countryside and Rights of Way Act 2000 s 82 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 658 et seq); or (b) is a site of special scientific interest within the meaning of the Wildlife and Countryside Act 1981 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674 et seq): Water Industry Act 1991 s 156(8) (definition amended by the Countryside and Rights of Way Act 2000 s 76(1), Sch 10 Pt II para 9, Sch 15 Pt I para 12). As to the meaning of 'the Broads' see PARA 735 note 2: definition applied by the Water Industry Act 1991 s 156(8). As to National Parks see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 636 et seq.

14 Water Industry Act 1991 s 156(4)(b). As to conditions of appointment see PARA 142.

15 Water Industry Act 1991 s 156(4)(c)(i) (s 156(4)(c)(i), (ii) substituted by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 131(1), (2)). As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

16 'Management agreement' means: (1) in relation to land in England, an agreement under the Wildlife and Countryside Act 1981 s 39 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 763) or the Natural Environment and Rural Communities Act 2006 s 7 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARAS 671, 762); (2) in relation to land in Wales, an agreement under the Wildlife and Countryside Act 1981 s 39: Water Industry Act 1991 s 156(8) (definition added by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 131(1), (4)).

17 Where a company holding an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17) is proposing, in such a case as is mentioned in s 156(4)(c), to dispose of, or of any interest or right in or over, any of its protected land, it may enter into a covenant with the Secretary of State or, as appropriate, the Welsh Ministers by virtue of which it accepts obligations with respect to: (1) the freedom of access to the land that is to be afforded to members of the public or to persons of any description; or (2) the use or management of the land; and a covenant under this provision binds all persons deriving title from or under that company and is enforceable by the Secretary of State or the Welsh Ministers accordingly: s 156(6).

18 Water Industry Act 1991 s 156(4)(c)(ii) (as substituted: see note 15). Section 3 (general environmental and recreational duties: see PARA 676) has effect for these purposes as if every proposal which is made by a company holding an appointment as a relevant undertaker with respect to land in a National Park, in the Broads or in an area of outstanding natural beauty or special scientific interest, or with respect to any interest or right in or over such land, and which is a proposal for which the Secretary of State's or the Welsh Ministers' consent or authorisation is required under s 156, were a proposal relating to the functions of such an undertaker: s 156(7). As to the meaning of 'functions' see PARA 133 note 5.

19 Water Industry Act 1991 s 156(4)(d) (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 131(1), (3)(b)).

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## **(2) POWERS TO CARRY OUT WORKS**

### **(i) Compulsory Works Orders**

#### **455. In general.**

Where a water undertaker<sup>1</sup> or the Environment Agency<sup>2</sup> is proposing, for the purposes of or in connection with the carrying out of any of its functions<sup>3</sup>, to carry out any engineering or building operations<sup>4</sup>, or to discharge water into any inland waters<sup>5</sup> or underground strata<sup>6</sup>, the undertaker or the Agency may apply to the Secretary of State<sup>7</sup> or, in relation to Wales, the Welsh Ministers<sup>8</sup> for a compulsory works order<sup>9</sup>. The application must follow the statutory procedures<sup>10</sup>. Subject thereto, a compulsory works order may:

- 1058 (1) confer power<sup>11</sup> to acquire compulsorily any land<sup>12</sup>, including power to acquire interests in and rights over land by the creation of new rights and interests and power, by the compulsory acquisition by any water undertaker or the Agency of any rights over land which is to be or has been acquired by that undertaker or by the Agency, to extinguish any such rights<sup>13</sup>;
- 1059 (2) apply certain statutory provisions<sup>14</sup> for the purposes of the order, whether with or without modifications<sup>15</sup>;
- 1060 (3) make any authority granted by the order subject to such conditions as may be specified in it<sup>16</sup>;
- 1061 (4) amend or repeal any local statutory provision<sup>17</sup>;
- 1062 (5) contain such supplemental, consequential and transitional provision as the Secretary of State or, as the case may be, the Welsh Ministers when making the order consider appropriate<sup>18</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17. The incidental functions of the Agency include joining with, or acting on behalf of, one or more relevant undertakers for the purpose of carrying out any works which at least one of the undertakers with which it joins, or on whose behalf it acts, is authorised to carry out for the purposes of any function of that undertaker under any enactment, or any function which is taken to be a function of that undertaker for the purposes to which the Water Industry Act 1991 s 217 applies (see PARA 133 note 5): see the Environment Act 1995 s 10(1), (3); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 80.

3 As to the meaning of 'functions' in relation to a water undertaker see PARA 133 note 5. As to the general functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

4 Water Industry Act 1991 s 167(1)(a); Water Resources Act 1991 s 168(1)(a). As to the meaning of 'engineering or building operations' see PARA 223 note 4.

5 As to the meaning of 'inland waters' see PARA 187 note 2.

6 Water Industry Act 1991 s 167(1)(b); Water Resources Act 1991 s 168(1)(b). As to the meaning of 'underground strata' see PARA 187 note 5.

7 As to the Secretary of State see PARA 15 note 1.

8 The functions of the Secretary of State under the Water Resources Act 1991 s 168, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. The functions of the Secretary of State under the Water Industry Act 1991 s 167 were transferred to the National Assembly for Wales as follows: (1) functions so far as relating to matters concerning the construction or enlargement of reservoirs were transferred to the Assembly in relation to Wales; (2) functions so far as relating to matters other than the construction or enlargement of reservoirs were transferred to the Assembly in relation to such parts of Wales as are outside the catchment areas of the rivers Dee, Wye and Severn; (3) functions so far as relating to matters other than the construction or enlargement of reservoirs were, in relation to such parts of Wales as are within the catchment areas of the rivers Dee, Wye and Severn, to be exercisable by the Assembly concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. All these functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

9 Water Industry Act 1991 s 167(1); Water Resources Act 1991 s 168(1) (s 168(1), (4) amended by the Environment Act 1995 Sch 22 para 128). The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of the making of an order under the Water Industry Act 1991 s 167 or the Water Resources Act 1991 s 168: see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748. The works may require an environmental impact assessment: see PARA 10.

10 See the Water Industry Act 1991 s 167(3), Sch 11; the Water Resources Act 1991 s 168(3), Sch 19; and PARAS 456-459.

11 *Ie* without prejudice to the Water Industry Act 1991 s 155 or, as the case may be, the Water Resources Act 1991 s 154: see PARA 453.

12 As to the meaning of 'land' see PARA 14 note 21.

13 Water Industry Act 1991 s 167(4)(a); Water Resources Act 1991 s 168(4)(a) (as amended: see note 9).

14 The provisions which may be applied are, as the case may be: (1) any of the relevant provisions of the Water Industry Act 1991 Pt VI (ss 155-192) (ie any of the provisions of Pt VI except ss 172, 173, the provisions of Pt VI Ch II (ss 174-178) (see PARAS 442, 445, 486) and any provision of Pt VI which is one of the relevant sewerage provisions: s 167(8)) (s 167(4)(b)); or (2) any of the relevant provisions of the Water Resources Act 1991 Pt VII (ss 154-186) (ie any of the provisions of Pt VII except ss 155-158 (see PARAS 454, 461, 610) and ss 165-167 (see PARAS 589, 596-597): s 168(8)) (s 168(4)(b)), which, in either case, do not apply for those purposes except by virtue of head (2) in the text: s 168(4)(b); Water Industry Act 1991 s 167(4)(b). 'Relevant sewerage provisions' means (a) the Water Industry Act 1991 Pt IV Chs II, III (ss 98-141), except ss 98-101, s 110 and so much of Pt I Ch III as provides for regulations under s 138 or has effect by virtue of any such regulations; (b) ss 160, 171, 172(4), 178, 184 (see PARA 589), ss 180, 189, 196, 204, Sch 12 para 4; and (c) the other provisions of the Water Industry Act 1991 so far as they have effect for the purposes of any provision falling within head (a) or (b): s 219(1). See further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 998 et seq.

15 Water Industry Act 1991 s 167(4)(b); Water Resources Act 1991 s 168(4)(b). As to the meaning of 'modifications' see PARA 141 note 20.

16 Water Industry Act 1991 s 167(4)(c); Water Resources Act 1991 s 168(4)(c).

17 Water Industry Act 1991 s 167(4)(d); Water Resources Act 1991 s 168(4)(d). As to the meaning of 'local statutory provision' see PARA 14 note 24.

18 Water Industry Act 1991 s 167(4)(e); Water Resources Act 1991 s 168(4)(e). In relation to the powers conferred by virtue of s 168, s 156(1) (acquisition of land etc for fisheries purposes: see PARA 453) applies as it applies in relation to the power conferred by s 154 (compulsory purchase: see PARA 453): s 168(4).



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#### **456. Procedure on application for compulsory works order.**

Where a water undertaker<sup>1</sup> or the Environment Agency<sup>2</sup> applies to the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup> for a compulsory works order<sup>5</sup>, it must submit to the Secretary of State or, as the case may be, the Welsh Ministers a draft of the order applied for and publish with respect to the application, at least once in each of two successive weeks, in one or more newspapers circulating in each relevant locality<sup>6</sup>, a notice:

- 1063 (1) stating the general effect of the order applied for<sup>7</sup>;
- 1064 (2) specifying a place where a copy of the draft order and of any relevant map or plan may be inspected by any person<sup>8</sup> free of charge at all reasonable times during the period of 28 days beginning with the date of the first publication of the notice<sup>9</sup>; and
- 1065 (3) stating that any person may, within that period, by notice to the Secretary of State or, as appropriate, the Welsh Ministers, object to the making of the order<sup>10</sup>.

In the case of an application made wholly or partly for the purpose of enabling any discharges of water to be made, the notice must also:

- 1066 (a) contain particulars of the proposed discharges, stating the purposes of them and specifying each place of discharge<sup>11</sup>;
- 1067 (b) specify the places at which the water to be comprised in the proposed discharges is to be taken and the treatment, if any, which the draft order proposes to require the water, or any of it, to receive before being discharged under the order<sup>12</sup>; and
- 1068 (c) state the effect which, in the opinion of the undertaker or the Agency, the proposed discharges would have on the flow, level and quality of water in any inland waters or underground strata<sup>13</sup>.

Not later than the date on which that notice is first published, the water undertaker or, as the case may be, the Agency must serve a copy of the notice<sup>14</sup> on each of the specified persons<sup>15</sup>, and in the case of a draft order which would authorise the stopping up or diversion of a footpath, bridleway or restricted byway cause such a copy, together with a plan showing the general effect of the draft order so far as it relates to the footpath, bridleway or restricted byway, to be displayed in a prominent position at the ends of the part of the path or way to be stopped up or diverted<sup>16</sup>. Notice must also be published in the London Gazette<sup>17</sup>.

Where a water undertaker or the Agency applies for a compulsory works order it must, at the request of any person and on payment by that person of such charge, if any, as it may reasonably require, furnish that person with a copy of the draft order submitted to the Secretary of State or, as the case may be, the Welsh Ministers and with a copy of any relevant map or plan<sup>18</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 Sch 19, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. The functions of the Secretary of State under the Water Industry Act 1991 Sch 11 were transferred to the National Assembly for Wales as follows: (1) functions so far as relating to matters concerning the construction or enlargement of reservoirs were transferred to the Assembly in relation to Wales; (2) functions so far as relating to matters other than the construction or enlargement of reservoirs were transferred to the Assembly in relation to such parts of Wales as are outside the catchment areas of the rivers Dee, Wye and Severn; (3) functions so far as relating to matters other than the construction or enlargement of reservoirs were, in relation to such parts of Wales as are within the catchment areas of the rivers Dee, Wye and Severn, to be exercisable by the Assembly concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. All these functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to compulsory works orders see PARA 455.

6 'Relevant locality', in relation to an application for a compulsory works order, means: (1) any locality which would be affected by any provision proposed to be made by the order for the purpose of enabling any engineering or building operations to be carried out; and (2) where provision is proposed to be made by the order for the purpose of enabling discharges of water to be made, each locality in which the place of any of the proposed discharges is situated or in which there appear to the water undertaker or the Agency, as the case may be, to be any inland waters or underground strata the flow, level or quality of water in which may be affected by any of the proposed discharges: Water Industry Act 1991 Sch 11 para 1(4); Water Resources Act 1991 Sch 19 para 1(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'engineering or building operations' see PARA 223 note 4. As to the meaning of 'inland waters' see PARA 187 note 2. As to the meaning of 'underground strata' see PARA 187 note 5.

7 Water Industry Act 1991 Sch 11 para 1(1)(a), (b), (2)(a); Water Resources Act 1991 Sch 19 para 1(1)(a), (b), (2)(a) (Sch 19 para 1(1) amended by the Environment Act 1995 s 120, Sch 22 para 128).

8 As to the meaning of 'person' see PARA 13 note 29.

9 Water Industry Act 1991 Sch 11 para 1(2)(c); Water Resources Act 1991 Sch 19 para 1(2)(c).

10 Water Industry Act 1991 Sch 11 para 1(2)(d); Water Resources Act 1991 Sch 19 para 1(2)(d).

11 Water Industry Act 1991 Sch 11 para 1(2)(b)(i); Water Resources Act 1991 Sch 19 para 1(2)(b)(i).

12 Water Industry Act 1991 Sch 11 para 1(2)(b)(ii); Water Resources Act 1991 Sch 19 para 1(2)(b)(ii).

13 Water Industry Act 1991 Sch 11 para 1(2)(b)(iii); Water Resources Act 1991 Sch 19 para 1(2)(b)(iii) (amended by the Environment Act 1995 s 120, Sch 22 para 128).

14 As to the service of documents see PARA 22.

15 Water Industry Act 1991 Sch 11 para 1(2)(c)(i); Water Resources Act 1991 Sch 19 para 1(2)(c)(i). The specified persons are: (1) in the case of an application by a water undertaker, the Agency; (2) every local authority whose area is or includes the whole or any part of a relevant locality and which, in the case of an application by the Agency, is not an English county council; (3) every water undertaker (or, in the case of an application by such an undertaker, every other water undertaker) whose area is or includes the whole or any part of such a locality; (4) every navigation authority, harbour authority and conservancy authority which would be affected by, or has functions in relation to any inland waters which would be affected by, any provision proposed to be made by the order; (5) every person (a) who is an owner, lessee, tenant (whatever the tenancy period) or occupier of any land in relation to which compulsory powers would become exercisable if the order were made in the terms of the draft order; or (b) who the water undertaker or the Agency thinks is likely to be entitled to make a claim for compensation under the Compulsory Purchase Act 1965 s 10 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 878) if the order is confirmed and the compulsory powers become exercisable, so far as he is known to the water undertaker or Agency after making diligent inquiry; (6) every person who has given notice to the water undertaker or, as the case may be, the Agency, requiring it to notify him of applications for compulsory works orders and has paid such reasonable charge as the undertaker or the Agency may have required him to pay for being so notified; and (7) such other persons as may be prescribed: Water Industry Act 1991 Sch 11 para 1(3) (amended by the Environment Act 1995 Sch 22 para 126; SI

2007/1519); Water Resources Act 1991 Sch 19 para 1(3) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(11); Environment Act 1995 s 120, Sch 22 para 128; SI 2007/1519). The prescribed persons are as follows: where a compulsory works order is applied for under the Water Industry Act 1991 s 167 or under the Water Resources Act 1991 s 168 which would authorise the stopping-up or diversion of a footpath, bridleway or restricted byway in an area specified in the Water (Compulsory Works Powers) (Notice) Regulations 1999, SI 1999/221, Schedule col 1, a copy of the notice of the application must be served on the persons specified in relation to that area in Schedule col 2: reg 2 (amended by SI 2006/1177). The specified areas and persons are: (i) with regard to England and Wales, the Auto-Cycle Union; the British Horse Society; the Byways and Bridleways Trust; the Cyclists Touring Club; the Open Spaces Society and the Ramblers' Association; (ii) with regard to the counties of Cheshire, Derbyshire, Greater Manchester, Lancashire, Merseyside, South Yorkshire, Staffordshire and West Yorkshire, the Peak and Northern Footpaths Society; (iii) with regard to (A) within the county of Bedfordshire, the borough of Luton and the districts of Mid Bedfordshire and South Bedfordshire; (B) within the county of Buckinghamshire, the districts of Chiltern, Wycombe, South Bucks and Aylesbury Vale; (C) within the county of Hertfordshire, the borough of Dacorum and the districts of Three Rivers and North Hertfordshire; and (D) within the county of Oxfordshire, the district of South Oxfordshire, the Chiltern Society: Schedule cols 1, 2. 'Bridleway' and 'footpath' have the same meanings as in the Highways Act 1980 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 64); and 'restricted byway' has the same meaning as in the Countryside and Rights of Way Act 2000 Pt 2 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 603); Water Industry Act 1991 Sch 11 para 10; Water Resources Act 1991 Sch 19 para 10 (both amended by SI 2006/1177). As to the meaning of 'local authority' for the purposes of the Water Industry Act 1991 see PARA 118 note 17, and for the purposes of the Water Resources Act 1991 see PARA 187 note 2. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3. As to the meaning of 'owner' see PARA 22 note 9. As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'England' see PARA 19 note 8.

Where the whole or part of a relevant locality is in a National Park, the application must also be served on the National Park authority: see the National Park Authorities (Wales) Order 1995, SI 1995/2803, art 18, Sch 5 para 2B (added by SI 1996/534); the National Park Authorities (England) Order 1996, SI 1996/1243, art 18, Sch 5 para 6(1). As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

16 Water Industry Act 1991 Sch 11 para 1(1)(c)(ii); Water Resources Act 1991 Sch 19 para 1(1)(c)(ii) (both amended by SI 2006/1177).

17 Water Industry Act 1991 Sch 11 para 1(1)(d); Water Resources Act 1991 Sch 19 para 1(1)(d). The notice must: (1) state that a draft order has been submitted to the Secretary of State or, as the case may be, the Welsh Ministers; (2) name every local authority on which a notice is required to be served under the Water Industry Act 1991 Sch 11 para 1 or the Water Resources Act 1991 Sch 19 para 1 (see note 15); (3) specify a place where a copy of the draft order and of any relevant map or plan may be inspected; and (4) give the name of every newspaper in which notice was required to be published and the date of an issue containing the notice: Water Industry Act 1991 Sch 1 para 1(1)(d); Water Resources Act 1991 Sch 19 para 1(1)(d).

18 Water Industry Act 1991 Sch 11 para 2; Water Resources Act 1991 Sch 19 para 2 (amended by the Environment Act 1995 s 120, Sch 22 para 128).

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#### **457. Consideration of objections.**

If, where an application for a compulsory works order<sup>1</sup> has been made by a water undertaker<sup>2</sup> or by the Environment Agency<sup>3</sup>, any notice of objection is received before the end of the relevant period<sup>4</sup> by the Secretary of State or, as the case may be, the Welsh Ministers from:

- 1069 (1) any person<sup>5</sup> on whom a notice<sup>6</sup> is required to be served<sup>7</sup>; or
- 1070 (2) any other person appearing to the Secretary of State or the Welsh Ministers to be affected by the order as submitted or as proposed<sup>8</sup> to be modified<sup>9</sup>,

then, unless the objection is withdrawn, the Secretary of State or, as appropriate, the Welsh Ministers must, before making the order, either cause a local inquiry<sup>10</sup> to be held or afford to the objector and to the undertaker or, as the case may be, the Agency, an opportunity of appearing before, and being heard by, a person appointed for the purpose<sup>11</sup>. Where any such objection relates to any powers of compulsory acquisition<sup>12</sup>, the Secretary of State or the Welsh Ministers may require the objector to state the grounds of his objection in writing<sup>13</sup> and may, if satisfied that the objection relates exclusively to matters that can be dealt with in the assessment of compensation<sup>14</sup>, disregard the objection for these purposes<sup>15</sup>.

1 As to compulsory works orders see PARA 455. As to applications for such orders see PARA 456.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the Environment Agency see PARA 17.

4 'Relevant period', in relation to an application for any order, means the period ending with whichever is the later of: (1) the end of the period of 28 days beginning with the date of the first publication of the notice published with respect to the application for the purposes of the Water Industry Act 1991 Sch 11 para 1(1)(b) or the Water Resources Act 1991 Sch 19 para 1(1)(b) (see PARA 456); and (2) the end of the period of 25 days beginning with the date of the publication in the London Gazette of the notice published for the purposes of the application by virtue of the Water Industry Act 1991 Sch 11 para 1(1)(d) or the Water Resources Act 1991 Sch 19 para 1(1)(d) (see PARA 456), together, in the case of an application for an order modifications to which have been proposed by the Secretary of State or, as the case may be, the Welsh Ministers, with any further periods specified with respect to the modifications in notices under the Water Industry Act 1991 Sch 11 para 3(2) or the Water Resources Act 1991 Sch 19 para 3(2) (see PARA 458): Water Industry Act 1991 Sch 11 para 4(3); Water Resources Act 1991 Sch 19 para 4(3). As to the meaning of 'modifications' see PARA 141 note 20.

The functions of the Secretary of State under the Water Resources Act 1991 Sch 19, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. The functions of the Secretary of State under the Water Industry Act 1991 Sch 11 were transferred to the National Assembly for Wales as follows: (a) functions so far as relating to matters concerning the construction or enlargement of reservoirs were transferred to the Assembly in relation to Wales; (b) functions so far as relating to matters other than the construction or enlargement of reservoirs were transferred to the Assembly in relation to such parts of Wales as are outside the catchment areas of the rivers Dee, Wye and Severn; (c) functions so far as relating to matters other than the construction or enlargement of reservoirs were, in relation to such parts of Wales as are within the catchment areas of the rivers Dee, Wye and Severn, to be exercisable by the Assembly concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. All these functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to the meaning of 'person' see PARA 13 note 29.

6 le a notice under the Water Industry Act 1991 Sch 11 para 1 or 3 or under the Water Resources Act 1991 Sch 19 para 1 or 3: see PARAS 456, 458.

7 Water Industry Act 1991 Sch 11 para 4(1)(a); Water Resources Act 1991 Sch 19 para 4(1)(a).

8 le under the Water Industry Act 1991 Sch 11 para 3 or the Water Resources Act 1991 Sch 19 para 3: see PARA 458.

9 Water Industry Act 1991 Sch 11 para 4(1)(b); Water Resources Act 1991 Sch 19 para 4(1)(b).

10 The Local Government Act 1972 s 250(2)-(5) (powers in relation to local inquiries: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) apply to local inquiries under any provision of the Water Industry Act 1991 as they apply to inquiries under that section; but the Local Government Act 1972 s 250(4) applies in relation to such local inquiries as are held with respect to any matter affecting the carrying out of any function of the Environment Agency as if the reference to a local authority in that subsection included a reference to the Environment Agency: see the Water Industry Act 1991 s 215(2), (3) (amended by the Environment Act 1995 s 120, Sch 22 para 123). As to local inquiries in respect of functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 89.

11 Water Industry Act 1991 Sch 11 para 4(1); Water Resources Act 1991 Sch 19 para 4(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

12 'Powers of compulsory acquisition' means any such powers as are mentioned in the Water Industry Act 1991 s 167(4)(a) or the Water Resources Act 1991 s 168(4)(a) (see PARA 455): Water Industry Act 1991 Sch 11 para 10; Water Resources Act 1991 Sch 19 para 10.

13 Water Industry Act 1991 Sch 11 para 4(2)(a); Water Resources Act 1991 Sch 19 para 4(2)(a). As to the meaning of 'writing' see PARA 22 note 1.

14 As to the assessment of compensation see PARA 469.

15 Water Industry Act 1991 Sch 11 para 4(2)(b); Water Resources Act 1991 Sch 19 para 4(2)(b).

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#### **458. Making or refusal of order.**

On an application for a compulsory works order<sup>1</sup>, the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup>, may make the order either in the terms of the draft order submitted or in those terms as modified in such manner as the Secretary of State or the Welsh Ministers thinks fit<sup>4</sup> or may refuse to make the order<sup>5</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may, on such an application, by order made by statutory instrument confer such compulsory powers and grant such authority as they consider necessary or expedient for the purpose of enabling any engineering or building operations<sup>6</sup> or discharges of water<sup>7</sup> to be carried out or made for the purposes of, or in connection with, the carrying out of the functions<sup>8</sup> with respect to which the application was made<sup>9</sup>. Where the Secretary of State or the Welsh Ministers makes a compulsory works order authorising a water undertaker or, as the case may be, the Environment Agency to carry out works for or in connection with the construction or operation of a reservoir or conferring compulsory powers for that purpose on such an undertaker or on the Agency<sup>10</sup>, and it appears to the Secretary of State or the Welsh Ministers that the works to be carried out may permanently affect the area in which they are situated and are not primarily intended to benefit the inhabitants of that area<sup>11</sup>, they may<sup>12</sup> include in the order provision with respect to facilities for recreation or other leisure-time occupation for the benefit of those inhabitants<sup>13</sup>.

Unless all interested parties consent, the Secretary of State or the Welsh Ministers may not make a compulsory works order so as to confer in relation to any land<sup>14</sup> any powers of compulsory acquisition<sup>15</sup> which would not have been conferred in relation to that land if the order were made in the terms of the draft order<sup>16</sup> as submitted<sup>17</sup>. Nothing in any compulsory works order may exempt any water undertaker, or the Agency, from any restriction imposed by the statutory provisions<sup>18</sup> as to abstraction and impounding<sup>19</sup>.

Where, on an application for a compulsory works order, the Secretary of State or the Welsh Ministers refuses to make the order, the water undertaker or, as the case may be, the Agency must, as soon as practicable after the refusal, notify the refusal to every person on whom it was required<sup>20</sup> to serve a copy of the notice with respect to the application<sup>21</sup>.

As soon as practicable after a compulsory works order has been made, the undertaker on whose application it is made or, as the case may be, the Agency, must publish a notice of the making of the order, at least once in each of two successive weeks, in one or more newspapers circulating in each relevant locality<sup>22</sup>. The notice must state the general effect of the order<sup>23</sup> and specify a place where a copy of the order and of any relevant map or plan may be inspected by any person free of charge at all reasonable times<sup>24</sup>. In the case of an order made wholly or partly for the purpose of enabling any discharges of water to be made, the order must also:

1071 (1) contain particulars of the discharges, stating the purposes of them and specifying each place of discharge<sup>25</sup>;

1072 (2) specify the places at which the water to be comprised in the discharges is to be taken and the treatment, if any, which the order requires the water, or any of it, to receive before being discharged under the order<sup>26</sup>; and

1073 (3) state the effect which, in the opinion of the undertaker, the discharges would have on the flow, level and quality of water in any inland waters or underground strata<sup>27</sup>.

Not later than the date on which that notice is first published, the undertaker or, as the case may be, the Agency must serve<sup>28</sup> a copy of it on every person on whom the undertaker or Agency was required<sup>29</sup> to serve a copy of the notice with respect to the application for the order<sup>30</sup> and, in the case of an order authorising the stopping up or diversion of a footpath, bridleway or restricted byway<sup>31</sup>, cause a copy, together with a plan showing the general effect of the order so far as it relates to the footpath or bridleway, to be displayed in a prominent position at the ends of the appropriate part of the path or way<sup>32</sup>.

Where a compulsory works order has been made, the undertaker on whose application it was made or, as the case may be, the Agency, must at the request of any person, and on payment by that person of such charge, if any, as the undertaker or Agency may reasonably require, furnish that person with a copy of the order and of any relevant map or plan<sup>33</sup>.

Certain protective provisions<sup>34</sup> apply in relation to the carrying out of works by virtue of an authority granted by so much of any compulsory works order as makes provision which does not confer powers of compulsory acquisition<sup>35</sup>.

1 As to compulsory works orders see PARA 455. As to applications for such orders see PARAS 456-457.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 Sch 19, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. The functions of the Secretary of State under the Water Industry Act 1991 Sch 11 were transferred to the National Assembly for Wales as follows: (1) functions so far as relating to matters concerning the construction or enlargement of reservoirs were transferred to the Assembly in relation to Wales; (2) functions so far as relating to matters other than the construction or enlargement of reservoirs were transferred to the Assembly in relation to such parts of Wales as are outside the catchment areas of the rivers Dee, Wye and Severn; (3) functions so far as relating to matters other than the construction or enlargement of reservoirs were, in relation to such parts of Wales as are within the catchment areas of the rivers Dee, Wye and Severn, to be exercisable by the Assembly concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. All these functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 Neither the Secretary of State nor the Welsh Ministers may make such a modification of a draft order as submitted as he or they considers is likely adversely to affect any persons unless satisfied that the water undertaker submitting it or, as the case may be, the Environment Agency has given and published such additional notices, in such manner, as the Secretary of State or Welsh Ministers may have required: Water Industry Act 1991 Sch 11 para 3(2); Water Resources Act 1991 Sch 19 para 3(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'modification' see PARA 141 note 20. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'water undertaker' see PARA 137 note 4. As to the Environment Agency see PARA 17. As to the meaning of 'notice' see PARA 22 note 1.

5 Water Resources Act 1991 Sch 11 para 3(1); Water Resources Act 1991 Sch 19 para 3(1).

6 As to the meaning of 'engineering or building operations' see PARA 223 note 4.

7 A compulsory works order may grant authority for discharges of water by a water undertaker or, as the case may be, by the Environment Agency where the undertaker or Agency has no power to take water, or to require discharges to be made, from the inland waters or other source from which the discharges authorised by the order are intended to be made; but nothing in so much of any such order as grants authority for any discharges of water has the effect of conferring any such power: Water Industry Act 1991 s 167(7); Water Resources Act 1991 s 168(7) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'inland waters' see PARA 187 note 2.

8 As to the meaning of 'functions' in relation to a water undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

- 9 Water Industry Act 1991 s 167(2); Water Resources Act 1991 s 168(2).
- 10 Water Industry Act 1991 s 167(5)(a); Water Resources Act 1991 s 168(5)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 11 Water Industry Act 1991 s 167(5)(b); Water Resources Act 1991 s 168(5)(b).
- 12 Ie without prejudice to any duty imposed by virtue of the Water Industry Act 1991 s 191 or the Water Resources Act 1991 s 184: see PARA 687.
- 13 Water Industry Act 1991 s 167(5); Water Resources Act 1991 s 168(5). In relation to Wales see also the Water Industry Act 1991 s 191; and PARA 687.
- 14 As to the meaning of 'land' see PARA 14 note 21.
- 15 As to the meaning of 'powers of compulsory acquisition' see PARA 457 note 12.
- 16 Ie the draft order submitted under the Water Industry Act 1991 Sch 11 para 1 or the Water Resources Act 1991 Sch 19 para 1: see PARA 456.
- 17 Water Industry Act 1991 Sch 11 para 3(3); Water Resources Act 1991 Sch 19 para 3(3).
- 18 Ie imposed by the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 214 et seq.
- 19 Water Industry Act 1991 s 167(6); Water Resources Act 1991 s 168(6) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 20 Ie by virtue of the Water Industry Act 1991 Sch 11 para 1(1)(c)(i) or the Water Resources Act 1991 Sch 19 para 1(1)(c)(i): see PARA 456.
- 21 Water Industry Act 1991 Sch 11 para 3(4); Water Resources Act 1991 Sch 19 para 3(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The duties of a water undertaker under the Water Industry Act 1991 Sch 11 para 3(4) and para 5 (see the text to notes 22-33) are enforceable by the Secretary of State or, as the case may be, the Welsh Ministers under the Water Industry Act 1991 s 18 (see PARA 163): Sch 11 paras 3(5), 5(4).
- 22 Water Industry Act 1991 Sch 11 para 5(1)(a); Water Resources Act 1991 Sch 19 para 5(1)(a) (Sch 19 para 5 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). See also note 21. 'Relevant locality', in relation to any compulsory works order, means: (1) any locality which is affected by any provision made by the order for the purpose of enabling any engineering or building operations to be carried out; and (2) where provision is made by the order for the purpose of enabling discharges of water to be made, each locality in which the place of any of the discharges is situated or in which there appear to the water undertaker or the Agency, as the case may be, to be any inland waters or underground strata the flow, level or quality of water in which may be affected by any of the proposed discharges: Water Industry Act 1991 Sch 11 para 5(5); Water Resources Act 1991 Sch 19 para 5(4) (as so amended). As to the meaning of 'underground strata' see PARA 187 note 5.
- 23 Water Industry Act 1991 Sch 11 para 5(2)(a); Water Resources Act 1991 Sch 19 para 5(2)(a).
- 24 Water Industry Act 1991 Sch 11 para 5(2)(c); Water Resources Act 1991 Sch 19 para 5(2)(c).
- 25 Water Industry Act 1991 Sch 11 para 5(2)(b)(i); Water Resources Act 1991 Sch 19 para 5(2)(b)(i).
- 26 Water Industry Act 1991 Sch 11 para 5(2)(b)(ii); Water Resources Act 1991 Sch 19 para 5(2)(b)(ii).
- 27 Water Industry Act 1991 Sch 11 para 5(2)(b)(iii); Water Resources Act 1991 Sch 19 para 5(2)(b)(iii).
- 28 As to the service of documents see PARA 22.
- 29 Ie by virtue of the Water Industry Act 1991 Sch 11 para 1(1)(c)(i) or the Water Resources Act 1991 Sch 19 para 1(1)(c)(i): see PARA 456.
- 30 Water Industry Act 1991 Sch 11 para 5(1)(b)(i); Water Resources Act 1991 Sch 19 para 5(1)(b)(i) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). See also note 21.
- 31 As to the meanings of 'footpath', 'bridleway' and 'restricted byway' see PARA 456 note 15.



32 Water Industry Act 1991 Sch 11 para 5(1)(b)(ii); Water Resources Act 1991 Sch 19 para 5(1)(b)(ii) (both amended by SI 2006/1177). See also note 21.

33 Water Industry Act 1991 Sch 11 para 5(3); Water Resources Act 1991 Sch 19 para 5(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). See also note 21.

34 In the Water Industry Act 1991 ss 183, 186, Sch 13 Pt I (paras 1-4); and the Water Resources Act 1991 ss 178, 179, Sch 22 paras 1, 2, 5: see PARAS 490-491, 660-661.

35 Water Industry Act 1991 Sch 11 para 9; Water Resources Act 1991 Sch 19 para 9.

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#### **459. Compulsory works orders containing provisions for compulsory acquisition.**

Certain enactments relating to the compulsory acquisition of land<sup>1</sup> apply in relation to so much of a compulsory works order<sup>2</sup> as confers powers of compulsory acquisition<sup>3</sup> as they apply in relation to a compulsory purchase order<sup>4</sup> and are accordingly applied with the specified modifications<sup>5</sup> where the case so requires<sup>6</sup>.

If any person aggrieved<sup>7</sup> by a compulsory works order containing such powers, or by a certificate given under the special land provisions<sup>8</sup> in connection with such an order, desires to question:

- 1074 (1) the validity of the order, or of any provision of the order, on the grounds that any powers of compulsory acquisition conferred by the order are not authorised<sup>9</sup> to be so conferred, or that any of the relevant requirements<sup>10</sup> have not been complied with in relation to the order<sup>11</sup>; or
- 1075 (2) the validity of the certificate on the grounds that any of the relevant requirements have not been complied with in relation to the certificate<sup>12</sup>,

he may make an application for the purpose to the High Court at any time before the end of the period of six weeks beginning with the date on which notice of the making of the order is first published<sup>13</sup> or, as the case may be, notice of the giving of the certificate is first published in accordance with the special land provisions<sup>14</sup>. On any such application with respect to any order or certificate, the High Court may by interim order suspend the operation of the compulsory works order, or any provision of it, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings<sup>15</sup>. If the court is satisfied that any powers of compulsory acquisition conferred by the compulsory works order are not authorised to be so conferred, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to the order or the certificate, it may quash the order, or any provision of the order, or the certificate, either generally or in so far as it affects any property of that applicant<sup>16</sup>. Except as so provided, the validity of any such order or certificate may not, either before or after the order or certificate has been made or given, be questioned in any legal proceedings whatsoever<sup>17</sup>.

Subject to any such order of the High Court, a compulsory works order conferring powers of compulsory acquisition which is not subject to special parliamentary procedure<sup>18</sup>, or a certificate given under the special land provisions in connection with such an order, becomes operative on the date on which notice of the making or giving of it is published<sup>19</sup>.

1    le (1) the Compulsory Purchase Act 1965 Pt I (ss 1-32); (2) the Acquisition of Land Act 1981 s 4, Pt III (ss 16-22) and Sch 3; and (3) the enactments for the time being in force with respect to compensation for the compulsory purchase of land (see generally **COMPULSORY ACQUISITION OF LAND**): Water Industry Act 1991 Sch 11 para 6(1)(a)-(c); Water Resources Act 1991 Sch 19 para 6(1)(a)-(c). As to the meaning of 'enactment' see PARA 14 note 31.

2    As to compulsory works orders see PARA 455.

3    As to the meaning of 'powers of compulsory acquisition' see PARA 457 note 12.

4     le a compulsory purchase order made by virtue of the Water Industry Act 1991 s 155 or, as the case may be, the Water Resources Act 1991 s 154: see **PARA** 453.

5     le the modifications made by the Water Industry Act 1991 Sch 9 or by the Water Resources Act 1991 Sch 18: see **PARA** 453.

6     Water Industry Act 1991 Sch 11 para 6(1); Water Resources Act 1991 Sch 19 para 6(1). As to the payment of compensation see **PARA** 469.

7     As to the meaning of 'person' see **PARA** 13 note 29. As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) **PARA** 664.

8     'Special land provisions' means the provisions, as applied (see note 1), of the Acquisition of Land Act 1981 Pt III or, as the case may require, of Sch 3 Pt II (paras 3-9): Water Industry Act 1991 Sch 11 para 6(7); Water Resources Act 1991 Sch 19 para 6(7).

9     le by the Water Industry Act 1991 or the Water Resources Act 1991, as appropriate.

10    'Relevant requirements', in relation to an order or certificate, means the requirements of the Water Industry Act 1991 Sch 11 or of the Water Resources Act 1991 Sch 19, as the case may be, and such requirements of the special land provisions or of any other enactment as are applicable to that order or certificate by virtue of the Water Industry Act 1991 Sch 11 para 6 or the Water Resources Act 1991 Sch 19 para 6: Water Industry Act 1991 Sch 11 para 6(7); Water Resources Act 1991 Sch 19 para 6(7).

11    Water Industry Act 1991 Sch 11 para 6(2)(a); Water Resources Act 1991 Sch 19 para 6(2)(a).

12    Water Industry Act 1991 Sch 11 para 6(2)(b); Water Resources Act 1991 Sch 19 para 6(2)(b).

13    le in accordance with the Water Industry Act 1991 Sch 11 para 5 or the Water Resources Act 1991 Sch 19 para 5: see **PARA** 458.

14    Water Industry Act 1991 Sch 11 para 6(2); Water Resources Act 1991 Sch 19 para 6(2). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) **PARA** 602 et seq.

15    Water Industry Act 1991 Sch 11 para 6(3)(a); Water Resources Act 1991 Sch 19 para 6(3)(a).

16    Water Industry Act 1991 Sch 11 para 6(3)(b); Water Resources Act 1991 Sch 19 para 6(3)(b).

17    Water Industry Act 1991 Sch 11 para 6(4); Water Resources Act 1991 Sch 19 para 6(4). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) **PARA** 655.

18    Where an order is subject to special parliamentary procedure, the Water Industry Act 1991 Sch 11 para 6(2)-(4) and the Water Resources Act 1991 Sch 19 para 6(2)-(4) (see the text to notes 7-17) do not apply to it if it is confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) **PARA** 926) and have effect, in any other case, as if the reference therein to the date on which notice of the making of the order is first published were a reference to the date on which the order becomes operative under the 1945 Act: Water Industry Act 1991 Sch 11 para 6(6); Water Resources Act 1991 Sch 19 para 6(6).

19    Water Industry Act 1991 Sch 11 para 6(5); Water Resources Act 1991 Sch 19 para 6(5).

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## (ii) Works Agreements

### 460. Agreements for works with respect to water sources.

A water undertaker<sup>1</sup> may enter into agreements with the owners<sup>2</sup> and occupiers of any land<sup>3</sup>, or with a local authority<sup>4</sup>, with respect to the carrying out and maintenance by any party to the agreement of such works as the undertaker considers necessary for the purpose of draining that land<sup>5</sup>, or for more effectually collecting, conveying and preserving the purity of any water which the undertaker is for the time being authorised to take<sup>6</sup>.

Before entering into such an agreement with respect to the carrying out of works which would result in the discharge of any water into a watercourse<sup>7</sup> otherwise than through public sewers<sup>8</sup>, a water undertaker must consult the Environment Agency<sup>9</sup> and, if the watercourse is subject to the jurisdiction of a navigation authority<sup>10</sup>, that authority<sup>11</sup>.

Any such agreement with the owner of any land which is expressed to be binding on and enforceable against the owner's successors in title to that land may be registered<sup>12</sup> and is so binding and enforceable unless it is void by reason of a failure so to register it<sup>13</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the meaning of 'owner' see PARA 22 note 9.

3 As to the meaning of 'land' see PARA 14 note 21.

4 For these purposes, 'local authority' includes a county council and the sub-treasurer of the Inner Temple and the under-treasurer of the Middle Temple: Water Industry Act 1991 s 164(4). As to the meaning of 'local authority' see PARA 118 note 17. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 32.

5 Water Industry Act 1991 s 164(1)(a).

6 Water Industry Act 1991 s 164(1)(b).

7 As to the meaning of 'watercourse' see PARA 187 note 2.

8 As to the meaning of 'public sewer' see PARA 138 note 11.

9 As to the Environment Agency see PARA 17.

10 As to the meaning of 'navigation authority' see PARA 189 note 1.

11 Water Industry Act 1991 s 164(2). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

12 Ie under the Land Charges Act 1972 s 2 as an obligation affecting land falling within Class D (see **LAND CHARGES** vol 26 (2004 Reissue) PARAS 633-636): Water Industry Act 1991 s 164(3)(a).

13 Water Industry Act 1991 s 164(3)(b).

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#### **461. Works agreements for water resources purposes.**

The Environment Agency<sup>1</sup> has power<sup>2</sup> to enter into an agreement with any water undertaker or sewerage undertaker<sup>3</sup>, with any local authority<sup>4</sup>, National Park Authority<sup>5</sup> or joint planning board<sup>6</sup>, or with the owner<sup>7</sup> or occupier of any land<sup>8</sup> with respect to any one or more of the following matters<sup>9</sup>:

- 1076 (1) the carrying out by any party to the agreement of works which the Agency considers necessary or expedient in connection with the carrying out of any of its water resources functions<sup>10</sup>;
- 1077 (2) the maintenance by any party to the agreement of works carried out in pursuance of the agreement<sup>11</sup>;
- 1078 (3) provision for the Agency to use, or have access to, any land for any purpose connected with the carrying out of such water resources functions<sup>12</sup>;
- 1079 (4) the manner in which any reservoir is to be operated<sup>13</sup>;

and such an agreement may contain such incidental and consequential provisions, including provisions of a financial character, as appear to the Agency necessary or expedient for the purposes of the agreement<sup>14</sup>.

The Secretary of State<sup>15</sup> or, in relation to Wales, the Welsh Ministers<sup>16</sup> may by a direction to the Agency direct that, in such cases or classes of cases as are specified in the direction, the Agency may not enter into any such agreement except with the consent of the Secretary of State or, as the case may be, the Welsh Ministers<sup>17</sup>.

Where such an agreement is made with the owner of land, and the agreement so provides, then:

- 1080 (a) where the land is not registered land<sup>18</sup>:

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- 1. (i) the agreement may be registered as a land charge<sup>19</sup>;
- 2. (ii) the statutory provisions relating to the effect of non-registration<sup>20</sup> then apply as if it were such a land charge<sup>21</sup>; and
- 3. (iii) subject to those provisions, the agreement is binding upon any successor<sup>22</sup> of that owner to the same extent as it is binding upon that owner, notwithstanding that it would not otherwise have been so binding<sup>23</sup>;

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- 1081 (b) where the land is registered land:

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- 4. (i) the agreement may be the subject of a notice in the register of title<sup>24</sup> as if it were an interest affecting the registered land<sup>25</sup>;
- 5. (ii) the statutory provisions regarding the effect of dispositions of registered land on the priority of adverse interests<sup>26</sup> apply as if the agreement were such an interest<sup>27</sup>; and
- 6. (iii) subject to those provisions, the agreement is binding upon any successor of that owner to the same extent as it is binding upon that owner,

notwithstanding that it would not otherwise have been so binding upon that successor<sup>28</sup>.

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1 As to the Environment Agency see **PARA 17**.

2 le without prejudice to the generality of its powers under the Environment Act 1995 s 37 (incidental general powers of the Agency): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) **PARA 73**.

3 As to the meanings of 'water undertaker' and 'sewerage undertaker' see **PARA 137** note 4.

4 As to the meaning of 'local authority' see **PARA 187** note 2. The Local Better Regulation Office has the objective of securing that local authorities in England and Wales exercise their functions under the Water Resources Act 1991 effectively, in a way which does not give rise to unnecessary burdens, and in a way which conforms with the statutory principles: see the Regulatory Enforcement and Sanctions Act 2008 ss 4(2), 5, Sch 3; and **LOCAL GOVERNMENT** vol 69 (2009) **PARA 733**.

5 As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) **PARA 526** et seq.

6 As to the meaning of 'joint planning board' see **PARA 187** note 2.

7 As to the meaning of 'owner' see **PARA 22** note 9.

8 As to the meaning of 'land' see **PARA 14** note 21.

9 Water Resources Act 1991 s 158(1) (amended by the Environment Act 1995 s 120(1), Sch 22 paras 128, 160; and modified by SI 1995/2803, SI 1996/1243, SI 2005/421).

10 Water Resources Act 1991 s 158(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The functions referred to are functions by virtue of the Water Resources Act 1991 Pt II (ss 20-81): see **PARA 196** et seq. References in s 158 to Pt II are to be read as if the Water Act 2003 ss 3, 4, 10 were included therein: see **PARA 188** note 16.

11 Water Resources Act 1991 s 158(1)(b).

12 Water Resources Act 1991 s 158(1)(c) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

13 Water Resources Act 1991 s 158(1)(d).

14 Water Resources Act 1991 s 158(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

15 As to the Secretary of State see **PARA 15** note 1.

16 The functions of the Secretary of State under the Water Resources Act 1991 s 158, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see **PARA 16** note 2. As to the Welsh Ministers see **PARA 16** note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see **PARA 16**.

17 Water Resources Act 1991 s 158(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

18 'Registered land' has the same meaning as in the Land Registration Act 2002 (see **LAND REGISTRATION** vol 26 (2004 Reissue) **PARA 939**): Water Resources Act 1991 s 158(6) (definition substituted by the Land Registration Act 2002 s 133, Sch 11 para 25).

19 le under the Land Charges Act 1972 as if it were a charge affecting land falling within Class D(iii) (see **LAND CHARGES** vol 26 (2004 Reissue) **PARAS 633-636**): Water Resources Act 1991 s 158(4)(a).

20 le the provisions of the Land Charges Act 1972 s 4: see **LAND CHARGES** vol 26 (2004 Reissue) **PARAS 626, 634, 642-644**.

21 Water Resources Act 1991 s 158(4)(b).

22 'Successor', in relation to an agreement with the owner of any land, means a person deriving title or otherwise claiming under that owner, otherwise than in right of an interest or charge to which the interest of the owner was subject immediately before: (1) where the land is not registered land, the time when the agreement was made; and (2) where the land is registered land, the time when the notice of the agreement was registered: Water Industry Act 1991 s 158(6). As to the meaning of 'person' see PARA 13 note 29.

23 Water Resources Act 1991 s 158(4)(c).

24 le under the Land Registration Act 2002: see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

25 Water Resources Act 1991 s 158(5)(a) (s 158(5)(a), (b) substituted, (c) amended, by the Land Registration Act 2002 s 133, Sch 11, para 25(1), (2)).

26 le the Land Registration Act 2002 ss 28-30: see **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934-936.

27 Water Resources Act 1991 s 158(5)(b) (as substituted: see note 25).

28 Water Resources Act 1991 s 158(5)(c) (as amended: see note 25).

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### **(iii) Powers to Lay Pipes**

#### **462. Powers of undertakers to lay pipes in streets.**

Every relevant undertaker<sup>1</sup> and the Environment Agency<sup>2</sup> has power<sup>3</sup>, for the purpose of carrying out its functions<sup>4</sup>:

- 1082 (1) to lay a relevant pipe<sup>5</sup> in, under or over any street<sup>6</sup> and to keep that pipe there<sup>7</sup>;
- 1083 (2) to inspect, maintain<sup>8</sup>, adjust, repair or alter<sup>9</sup> any relevant pipe which is in, under or over any street<sup>10</sup>; and
- 1084 (3) to carry out any works requisite for, or incidental to, the purposes of any works falling within head (1) or head (2) above, including, for those purposes, breaking up or opening a street, tunnelling or boring under a street, breaking up or opening a sewer, drain or tunnel<sup>11</sup> and moving or removing earth and other materials<sup>12</sup>.

These powers also apply to accessories for such pipes<sup>13</sup>.

A stopcock<sup>14</sup> fitted to any service pipe in a street must be situated as near as reasonably practicable to the boundary of the street and a water undertaker must consult with the highway authority<sup>15</sup> concerned before determining where to fit a stopcock in a highway<sup>16</sup>.

Where a water undertaker exercises its powers under any of the above provisions for the purpose of carrying out works of maintenance, repair or renewal in relation to a service pipe belonging to a person other than the undertaker, the undertaker is entitled to recover from the occupier<sup>17</sup> of the premises supplied by means of that pipe the expenses reasonably incurred in so exercising that power<sup>18</sup>.

Nothing in these provisions authorises:

- 1085 (a) the installation by a relevant undertaker of any apparatus for measuring or showing the volume of water supplied to, or of effluent discharged from, any premises where that apparatus is to be used for the purpose only of determining the amount of any charges fixed, or to be fixed, in relation to those premises wholly or partly by reference to the volume of that water or effluent<sup>19</sup>;
- 1086 (b) any relevant undertaker, or the Agency, to carry out any works at any place below the place to which the tide flows at mean high water springs, except in accordance with such plans and sections, and subject to such restrictions, as may, before the works are commenced, have been approved by the Secretary of State or, in relation to Wales, by the Welsh Ministers<sup>20</sup>.

The exercise of these powers is subject to the provisions of the New Roads and Street Works Act 1991 relating to the carrying out of works in the street<sup>21</sup>. A water undertaker must only exercise these powers for the purposes of its authorised works<sup>22</sup>. They are exercisable both inside and outside the undertaker's area<sup>23</sup>. Where, however, a relevant undertaker proposes to exercise any of these powers outside its own area, then if the proposal is to lay:



- 1087 (i) a trunk main or a water main used solely for the purpose of supplying water otherwise than for domestic purposes<sup>24</sup>; or
- 1088 (ii) a sewer which is intended to be a public sewer but not a storm-water overflow sewer<sup>25</sup>,

it must give notice of its proposal to the water undertaker or sewerage undertaker for the area in question and must not carry out its proposal without the consent of that other undertaker<sup>26</sup>, or, where that other undertaker refuses to give its consent, or fails to give its consent before the end of the period of 28 days beginning with the day on which it is notified of the proposal, without the consent of the Water Services Regulation Authority<sup>27</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8. In certain circumstances these powers may also be exercised by a local authority: see PARA 404.

2 As to the Environment Agency see PARA 17. As to the power of the Agency to join in or act on behalf of one or more relevant undertakers for the purpose of carrying out works see PARA 455 note 2.

3 I.e., in the case of a relevant undertaker, subject to the provisions of the Water Industry Act 1991 s 158(2)-(11) (see note 5 and the text to notes 13-18), to s 162(9) (see the text to note 19) and the provisions of Pt VI Ch III (ss 179-192); and, in the case of the Agency, subject to the Water Resources Act 1991 ss 160-186. As to powers of entry for the exercise of these powers see PARA 477. As to discharges in the exercise of such powers see PARA 466. As to compensation for damage caused in the exercise of such powers see PARA 470.

4 As to the meaning of 'functions' in relation to a relevant undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

5 References in the Water Industry Act 1991 s 158 to a 'relevant pipe' are to be construed: (1) in relation to a water undertaker, as references to a water main (including a trunk main), resource main, discharge pipe or service pipe but not including a pipe laid in pursuance of s 66B(3)(a)(ii) (see PARA 342) which is used for the purpose of supplying water other than for domestic or food production purposes or laid in pursuance of s 66B(3)(a)(iii); and (2) in relation to a sewerage undertaker, as references to (a) any sewer or disposal main; or (b) in relation to the exercise of a power to lay a pipe under s 158(1)(a) (see head (1) in the text) or a power related to that power under s 158(1)(c) (see head (3) in the text), any lateral drain which the undertaker is to lay by virtue of s 98 or s 101B (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARAS 1018, 1022); or (c) in relation to the exercise of any other power under s 158(1), any lateral drain which belongs to or is vested for the time being in the undertaker: s 158(7) (amended by the Water Act 2003 ss 97(1), (4), 101(1), Sch 8 paras 2, 36). References to the laying of a relevant pipe include references to the laying of any drain or sewer for any of the purposes mentioned in the Water Industry Act 1991 s 161(3)(a), (b) (powers to deal with foul water and pollution: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) and to the construction of a watercourse for any of those purposes: s 161(7). As to the meanings of 'water main', 'trunk main', 'pipe', 'sewer', 'lateral drain' and 'drain' see PARA 138 note 11. As to the meaning of 'resource main' see PARA 179 note 4. As to the meaning of 'discharge pipe' see PARA 466 note 6. As to the meaning of 'service pipe' see PARA 179 note 8. As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44. 'Disposal main' means (subject to the Water Industry Act 1991 s 219(2): see PARA 138 note 11) any outfall pipe or other pipe which is a pipe for the conveyance of effluent to or from any sewage disposal works, whether of a sewerage undertaker or of any other person, and is not a public sewer: s 219(1). As to the meaning of 'effluent' see PARA 262 note 31. As to the meaning of 'watercourse' see PARA 187 note 2. As to the meaning of 'public sewer' see PARA 138 note 11. As to the meaning of 'person' see PARA 13 note 29.

Where: (i) an appointment or variation has been made under the Water Industry Act 1991 s 7 replacing a company as a relevant undertaker (see PARA 138); (ii) the appointment or variation relates only to parts of the area to which the company's appointment as relevant undertaker related; (iii) the conditions mentioned in s 7(5) (see PARA 138) were required to be satisfied in relation to each of the premises in those parts served by that company; and (iv) the company which has replaced the relevant undertaker has done so as water undertaker, then in the application of s 158 and s 159 (see PARA 463) in relation to that company, any pipe supplying, or intended to supply, any of the premises referred to in head (iii) with a supply of water which exceeds, or is likely to exceed, in any period of 12 months (A) if the area of the relevant undertaker concerned is wholly or mainly in Wales, 250 megalitres; (B) in all other cases, 50 megalitres, is deemed for the purpose of s 158(7) to be a water main: s 158(8), (9) (s 158(8)-(11) added by the Competition and Service (Utilities) Act 1992 s 40(6); the Water Industry Act 1991 s 158(9) substituted by SI 2000/1842, and amended by SI 2005/268). Where the Secretary of State or, in relation to Wales, the Welsh Ministers make regulations under the Water Industry Act 1991 s 7(6) (see PARA 138) amending s 7(5)(a), he or they must by regulations make the

corresponding amendment in s 158(9): s 158(10) (as so added). Where the company which has replaced the relevant undertaker has done so as a sewerage undertaker, any pipe draining or intended to drain any of the premises referred to in head (iii) above is deemed for these purposes to be a sewer: s 158(11) (as so added). As to water undertakers and sewerage undertakers see PARA 108 note 4. As to the meaning of 'month' see PARA 23 note 10.

The functions of the Secretary of State under the Water Industry Act 1991 s 158, in relation to any water undertaker or sewerage undertaker whose area is wholly or mainly in Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

References in the Water Resources Act 1991 s 159 to a relevant pipe (ie references in relation to the Environment Agency) are references to a resource main or discharge pipe and references to laying such a pipe include references to the laying of any drain or sewer for the specified purposes and to the construction of a watercourse for any of those purposes: s 159(5). The specified purposes are: (aa) intercepting, treating or disposing of any foul water arising or flowing upon any land; or (bb) otherwise preventing the pollution of (I) any waters, whether on the surface or underground, which belong to the Agency or any water undertaker or from which the Agency or any water undertaker is authorised to take water; (II) without prejudice to head (I), any reservoir which belongs to or is operated by the Agency or any water undertaker or which the Agency or any water undertaker is proposing to acquire or construct for the purpose of being so operated; or (III) any underground strata from which the Agency or any water undertaker is for the time being authorised to abstract water in pursuance of a licence under Pt II Ch II (ss 24-72) (see PARA 227 et seq): s 159(6) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'underground strata' see PARA 187 note 5.

6 As to the meaning of 'street' see PARA 308 note 19.

7 Water Industry Act 1991 s 158(1)(a); Water Resources Act 1991 s 159(1)(a) (s 159(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). See also *Dwr Cymru Cyfngedig v Williams* (1991) Times, 9 October, DC, per Nolan J.

8 References to maintaining a pipe include references to cleansing it: see the Water Industry Act 1991 s 192(2); the Water Resources Act 1991 s 159(7).

9 References to altering a pipe include references to altering its size or course, to moving or removing it and to replacing it with a pipe which is of the same description of relevant pipe as the pipe replaced: see the Water Industry Act 1991 s 192(2); the Water Resources Act 1991 s 159(7). In so far as any powers conferred by the Water Industry Act 1991 Pt VI (ss 155-192) on a relevant undertaker authorise the removal of any pipe or the alteration of its size or course, those powers are subject to such obligations by virtue of which the undertaker is required to maintain a pipe or a connection with it, or to alter a pipe only where certain conditions are satisfied, as are imposed on the undertaker by or under any enactment: Water Industry Act 1991 s 192(4). As to the meaning of 'enactment' see PARA 14 note 31.

10 Water Industry Act 1991 s 158(1)(b); Water Resources Act 1991 s 159(1)(b).

11 'Tunnel' does not include a railway tunnel, but only a tunnel of the same class as a sewer or drain: *Caledonian Rly Co v Glasgow Corpn* (1901) 3 F 526, followed in *Schweder v Worthing Gas Light and Coke Co* [1912] 1 Ch 83 (tunnel connecting two sides of a road); see also *Thompson v Sunderland Gas Co* (1877) 2 Ex D 429, CA. As to railway bridges see *Glasgow Corpn v Glasgow and South Western Rly Co* [1895] AC 376, HL, where it was held that a power to interfere with the structure of such a bridge was not included.

12 Water Industry Act 1991 s 158(1)(c); Water Resources Act 1991 s 159(1)(c), (d).

13 References to a pipe include references to any accessories for the pipe: see the Water Industry Act 1991 s 219(2); the Water Resources Act 1991 s 221(2). As to the meaning of 'accessories' in relation to the Water Industry Act 1991 see PARA 138 note 11; and in relation to the Water Resources Act 1991 see PARA 187 note 2. Note that the Agency uses cables known as 'telemetry cables' for remotely monitoring mains etc. Such cables may be laid under notice as 'accessories' to another pipe if they meet the above conditions.

Without prejudice to the generality of these powers, every water undertaker and the Agency has power to erect and keep in any street notices indicating the position of such underground accessories for its relevant pipes as may be used for controlling the flow of water in those pipes; and this power includes power to attach any such notice to any building, fence or other structure which is comprised in premises abutting on the street in question: Water Industry Act 1991 s 158(2), (3); Water Resources Act 1991 s 159(2), (3) (s 159(2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). There is no express power to place markers in private

land not abutting on a street; however, under the Pipelaying Code of Practice (see PARA 475) there is generally a requirement to mark the position of a cross country water main, which is generally done at field boundaries. It is submitted that such markers can be regarded as accessories though not strictly machinery or other apparatus.

14 As to the meaning of 'stopcock' see PARA 138 note 11.

15 As to the meaning of 'highway authority' see PARA 350 note 3. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

16 Water Industry Act 1991 s 158(4). As to the meaning of 'highway' see PARA 350 note 8.

17 As to the meaning of 'occupier' see PARA 339 note 8.

18 Water Industry Act 1991 s 158(5). As to the recovery of expenses see PARA 131 note 6.

19 Water Industry Act 1991 s 162(9). As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

20 Water Industry Act 1991 s 187(1), (3); Water Resources Act 1991 s 181(1), (5) (s 181(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). An approval for these purposes must be given to a relevant undertaker, or to the Agency, by the service on it of a notice containing the approval: Water Industry Act 1991 s 187(2); Water Resources Act 1991 s 181(2) (as so amended). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. The functions of the Secretary of State under the Water Industry Act 1991 s 187 and the Water Resources Act 1991 s 181, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

21 See the New Roads and Street Works Act 1991 Pt III (ss 48-106); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 406 et seq.

22 *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* (1897) 25 R 370; *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70.

23 Water Industry Act 1991 s 192(3). As to water undertakers' areas see PARA 318.

24 Water Industry Act 1991 s 192(3B)(a) (s192(3A), (3B) added by the Competition and Service (Utilities) Act 1992 s 47).

25 Water Industry Act 1991 s 192(3B)(b) (as added: see note 24).

26 Water Industry Act 1991 s 192(3A)(a) (as added: see note 24).

27 Water Industry Act 1991 s 192(3A)(b) (as added (see note 24); and amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

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#### **463. Powers to lay pipes in other land.**

Every relevant undertaker<sup>1</sup> and the Environment Agency<sup>2</sup> has power<sup>3</sup>, for the purpose of carrying out its functions<sup>4</sup>:

- 1089 (1) to lay a relevant pipe<sup>5</sup> (whether above or below the surface) in any land<sup>6</sup> which is not in, under or over a street<sup>7</sup> and to keep that pipe there<sup>8</sup>;
- 1090 (2) to inspect, maintain<sup>9</sup>, adjust, repair or alter<sup>10</sup> any relevant pipe which is in any such land<sup>11</sup>; and
- 1091 (3) to carry out any works requisite for, or incidental to, the purposes of any works falling within head (1) or head (2) above<sup>12</sup>.

These powers are exercisable only after reasonable notice<sup>13</sup> of the proposed exercise of any such power has been given to the owner<sup>14</sup> and to the occupier of the land where the power is to be exercised<sup>15</sup>. Nothing in these provisions authorises:

- 1092 (a) the installation by a relevant undertaker of any apparatus for measuring or showing the volume of water supplied to, or of effluent<sup>16</sup> discharged from, any premises where that apparatus is to be used for the purpose only of determining the amount of any charges fixed, or to be fixed, in relation to those premises wholly or partly by reference to the volume of that water or effluent<sup>17</sup>;
- 1093 (b) a water undertaker<sup>18</sup> to lay a service pipe in, on or over any land except where there is already a service pipe where that pipe is to be laid<sup>19</sup>, or the undertaker is required to lay the pipe in, on or over that land by virtue of the statutory duty<sup>20</sup> to carry out ancillary works to make a domestic water supply connection<sup>21</sup>;
- 1094 (c) any relevant undertaker, or the Agency, to carry out any works at any place below the place to which the tide flows at mean high water springs, except in accordance with such plans and sections, and subject to such restrictions, as may, before the works are commenced, have been approved by the Secretary of State<sup>22</sup> or, in relation to Wales, by the Welsh Ministers<sup>23</sup>.

Without prejudice to its powers under the provisions above<sup>24</sup>, but subject to head (c) above<sup>25</sup>, a water undertaker has power at its own expense to fit a stopcock<sup>26</sup> to any service pipe by which a supply of water is, or is to be, provided to any premises by the undertaker or a licensed water supplier<sup>27</sup>, whether that pipe belongs to the undertaker or to any other person<sup>28</sup>.

A water undertaker must only exercise these powers for the purposes of its authorised works<sup>29</sup>. The powers are exercisable both inside and outside the undertaker's area<sup>30</sup>; but where a relevant undertaker proposes to exercise any such powers outside its own area, in certain cases it must give notice of its proposal to the water undertaker or sewerage undertaker for the area in question and must not carry out its proposal without the consent of that other undertaker or, as appropriate the Water Services Regulation Authority<sup>31</sup>.

<sup>1</sup> As to the meaning of 'relevant undertaker' see PARA 137 note 8. In certain circumstances these powers may also be exercised by a local authority: see PARA 404.

2 As to the Environment Agency see PARA 17. As to the power of the Agency to join in or act on behalf of one or more relevant undertakers for the purpose of carrying out works see PARA 455 note 2.

3 Ie, in the case of a relevant undertaker, subject to the Water Industry Act 1991 s 159(2)-(7) (see note 11 and the text to notes 13-15, 18-21), to s 162(9) (see the text to note 17) and to the provisions of Pt VI Ch III (ss 179-192); and, in the case of the Agency, subject to the Water Resources Act 1991 ss 161-186. As to powers of entry for the exercise of these powers see PARA 477. As to compensation for damage caused in the exercise of such powers see PARA 471. As to complaints with respect to the exercise of these powers see PARA 474. As to codes of practice with respect to the exercise of these powers see PARA 475.

4 As to the meaning of 'functions' in relation to a relevant undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

5 For meanings of 'relevant pipe' and of references to laying such a pipe, in relation to an undertaker, see PARA 462 note 5: definition is applied by the Water Industry Act 1991 s 159(7) (amended by the Water Act 2003 s 97(1), (5)). In relation to the Agency, references to a relevant pipe for these purposes are references to a resource main or a discharge pipe: Water Resources Act 1991 s 160(4). As to the meaning of 'resource main' see PARA 179 note 4. As to the meaning of 'discharge pipe' see PARA 466 note 6. These powers also apply to accessories for such pipes: see the Water Industry Act 1991 s 219(2); the Water Resources Act 1991 s 221(2). As to the meaning of 'accessories' in relation to the Water Industry Act 1991 see PARA 138 note 11; and in relation to the Water Resources Act 1991 see PARA 187 note 2.

6 As to the meaning of 'land' see PARA 14 note 21. As to the carrying out of works on common land see the Commons Act 2006 Pt 3 (ss 38-44); and **COMMONS** vol 13 (2009) PARA 401 et seq.

7 As to the meaning of 'street' see PARA 308 note 19.

8 Water Industry Act 1991 s 159(1)(a); Water Resources Act 1991 s 160(1)(a) (s 160(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

9 As to the meaning of references to 'maintaining' a pipe see PARA 462 note 8.

10 As to the meaning of references to 'altering' a pipe see PARA 462 note 9.

11 Water Industry Act 1991 s 159(1)(b); Water Resources Act 1991 s 160(1)(b). The power conferred by virtue of the Water Industry Act 1991 s 159(1)(b), and the power conferred in relation thereto by virtue of s 159(1)(c) (see the text to note 12) is exercisable in relation to a service pipe irrespective of the person to whom the pipe belongs; but expenses incurred in exercising those powers in relation to any pipe are recoverable from the person to whom the pipe belongs only if and to the extent that that person has agreed to pay them: s 159(3). As to the meaning of 'service pipe' see PARA 179 note 8. As to the meaning of 'person' see PARA 13 note 29. As to the recovery of expenses see PARA 131 note 6.

12 Water Industry Act 1991 s 159(1)(c); Water Resources Act 1991 s 160(1)(c). See also note 11.

13 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. In relation to any exercise of the powers conferred by these provisions for the purpose of laying or altering a relevant pipe, the minimum period that is capable of constituting reasonable notice is deemed: (1) where the power is exercised for the purpose of laying a relevant pipe otherwise than in substitution for an existing pipe of the same description, to be three months; and (2) where the power is exercised for the purpose of altering an existing pipe, to be 42 days: Water Industry Act 1991 s 159(5); Water Resources Act 1991 s 160(3). The Water Industry Act 1991 s 159(5) does not apply in the case of any notice given by a relevant undertaker with respect to the exercise of any power in an emergency or for the purpose of laying or altering a service pipe, or complying with a duty imposed under s 41 (see PARA 332) or s 98 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1018): s 159(6). As to the meaning of 'month' see PARA 23 note 10.

14 As to the meaning of 'owner' see PARA 22 note 9.

15 Water Industry Act 1991 s 159(4); Water Resources Act 1991 s 160(2).

16 As to the meaning of 'effluent' see PARA 262 note 31.

17 Water Industry Act 1991 s 162(9). As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11.

18 As to the meaning of 'water undertaker' see PARA 137 note 4.

19 Water Industry Act 1991 s 159(2)(a).

20 le by virtue of any of the Water Industry Act 1991 s 46(3)-(5): see PARA 336.

21 Water Industry Act 1991 s 159(2)(b).

22 As to the Secretary of State see PARA 15 note 1.

23 Water Industry Act 1991 s 187(1), (3); Water Resources Act 1991 s 181(1), (5) (s 181(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). An approval for these purposes must be given to a relevant undertaker, or to the Agency, by the service on it of a notice containing the approval: Water Industry Act 1991 s 187(2); Water Resources Act 1991 s 181(2) (as so amended). The functions of the Secretary of State under the Water Industry Act 1991 s 187 and the Water Resources Act 1991 s 181, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

24 le without prejudice to the Water Industry Act 1991 s 159: see the text to notes 1-15, 18-21.

25 See the Water Industry Act 1991 s 187(1), (3).

26 As to the meaning of 'stopcock' see PARA 138 note 11.

27 As to the meaning of 'licensed water supplier' see PARA 152.

28 Water Industry Act 1991 s 163(1) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 38). A stopcock fitted in private premises by a water undertaker to any service pipe must be situated as near as practicable to any street from which that pipe enters those premises: Water Industry Act 1991 s 163(2). Note that a water undertaker may fit a unit combining both a stopcock and a water meter; when this is done, the requirements for positioning water meters must also be followed: see PARA 435. In certain circumstances these powers may also be exercised by a local authority: see PARA 404.

29 *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* (1897) 25 R 370; *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70. The Water Industry Act 1991 s 159 does not confer on a sewerage undertaker an implied power to discharge water onto another person's land or watercourse without obtaining the owner's consent: see *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276, [2002] Ch 25, [2001] 3 All ER 673. As to discharges for works purposes see PARA 466.

30 Water Industry Act 1991 s 192(3). As to water undertakers' areas see PARA 318.

31 See the Water Industry Act 1991 s 192(3A), (3B) (both added by the Competition and Service (Utilities) Act 1992 s 47; Water Industry Act 1991 s 192(3A) amended by the Water Act 2003 s 36(2)); and PARA 462. As to the Water Services Regulation Authority see PARA 109.

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#### **464. Vesting of pipes in the relevant undertaker or in the Environment Agency.**

Subject to any provision to the contrary contained in an agreement between the relevant undertaker<sup>1</sup> or, as the case may be, the Environment Agency<sup>2</sup>, and the person<sup>3</sup> in whom an interest in the pipe<sup>4</sup> is or is to be vested<sup>5</sup>, every relevant pipe<sup>6</sup> which has been laid by such an undertaker or by the Agency in exercise of any statutory power<sup>7</sup> vests in the undertaker which laid it or, as the case may be, in the Agency<sup>8</sup>.

In addition to the water mains and service pipes which vest in a water undertaker by virtue of the above provisions, every water main and so much of each service pipe with respect to which a declaration of vesting made by a water undertaker<sup>9</sup> takes effect also vest in that undertaker<sup>10</sup>. However, those provisions do not apply to a service pipe laid in a street<sup>11</sup> other than the street in which the water main with which it connects is situated, nor to a service pipe laid otherwise than in a street where that pipe is laid in pursuance of the statutory duty on a water undertaker to make a domestic connection pursuant to a requirement imposed by a local authority<sup>12</sup>, or in substitution for a service pipe belonging to a person other than the person who lays the replacement pipe<sup>13</sup>.

If any water fittings<sup>14</sup> let on hire by a water undertaker are suitably marked<sup>15</sup> they continue to be the property of, and removable by, the undertaker, even if they are fixed to some part of the premises in which they are situated or are laid in the soil under any premises<sup>16</sup>, and they are not subject to distress or to the landlord's remedy for rent or liable to be taken in execution under any process of any court or in any proceedings in bankruptcy against a person in whose possession they are<sup>17</sup>.

The above provisions are without prejudice, in relation to any company appointed to be a relevant undertaker, to the vesting of anything in that company by virtue of any transfer scheme<sup>18</sup> or to the exercise by any relevant undertaker of any power to acquire property by agreement or compulsorily<sup>19</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to the meaning of 'pipe' and references to laying a pipe in the Water Industry Act 1991 see PARA 138 note 11; and in the Water Resources Act 1991 see PARA 187 note 2.

5 Water Industry Act 1991 s 179(1), (1A) (s 179(1) amended, (1A) added, by the Water Act 2003 s 101(1), Sch 8 paras 2, 41); Water Resources Act 1991 s 175(1) (s 175 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). No agreement may be made between a relevant undertaker and any other person for the vesting in that person of any pipe laid in pursuance of the Water Industry Act 1991 s 66B(3)(a)(ii) (see PARA 342) or of s 66C(2)(b)(i) by virtue of s 66C(3)(b) (see PARA 343); s 179(1A) (as so added).

6 'Relevant pipe' in relation to a water undertaker means any water main (including a trunk main), resource main, discharge pipe or service pipe; and in relation to a sewerage undertaker means any sewer, lateral drain or disposal main: Water Industry Act 1991 s 179(7) (definition amended by the Water Act 2003 s 97(1), (7)(b)). As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meanings of 'water main', 'trunk main', 'sewer' and 'lateral drain' see PARA 138 note 11. As to the meaning of 'resource main' see PARA 179 note 4. As to the meaning of 'discharge pipe' see PARA 466 note 6. As to the meaning of 'service pipe' see PARA 179 note 8. As to the meaning of 'disposal main' PARA 462 note 5.

In relation to the Agency, 'relevant pipe' means a relevant pipe for the purposes of the Water Resources Act 1991 s 159 or 160 (see PARA 462 note 5): see s 175(1)(a).

7     Ie, in the case of a relevant undertaker, any power conferred by the Water Industry Act 1991 Pt VI (ss 155-192) or otherwise (see s 179(1)(a)); and in the case of the Agency, any power conferred by the Water Resources Act 1991 Pt VII Ch I (ss 154-168) or otherwise (see s 175(1)(b) (as amended: see note 5)).

8     Water Industry Act 1991 s 179(1); Water Resources Act 1991 s 175(1) (as amended: see note 5). In the case of the Agency, this provision is without prejudice to the vesting of anything in the Agency by virtue of the exercise by the Agency of any power to acquire property by agreement or compulsorily: s 175(2) (as so amended). As to the power of the Agency to acquire property compulsorily see PARA 453.

Similar provision is made with respect to the vesting of sewage disposal works in the sewerage undertaker which constructed them: see the Water Industry Act 1991 s 179(1)(b) (as amended: see note 5), s 179(2) (amended by the Water Act 2003 s 97(1), (7)(a)), Water Industry Act 1991 s 179(5); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1003.

9     Ie under the Water Industry Act 1991 Pt III Ch II (ss 40-66): see PARA 330 et seq.

10    Water Industry Act 1991 s 179(2A) (added by the Water Act 2003 s 92(4)).

11    As to the meaning of 'street' see PARA 308 note 19.

12    Water Industry Act 1991 s 179(3)(a). The duty referred to in the text is that imposed by s 46(4): see PARA 336.

13    Water Industry Act 1991 s 179(3)(b).

14    As to the meaning of 'water fittings' see PARA 134 note 6; definition applied by the Water Industry Act 1991 s 179(7).

15    Water fittings let on hire by a water undertaker are treated as suitably marked for these purposes if, and only if, they bear either such a distinguishing metal plate affixed to them or such a distinguishing brand or other mark conspicuously impressed or made on them as sufficiently indicates the undertaker as the actual owner of the fittings: Water Industry Act 1991 s 179(7).

16    Water Industry Act 1991 s 179(4)(a). Nothing in s 179(4), however, affects the valuation for rating of any rateable hereditament: s 179(4). As to the abolition of domestic rates, and as to non-domestic rating, see **RATING AND COUNCIL TAX**.

17    Water Industry Act 1991 s 179(4)(b). See also note 16. As from a day to be appointed s 179(4)(b) is amended so as to read: and they are not subject to distress, or liable to be taken control of under the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1386 et seq), or to be taken in execution under any process of any court or in any proceedings in bankruptcy against a person in whose possession they are: Water Industry Act 1991 s 179(4)(b) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 86, 146, 148(5), Sch 13 para 98, Sch 14 para 46, Sch 23 Pt 4). At the date at which this volume states the law no such day had been appointed.

18    Ie any scheme under the Water Industry Act 1991 Sch 2: see PARA 141.

19    Water Industry Act 1991 s 179(6). As to the power of undertakers to acquire property compulsorily see PARA 453.



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#### **465. Liability for injuries from apparatus in streets.**

Where in the performance of its statutory duties, any water undertaker<sup>1</sup> places a hydrant<sup>2</sup> or stopcock<sup>3</sup> in a street, and persons are injured by falling over or being caused to trip by it, either because of its defective condition or because of the defective state of the highway in which it is placed<sup>4</sup>, the liability of the undertaker depends on whether it has failed in its duty to take care at common law<sup>5</sup> or under statute<sup>6</sup>. If the apparatus is out of repair and there is no specific evidence relating to the relative responsibility of the undertaker and the street authority<sup>7</sup>, each of them will bear liability equally<sup>8</sup>.

The undertaker is normally liable to repair stopcocks<sup>9</sup>, but if a hydrant or stopcock has been properly laid and constructed in the first instance, and has been maintained in a reasonably proper condition, the undertaker is not liable for injury caused by its subsequently projecting above the pavement solely by reason of the ordinary wearing away of the highway<sup>10</sup>. The undertaker is not liable if a cover plate in the pavement belonging to the undertaker has been opened by the malicious act of a third person and the undertaker has not been negligent in failing to take precautions to prevent such an occurrence<sup>11</sup>; but it will be liable if precautions could have been taken and were not<sup>12</sup>, or if the hydrant or stopcock was improperly laid or constructed<sup>13</sup>, or if the undertaker has failed to keep it in proper repair<sup>14</sup>, or if the pavement was improperly reinstated by the undertaker<sup>15</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the provision of fire-hydrants see PARAS 348-349.

3 As to the placing of stopcocks see PARA 463.

4 Although the apparatus is the property and responsibility of the undertaker, it is the state of the highway which may be a nuisance, not the statutory works placed in it: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 397. Where apparatus in a street is defective owing to the bursting of pipes or of fire-hydrants, the undertaker will normally be liable for resultant damage in so far as this is attributable to the escape of water: see PARA 672.

5 As to the duty at common law see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 395-396.

6 As to the duty concerning statutory works see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 395, 397, 457-461; and in particular *Hartley v Rochdale Corpn* [1908] 2 KB 594, DC; and *Withington v Bolton Borough Council* [1937] 3 All ER 108. The undertaker will not be liable if the reinstatement was carried out by the highway authority under power authorising it to do so: *Rider v Metropolitan Water Board* [1949] 2 KB 378, [1949] 2 All ER 97. As to the responsibility for reinstatement following the execution of street works see the New Roads and Street Works Act 1991 ss 70-73; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 457-461.

7 As to street authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 412.

8 *Nolan v Merseyside County Council and North West Water Authority* (1982, unreported), CA.

9 Stopcocks not inside buildings are usually vested in, and the responsibility of, the undertaker: see PARA 463. If however, the duty of keeping a stopcock in repair is cast upon the owner of premises (ie the stopcock is not vested in the undertaker), the undertaker is not liable.

10 *Moore v Lambeth Waterworks Co* (1886) 17 QBD 462, CA, where a fire plug was left projecting; *Thompson v Brighton Corpn* [1894] 1 QB 332, CA.

11 *Simpson v Metropolitan Water Board* (1917) 15 LGR 629.

12 *Wells v Metropolitan Water Board* [1937] 4 All ER 639. A local or highway authority may be empowered by a local Act to take temporary precautions to guard against such dangers.

13 *Hendra v Chelsea Waterworks Governor & Co* (1891) 8 TLR 101; *Osborn v Metropolitan Water Board* (1910) 102 LT 217, DC; but see *Strute v Southwark and Vauxhall Water Co* (1889) 53 JP 424 (affd 5 TLR 638, CA); *Rosenbaum v Metropolitan Water Board* (1910) 103 LT 739, CA.

14 See **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 397; and *Bayley v Wolverhampton Waterworks Co* (1860) 6 H & N 241; *Blackmore v Mile End Old Town Vestry* (1882) 9 QBD 451, CA; *Stockings v Lambeth Waterworks Co* (1891) 7 TLR 460, CA.

15 See note 6; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 395, 457 et seq.

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#### **(iv) Powers to Discharge Water**

##### **466. Discharges for works purposes.**

Where any water undertaker<sup>1</sup> or the Environment Agency<sup>2</sup>:

- 1095 (1) is exercising, or is about to exercise, any of certain statutory works powers<sup>3</sup>; or
- 1096 (2) is carrying out, or is about to carry out, the construction, alteration, repair, cleaning or examination of any reservoir, well, borehole or other work belonging to or used by that undertaker or, as the case may be, the Agency for the purposes of, or in connection with, the carrying out of any of its functions<sup>4</sup>,

the undertaker or Agency may<sup>5</sup> cause the water in any relevant pipe<sup>6</sup> or in any such reservoir, well, borehole or other work to be discharged into any available watercourse<sup>7</sup>. Nothing in these provisions, however, authorises:

- 1097 (a) any discharge which damages or injuriously affects the works or property of any railway undertakers<sup>8</sup> or navigation authority<sup>9</sup> or floods or damages any highway<sup>10</sup>; or
- 1098 (b) any relevant undertaker, or the Agency, to carry out any works at any place below the place to which the tide flows at mean high water springs, except in accordance with such plans and sections, and subject to such restrictions, as may, before the works are commenced, have been approved by the Secretary of State<sup>11</sup> or, in relation to Wales, by the Welsh Ministers<sup>12</sup>.

If any water undertaker, or the Agency, fails to take all necessary steps to secure that any water discharged by it under these powers is as free as may be reasonably practicable from (i) mud and silt<sup>13</sup>; (ii) solid, polluting, offensive or injurious substances<sup>14</sup>; and (iii) any substances prejudicial to fish or spawn, or to spawning beds or food of fish<sup>15</sup>, it is guilty of an offence<sup>16</sup>.

Except in an emergency, no discharge may be made under the above provisions through any pipe the diameter of which exceeds 229 millimetres except with the required consent<sup>17</sup>. In the case of a water undertaker, discharge through such a pipe requires the consent of the Agency and of any navigation authority which carries out functions in relation to the part of the watercourse where the discharge is made or any part of that watercourse which is less than three miles downstream from the place of the discharge<sup>18</sup>; and in the case of the Agency, it requires such consent as may be prescribed<sup>19</sup>. An application for such consent must be accompanied or supplemented by all such information<sup>20</sup> as the person to whom it is made may reasonably require<sup>21</sup>. The undertaker or, as the case may be, the Agency must serve a copy of the application and of any consent given on that application on every person who is registered<sup>22</sup> with the undertaker or Agency in respect of any premises which are within three miles of the place where the discharge to which the application relates is proposed to be made and are not upstream from that place<sup>23</sup>, and who has not agreed in writing<sup>24</sup> that he need not be served with such a copy<sup>25</sup>.

An application for consent with respect to a particular discharge must be determined before the end of the period of seven days beginning with the day after the application is made and if it is not so determined within that period, the consent applied for is deemed to have been given unconditionally<sup>26</sup>. An application for consent in any other case must be determined before the end of the period of three months<sup>27</sup> beginning with the day after the application is made<sup>28</sup>. Where, however, an undertaker or the Agency made an application for consent but failed to comply with its obligation to supplement the application with information required by the person to whom it was made<sup>29</sup>, and that requirement was made at such a time before the end of the period within which that person is required to determine the application as gave the undertaker or, as the case may be, the Agency, a reasonable opportunity to provide the required information within that period<sup>30</sup>, that person may delay determination of the application until a reasonable time after the required information is provided<sup>31</sup>.

A consent for these purposes may relate to a particular discharge or to discharges of a particular description and may be made subject to such reasonable conditions as may be specified by the person giving it, but may not be unreasonably withheld<sup>32</sup>. Any dispute as to whether such a consent should be given or withheld, or as to whether the conditions to which any such consent is made subject are reasonable, must be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, by the President of the Institution of Civil Engineers<sup>33</sup>.

Where any discharge is made in an emergency without the consent which, if there were no emergency, would be required by virtue of the above provisions, the undertaker which made the discharge or, as the case may be, the Agency must, as soon as practicable after making the discharge, serve a notice on every person on whom it would have been required to serve the application for consent or any copy of that application, stating that the discharge has been made<sup>34</sup>, and giving such particulars of it, and of the emergency, as the persons served with the notice might reasonably require<sup>35</sup>. If any water undertaker, or the Agency, contravenes any of the above requirements relating to consents, or any condition of a consent given for these purposes, it is guilty of an offence<sup>36</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4. In certain circumstances these powers may also be exercised by a local authority: see PARA 404.

2 As to the Environment Agency see PARA 17. As to the power of the Agency to join in or act on behalf of one or more relevant undertakers for the purpose of carrying out works see PARA 455 note 2.

3 I.e., in the case of a water undertaker, any power conferred by the Water Industry Act 1991 s 158 (see PARA 462), s 159 (see PARA 463), s 161 (other than the power conferred by s 161(3)) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) or s 163 (see PARA 463); or, in the case of the Agency, any power conferred by the Water Resources Act 1991 s 159 (see PARA 462), s 160 (see PARA 463) or s 162(2) or (3) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329): Water Industry Act 1991 s 165(1)(a); Water Resources Act 1991 s 163(1)(b).

4 Water Industry Act 1991 s 165(1)(b); Water Resources Act 1991 s 163(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'functions' in relation to a water undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

5 I.e., in the case of a water undertaker, subject to the Water Industry Act 1991 s 165(2)-(4) (see the text to notes 8-10; 13-16) and s 166 (see the text to notes 17-36); and, in the case of the Agency, subject to the Water Resources Act 1991 s 163(2)-(4) (see the text to notes 8-10, 13-16) and s 164 (see the text to notes 17-36): Water Industry Act 1991 s 165(1); Water Resources Act 1991 s 163(1).

6 'Relevant pipe' means (1) in relation to a water undertaker, any water main (including a trunk main), resource main, discharge pipe or service pipe (Water Industry Act 1991 s 165(4)); and (2) in relation to the Agency, a relevant pipe within the meaning of the Water Resources Act 1991 s 159 (see PARA 462 note 5) (Water Resources Act 1991 s 163(4)). As to the meanings of 'water main' and 'trunk main' see PARA 138 note 11. As to the meaning of 'resource main' see PARA 179 note 4. As to the meaning of 'service pipe' see PARA 179 note 8. 'Discharge pipe' means a pipe from which discharges are or are to be made under the Water Industry Act

1991 s 165 or, as the case may be, the Water Resources Act 1991 s 163; Water Industry Act 1991 s 192(1); Water Resources Act 1991 s 186(1). As to the meaning of 'pipe' see PARA 138 note 11.

7 Water Industry Act 1991 s 165(1); Water Resources Act 1991 s 163(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'watercourse' see PARA 187 note 2. As to powers of entry in respect of such works see PARA 477. As to compensation in respect of such works see PARA 472.

8 'Railway undertakers' means the successor to the British Railways Board, Transport for London or any subsidiary (within the meaning of the Greater London Authority Act 1999) of Transport for London, and any other person authorised by any enactment, or by any order, rule or regulation made under any enactment, to construct, work or carry on any railway: Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 163(4) (definition in each case amended by SI 2003/1615). As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to Transport for London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 269-321. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'enactment' see PARA 14 note 31.

9 Water Industry Act 1991 s 165(2)(a); Water Resources Act 1991 s 163(2)(a). As to the meaning of 'navigation authority' see PARA 189 note 1.

10 Water Industry Act 1991 s 165(2)(b); Water Resources Act 1991 s 163(2)(b). As to the meaning of 'highway' see PARA 350 note 8.

11 As to the Secretary of State see PARA 15 note 1.

12 Water Resources Act 1991 s 187(1), (3); Water Resources Act 1991 s 181(1), (5) (s 181(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). An approval for these purposes must be given to a relevant undertaker, or to the Agency, by the service on it of a notice containing the approval: Water Industry Act 1991 s 187(2); Water Resources Act 1991 s 181(2) (as so amended). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. The functions of the Secretary of State under the Water Industry Act 1991 s 187 and the Water Resources Act 1991 ss 164 (see the text to note 19), 181, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

13 Water Industry Act 1991 s 165(3)(a); Water Resources Act 1991 s 163(3)(a).

14 Water Industry Act 1991 s 165(3)(b); Water Resources Act 1991 s 163(3)(b). As to the meaning of 'substance' see PARA 367 note 21.

15 Water Industry Act 1991 s 165(3)(c); Water Resources Act 1991 s 163(3)(c).

16 Water Industry Act 1991 s 165(3); Water Resources Act 1991 s 163(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: Water Industry Act 1991 s 165(3); Water Resources Act 1991 s 163(3). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

17 See the Water Industry Act 1991 s 166(1); the Water Resources Act 1991 s 164(1). No consent is required, however, and no notice need be served, in respect of any discharge if the requirements of the Water Act 1945 s 34 (repealed) (temporary discharges into watercourses) had been satisfied in relation to that discharge before 1 September 1989: Water Industry Act 1991 s 166(9); Water Resources Act 1991 s 164(9). The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48, 49 (requirement to consider effect on European sites in Great Britain and European offshore marine sites) apply in relation to the granting of an authorisation by virtue of any consent given under the Water Industry Act 1991 s 166 or the Water Resources Act 1991 s 164: see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 84B (added by SI 2007/1843); and PARA 11; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

18 Water Industry Act 1991 s 166(1) (amended by the Environment Act 1995 Sch 22 para 118).

19 See the Water Resources Act 1991 s 164(1). 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: see s 221(1); the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30. At the date at which this volume states the law no such regulations had been made.

20 As to the meaning of 'information' see PARA 117 note 13.

21 See the Water Industry Act 1991 s 166(2)(a); Water Resources Act 1991 s 164(2)(a). Subject to the Water Industry Act 1991 s 166(4) or the Water Resources Act 1991 s 164(4) (see the text to notes 29-31), and without prejudice to the effect, if any, of any other contravention of the statutory requirements in relation to such an application, a failure to provide information in pursuance of the obligation to supplement such an application does not invalidate the application: Water Industry Act 1991 s 166(2); Water Resources Act 1991 s 164(2). As to the meaning of 'contravention' see PARA 20 note 5.

22 As to the requirement to keep a register see PARA 467.

23 Water Industry Act 1991 s 166(2)(b)(i); Water Resources Act 1991 s 164(2)(b)(i) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

24 As to the meaning of 'writing' see PARA 22 note 1.

25 Water Industry Act 1991 s 166(2)(b)(ii); Water Resources Act 1991 s 164(2)(b)(ii).

26 Water Industry Act 1991 s 166(3)(a); Water Resources Act 1991 s 164(3)(a).

27 As to the meaning of 'month' see PARA 23 note 10.

28 Water Industry Act 1991 s 166(3)(b); Water Resources Act 1991 s 164(3)(b).

29 See the Water Industry Act 1991 s 166(4)(a); Water Resources Act 1991 s 164(4)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

30 Water Industry Act 1991 s 166(4)(b); Water Resources Act 1991 s 164(4)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

31 Water Industry Act 1991 s 166(4); Water Resources Act 1991 s 164(4).

32 Water Industry Act 1991 s 166(5); Water Resources Act 1991 s 164(5).

33 Water Industry Act 1991 s 166(6); Water Resources Act 1991 s 164(6). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

34 Water Industry Act 1991 s 166(7)(a); Water Resources Act 1991 s 164(7)(a) (s 164(7) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

35 Water Industry Act 1991 s 166(7)(b); Water Resources Act 1991 s 164(7)(b).

36 Water Industry Act 1991 s 166(8); Water Resources Act 1991 s 164(8) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: Water Industry Act 1991 s 166(8); Water Resources Act 1991 s 164(8).

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#### **467. Register for the purposes of works discharges.**

Every water undertaker<sup>1</sup> and the Environment Agency<sup>2</sup> must keep a register of persons<sup>3</sup> and premises for the purposes of the provisions<sup>4</sup> relating to works discharges<sup>5</sup>. A water undertaker, or the Agency, must enter the name and address of a person in that register in respect of any premises which abut on any watercourse<sup>6</sup> if that person has requested to be so registered and is either the owner<sup>7</sup> or occupier of those premises<sup>8</sup>, or an officer of an association of owners or occupiers of premises which abut on that watercourse and include those premises<sup>9</sup>. Certain confidential information or information affecting national security may be excluded from the register kept by the Agency<sup>10</sup>.

If a water undertaker or the Agency contravenes<sup>11</sup> any of these requirements without reasonable excuse, it is guilty of an offence<sup>12</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'person' see PARA 13 note 29.

4 In the Water Industry Act 1991 s 166 or, as the case may be, the Water Resources Act 1991 s 164: see PARA 466.

5 Water Industry Act 1991 s 197(1); Water Resources Act 1991 s 191(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

6 As to the meaning of 'watercourse' see PARA 187 note 2.

7 As to the meaning of 'owner' see PARA 22 note 9.

8 Water Industry Act 1991 s 197(2)(a); Water Resources Act 1991 s 191(2)(a) (s 191(2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

9 Water Industry Act 1991 s 197(2)(b); Water Resources Act 1991 s 191(2)(b). As to restrictions on the disclosure of information obtained under the Water Industry Act 1991 or the Water Resources Act 1991 see PARA 183.

10 See PARAS 269, 270.

11 As to the meaning of 'contravene' see PARA 20 note 5.

12 Water Industry Act 1991 s 197(3); Water Resources Act 1991 s 191(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: Water Industry Act 1991 s 197(3); Water Resources Act 1991 s 191(3). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

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## **(v) Works requiring Scheduled Monument Consent**

### **468. In general.**

Scheduled monument consent<sup>1</sup> is granted to the following works carried out by, inter alia, a relevant undertaker<sup>2</sup> or the Environment Agency<sup>3</sup>:

- 1099 (1) works for the repair or maintenance of machinery, being works which do not involve a material alteration to a scheduled monument<sup>4</sup>;
- 1100 (2) works which are urgently necessary in the interests of safety or health, provided that they are limited to the minimum measures immediately necessary, and that notice in writing<sup>5</sup> justifying in detail the need for the works is given to the Secretary of State<sup>6</sup> or, in relation to Wales, to the Welsh Ministers<sup>7</sup>, as soon as reasonably practicable<sup>8</sup>.

Where scheduled monument consent for works not falling within head (1) or head (2) is required, it may be granted on an application made to the Secretary of State or, as appropriate, the Welsh Ministers<sup>9</sup>.

1 As to scheduled monument consent see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1013.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 As to the Environment Agency see PARA 17. As to the power of the Agency to join in or act on behalf of one or more relevant undertakers for the purpose of carrying out works see PARA 455 note 2.

4 See the Ancient Monuments (Class Consents) Order 1994, SI 1994/1381, art 2(1), Schedule, Class 4.

5 As to the meaning of 'writing' see PARA 22 note 1.

6 As to the Secretary of State see PARA 15 note 1.

7 The functions of the Secretary of State under the Ancient Monuments (Class Consents) Order 1994, SI 1994/1381, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 3, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

8 See the Ancient Monuments (Class Consents) Order 1994, SI 1994/1381, Schedule, Class 5.

9 See **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1014.



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### **(3) COMPENSATION AND COMPLAINTS IN RESPECT OF WORKS POWERS**

#### **(i) Compensation**

##### **469. Compensation in respect of compulsory works orders.**

Where a licence<sup>1</sup> to abstract water or to obstruct or impede the flow of any inland waters is granted, or is deemed to be granted, to a water undertaker<sup>2</sup> or, as the case may be, to the Environment Agency<sup>3</sup>, in connection with any engineering or building operations<sup>4</sup> to which a compulsory works order<sup>5</sup> relates, no compensation is payable<sup>6</sup> in respect of any land<sup>7</sup> or interest injuriously affected by the carrying out of those operations, in so far as that land or interest is injuriously affected by the abstraction of water, or the obstruction or impeding of the flow, in accordance with the provisions of the licence<sup>8</sup>.

If the value of any interest in any relevant land<sup>9</sup> is depreciated by the coming into force of so much of any compulsory works order as confers compulsory powers, other than powers of compulsory acquisition, for the purpose of enabling any engineering or building operations to be carried out and grants authority for the carrying out of the operations, the person<sup>10</sup> entitled to that interest is entitled to compensation from the applicant for the order of an amount equal to the amount of the depreciation<sup>11</sup>. Where the person entitled to an interest in any relevant land sustains loss or damage<sup>12</sup> which is attributable to so much of any compulsory works order as:

- 1101 (1) confers compulsory powers, other than powers of compulsory acquisition, for the purpose of enabling any engineering or building operations to be carried out, and grants authority for the carrying out of operations<sup>13</sup>;
- 1102 (2) does not consist in depreciation of the value of that interest<sup>14</sup>; and
- 1103 (3) is loss or damage for which he would have been entitled to compensation by way of compensation for disturbance, if his interest in that land had been compulsorily acquired<sup>15</sup> in pursuance of a notice to treat served on the date on which the order comes into force<sup>16</sup>,

he is additionally entitled to compensation from the applicant for the order or, as the case may be, from the Agency, in respect of that loss or damage<sup>17</sup>.

Where any damage to, or injurious affection of, any land which is not relevant land is attributable to so much of any compulsory works order as confers compulsory powers, other than powers of compulsory acquisition, for the purpose of enabling any engineering or building operations to be carried out and grants authority for the carrying out of the operations, the applicant for the order or, as the case may be, the Agency must pay compensation in respect of that damage or injurious affection to every person entitled to an interest in that land<sup>18</sup>.

Any person who sustains any loss or damage which is attributable to any discharge of water made by a water undertaker or by the Agency in pursuance of a compulsory works order is entitled to recover compensation from the undertaker or, as the case may be, from the Agency in respect of the loss or damage<sup>19</sup>.

Any question of disputed compensation under these provisions must be referred to and determined by the Lands Tribunal<sup>20</sup>.

1    le a licence under the Water Resources Act 1991 Pt II Ch II (ss 24-72): see PARA 229 et seq.

2    As to the meaning of 'water undertaker' see PARA 137 note 4.

3    As to the Environment Agency see PARA 17.

4    As to the meaning of 'engineering or building operations' see PARA 223 note 4.

5    As to compulsory works orders see PARA 455.

6    le by virtue of the Water Industry Act 1991 Sch 11 para 6(1) or the Water Resources Act 1991 Sch 19 para 6(1): see PARA 459.

7    As to the meaning of 'land' see PARA 14 note 21.

8    Water Industry Act 1991 Sch 11 para 7; Water Resources Act 1991 Sch 19 para 7 (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

9    'Relevant land', in relation to a compulsory works order, means any land which is not land in relation to which powers of compulsory acquisition are conferred by the order but is land: (1) where any operations for which authority is granted by the order are to be carried out; (2) in relation to which compulsory powers are conferred by the order; or (3) held with any land falling under head (1) or (2): Water Industry Act 1991 Sch 11 para 8(9); Water Resources Act 1991 Sch 19 para 8(9). As to the meaning of 'powers of compulsory acquisition' see PARA 457 note 12.

10   As to the meaning of 'person' see PARA 13 note 29.

11   Water Industry Act 1991 Sch 11 para 8(1); Water Resources Act 1991 Sch 19 para 8(1). For the purpose of assessing any compensation under these provisions, so far as that compensation is in respect of loss or damage consisting in depreciation of the value of an interest in land, the rules set out in the Land Compensation Act 1961 s 5 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 754) have effect, so far as applicable and subject to any necessary modifications, as they have effect for the purpose of assessing compensation for the compulsory acquisition of an interest in land: Water Industry Act 1991 Sch 11 para 8(7); Water Resources Act 1991 Sch 19 para 8(7). As to the meaning of 'modifications' see PARA 141 note 20. Where the interest in land in respect of which any compensation so falls to be assessed is subject to a mortgage: (1) the compensation must be assessed as if the interest were not so subject; (2) a claim for compensation may be made by any mortgagee of the interest, but without prejudice to the making of a claim by the person entitled to the interest; (3) no such compensation is payable in respect of the interest of the mortgagee, as distinct from the interest which is subject to the mortgage; and (4) any such compensation which is payable in respect of the interest which is subject to the mortgage must be paid to the mortgagee, or, if there is more than one mortgagee, to the first mortgagee, and in either case must be applied by him as if it were the proceeds of sale: Water Industry Act 1991 Sch 11 para 8(8); Water Resources Act 1991 Sch 19 para 8(8). As to the meaning of 'mortgage' for the purposes of the Water Resources Act 1991 see PARA 263 note 25. There is no corresponding definition in the Water Industry Act 1991.

12   As to the meaning of 'damage' see PARA 129 note 7.

13   Water Industry Act 1991 Sch 11 para 8(2)(a); Water Resources Act 1991 Sch 19 para 8(2)(a).

14   Water Industry Act 1991 Sch 11 para 8(2)(b); Water Resources Act 1991 Sch 19 para 8(2)(b).

15   le under the Water Industry Act 1991 s 155 or, as the case may be, the Water Resources Act 1991 s 154: see PARA 453.

16   Water Industry Act 1991 Sch 11 para 8(2)(c); Water Resources Act 1991 Sch 19 para 8(2)(c).

17   Water Industry Act 1991 Sch 11 para 8(2); Water Resources Act 1991 Sch 19 para 8(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

18   Water Industry Act 1991 Sch 11 para 8(3); Water Resources Act 1991 Sch 19 para 8(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

19   Water Industry Act 1991 Sch 11 para 8(4); Water Resources Act 1991 Sch 19 para 8(4) (Sch 19 para 8(4), (5) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). For these purposes, any extra

expenditure which it becomes reasonably necessary for any water undertaker (other than, in the case of a discharge made by such an undertaker, that undertaker) or public authority (other than, in the case of a discharge made by the Agency, the Agency) to incur for the purpose of properly carrying out any statutory functions, and which is attributable to any such discharge of water, is deemed to be a loss sustained by the undertaker or public authority and to be so attributable: Water Industry Act 1991 Sch 11 para 8(5); Water Resources Act 1991 Sch 19 para 8(5) (as so amended). As to the meaning of 'public authority' for the purposes of the Water Industry Act 1991 see PARA 118 note 17. For the purposes of the Water Resources Act 1991 'public authority' means any Minister of the Crown or government department, the Agency, any local authority or any person certified by the Secretary of State, or in relation to Wales, the Welsh Ministers to be a public authority for the purposes of the Act: s 221(1) (definition amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'local authority' see PARA 187 note 2. As to the meaning of 'functions' in relation to an undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

The functions of the Secretary of State under the Water Resources Act 1991 s 221, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

20 See the Water Industry Act 1991 Sch 11 para 8(6); Water Resources Act 1991 Sch 19 para 8(6). In relation to the determination of any such compensation, the provisions of the Land Compensation Act 1961 s 2 and s 4 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 716-717, 746) apply, subject to any necessary modifications: Water Industry Act 1991 Sch 11 para 8(6); Water Resources Act 1991 Sch 19 para 8(6). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

## UPDATE

### 469 Compensation in respect of compulsory works orders

TEXT AND NOTE 20--Reference to the Lands Tribunal is now to the Upper Tribunal; Land Compensation Act 1961 s 2 omitted: Water Industry Act 1991 Sch 11 para 8(6); Sch 19 para 8(6) (amended by SI 2009/1307).

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#### **470. Compensation in respect of street works powers.**

In exercise of its street works powers<sup>1</sup>, it is the duty of every relevant undertaker, and of the Environment Agency, to do as little damage<sup>2</sup> as possible<sup>3</sup>, and to pay compensation for any loss caused or damage done in the exercise of those powers<sup>4</sup>. Any dispute as to whether such compensation should be paid, or as to the amount of the compensation, must be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute<sup>5</sup>. In default of such agreement, the arbitrator must be appointed, in the case of compensation payable by a relevant undertaker, by the Water Services Regulation Authority<sup>6</sup> and, in the case of compensation payable by the Agency, by the Secretary of State<sup>7</sup> or, in relation to Wales, by the Welsh Ministers<sup>8</sup>.

1 le, in relation to a relevant undertaker, the powers conferred in relation to streets by the Water Industry Act 1991 s 158 (see PARA 462), s 161 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) and s 162 (see PARA 433); or, in relation to the Environment Agency, the powers conferred in relation to streets by the Water Resources Act 1991 s 159 (see PARA 462) and s 162 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329); Water Industry Act 1991 Sch 12 para 1(1); Water Resources Act 1991 Sch 21 para 1(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the Environment Agency see PARA 17. As to the meaning of 'street' see PARA 308 note 19.

2 As to the meaning of 'damage' see PARA 129 note 7.

3 Water Industry Act 1991 Sch 12 para 1(2)(a); Water Resources Act 1991 Sch 21 para 1(2)(a) (Sch 21 para 1(2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

4 Water Industry Act 1991 Sch 12 para 1(2)(b); Water Resources Act 1991 Sch 21 para 1(2)(b) (as amended: see note 3). Compensation may be recoverable in respect of interference with the access to premises by which a person's trade is injured (see *Ocean Leisure Ltd v Westminster City Council* [2004] EWCA Civ 970, [2004] 3 EGLR 9, [2004] All ER (D) 368 (Jul)) or for loss of profit in these circumstances (*Leonidis v Thames Water Authority* (1979) 77 LGR 722). The undertakers cannot escape liability to pay compensation by showing that there was no greater obstruction than was reasonably necessary for carrying out their duties: *Leonidis v Thames Water Authority*.

5 Water Industry Act 1991 Sch 12 para 1(3); Water Resources Act 1991 Sch 21 para 1(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

6 Water Industry Act 1991 Sch 12 para 1(3) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

7 As to the Secretary of State see PARA 15 note 1.

8 Water Resources Act 1991 Sch 21 para 1(3). The functions of the Secretary of State under the Water Resources Act 1991 Sch 21, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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#### **471. Compensation in respect of pipe-laying works in private land.**

If the value of any interest in any relevant land<sup>1</sup> is depreciated by virtue of the exercise, by any relevant undertaker or by the Environment Agency, of any power to carry out pipe-laying works on private land, the person<sup>2</sup> entitled to that interest is entitled to compensation from the undertaker or, as the case may be, from the Agency, of an amount equal to the amount of the depreciation<sup>3</sup>. Where the person entitled to an interest in any relevant land sustains loss or damage<sup>4</sup> which:

- 1104 (1) is attributable to the exercise by any relevant undertaker, or by the Agency, of any power to carry out pipe-laying works on private land<sup>5</sup>;
- 1105 (2) does not consist in depreciation of the value of that interest<sup>6</sup>; and
- 1106 (3) is loss or damage for which he would have been entitled to compensation by way of compensation for disturbance if his land had been compulsorily<sup>7</sup> acquired<sup>8</sup>,

he is, additionally, entitled to compensation from the undertaker or, as the case may be, from the Agency in respect of that loss or damage<sup>9</sup>.

Where any damage to, or injurious affection of, any land which is not relevant land is attributable to the exercise by any relevant undertaker, or by the Agency, of any power to carry out pipe-laying works on private land, the undertaker or, as the case may be, the Agency must pay compensation in respect of that damage or injurious affection to every person entitled to an interest in that land<sup>10</sup>.

The Secretary of State<sup>11</sup> or, in relation to Wales, the Welsh Ministers<sup>12</sup> may by regulations<sup>13</sup> make provision requiring a relevant undertaker, or the Agency, where it is proposing or, in a prescribed<sup>14</sup> case, where it has begun, to exercise any power to carry out pipe-laying works on private land, to make advance payments on account of compensation that will become payable in respect of the exercise of that power<sup>15</sup>. Any request for such advance payments must be made in writing<sup>16</sup> by the person entitled to the compensation (the 'claimant'), must give particulars of his interest in the land, so far as not already given, and must be accompanied or supplemented by such other particulars as the undertaker or the Agency may reasonably require to enable it to estimate the amount of the compensation in respect of which the advance payment is to be made<sup>17</sup>. The amount of any advance payment must be equal to 90 per cent of the agreed amount of compensation or, if no amount has been agreed with the claimant, 90 per cent of the amount estimated by the undertaker or the Agency<sup>18</sup>, and payment must be made not later than three months<sup>19</sup> after the date on which a request for it is duly made<sup>20</sup>. Where an advance payment is made on the basis of an estimate by the undertaker or the Agency, and the amount of that payment exceeds the compensation as finally determined or agreed, the excess must be repaid; and if after an advance payment has been made to any person it is discovered that he was not entitled to it, the amount of the payment is recoverable by the undertaker or, as the case may be, by the Agency<sup>21</sup>. Where an advance payment is made to the claimant in respect of an interest in any relevant land, then if thereafter he disposes of the interest to, or creates an interest in that land in favour of, a person other than the undertaker or the Agency, the amount of the advance payment must be set off against any

sum payable by the undertaker or the Agency to that other person in respect of the exercise of the power to which the advance payment relates<sup>22</sup>.

Any question of disputed compensation under these provisions must be referred to and determined by the Lands Tribunal<sup>23</sup>. Where any person entitled to an interest in any land would otherwise be entitled under these provisions to an amount of compensation in respect of any works, there must be deducted from that amount an amount equal to the amount by which the carrying out of the works has enhanced the value of any other land which is contiguous or adjacent<sup>24</sup> to that land and is land to an interest in which that person is entitled in the same capacity<sup>25</sup>.

1 For these purposes, 'relevant land', in relation to any exercise of a power to carry out pipe-laying works on private land, means the land where the power is exercised or land held with that land: Water Industry Act 1991 Sch 12 para 2(5); Water Resources Act 1991 Sch 21 para 2(5). References to a power to carry out pipe-laying works on private land are references, in the case of a relevant undertaker, to any of the powers conferred by the Water Industry Act 1991 s 159 (see PARA 463), s 161(2) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) and s 163 (see PARA 463); or, in the case of the Environment Agency, the Water Resources Act 1991 s 160 (see PARA 463) or s 162(3) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329); Water Industry Act 1991 Sch 12 para 2(6); Water Resources Act 1991 Sch 21 para 2(6). As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the Environment Agency see PARA 17.

2 As to the meaning of 'person' see PARA 13 note 29.

3 Water Industry Act 1991 Sch 12 para 2(1); Water Resources Act 1991 Sch 21 para 2(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Compensation payable under these provisions carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from the date of the claim: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58).

4 As to the meaning of 'damage' see PARA 129 note 7.

5 Water Industry Act 1991 Sch 12 para 2(2)(a); Water Resources Act 1991 Sch 21 para 2(2)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

6 Water Industry Act 1991 Sch 12 para 2(2)(b); Water Resources Act 1991 Sch 21 para 2(2)(b).

7 Ie under the Water Industry Act 1991 s 155 or the Water Resources Act 1991 s 154: see PARA 453.

8 Water Industry Act 1991 Sch 12 para 2(2)(c); Water Resources Act 1991 Sch 21 para 2(2)(c).

9 Water Industry Act 1991 Sch 12 para 2(2); Water Resources Act 1991 Sch 21 para 2(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Compensation payable under the Water Industry Act 1991 Sch 12 para 2(2) or (3) and the Water Resources Act 1991 Sch 21 para 2(2) or (3) carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from, in the case of damage sustained by reason of expenditure, the date on which the damage is sustained, otherwise the date of claim: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58).

Compensation under these provisions will not include a ransom value to reflect an unreal assumption that the landowner can prevent pipe-laying, where that pipe-laying is undertaken in exercise of a statutory power: *Kettering Borough Council v Anglian Water Services plc* [2001] 2 EGLR 157, [2002] RVR 266, Lands Tribunal. See also note 22.

10 Water Industry Act 1991 Sch 12 para 2(3); Water Resources Act 1991 Sch 21 para 2(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). See also note 9.

11 As to the Secretary of State see PARA 15 note 1.

12 The functions of the Secretary of State under the Water Industry Act 1991 Sch 12 and the Water Resources Act 1991 Sch 21, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh

Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

13 As to the making of regulations see PARA 21. By virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), the Water and Sewerage (Works) (Advance Payments) Regulations 1989, SI 1989/1379, have effect: see the text to notes 16-22.

14 'Prescribed' means prescribed by the regulations: see the Water Industry Act 1991 s 219(1); Water Resources Act 1991 s 221(1).

15 Water Industry Act 1991 Sch 12 para 2(4); Water Resources Act 1991 Sch 21 para 2(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

16 As to the meaning of 'writing' see PARA 22 note 1.

17 See the Water and Sewerage (Works) (Advance Payments) Regulations 1989, SI 1989/1379, regs 2, 3(1), (2) (regs 2, 3(1) amended by the Environment Act 1995 s 120, Sch 22 para 233(1)).

18 See the Water and Sewerage (Works) (Advance Payments) Regulations 1989, SI 1989/1379, reg 3(3).

19 As to the meaning of 'month' see PARA 23 note 10.

20 See the Water and Sewerage (Works) (Advance Payments) Regulations 1989, SI 1989/1379, reg 3(4). Any advance payment on account of compensation in respect of an interest which is settled land for the purposes of the Settled Land Act 1925 must be made to the persons entitled to give a discharge for capital money and is treated as capital money arising under that Act: reg 3(6). Note that, subject to certain exceptions, it has not been possible to create a strict settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 65; **SETTLEMENTS**.

21 See the Water and Sewerage (Works) (Advance Payments) Regulations 1989, SI 1989/1379, reg 3(5).

22 See the Water and Sewerage (Works) (Advance Payments) Regulations 1989, SI 1989/1379, reg 3(7).

23 Water Industry Act 1991 Sch 12 para 3(1); Water Resources Act 1991 Sch 21 para 3(1). In relation to the determination of any such compensation, the provisions of the Land Compensation Act 1961 s 2 and s 4 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 716-717, 746) apply subject to any necessary modifications: Water Industry Act 1991 Sch 12 para 3(1); Water Resources Act 1991 Sch 21 para 3(1). As to the meaning of 'modifications' see PARA 141 note 20. For the purpose of assessing any such compensation, so far as the compensation is in respect of loss or damage consisting in depreciation of the value of an interest in land, the rules set out in the Land Compensation Act 1961 s 5 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 754) have effect, so far as applicable and subject to any necessary modifications, as they have effect for the purpose of assessing compensation for the compulsory acquisition of an interest in land: Water Industry Act 1991 Sch 12 para 3(2); Water Resources Act 1991 Sch 21 para 3(2). Where the interest in land in respect of which any compensation so falls to be assessed is subject to a mortgage: (1) the compensation must be assessed as if the interest were not so subject; (2) a claim for compensation may be made by any mortgagee of the interest, but without prejudice to the making of a claim by the person entitled to the interest; (3) no such compensation is payable in respect of the interest of the mortgagee, as distinct from the interest which is subject to the mortgage; and (4) any such compensation which is payable in respect of the interest which is subject to the mortgage must be paid to the mortgagee or, if there is more than one mortgagee, to the first mortgagee, and must in either case be applied by him as if it were proceeds of sale: Water Industry Act 1991 Sch 12 para 3(3); Water Resources Act 1991 Sch 21 para 3(3). As to the meanings of 'mortgage' and 'mortgagee' in the Water Resources Act 1991 see PARA 263 note 25. There are no equivalent definitions in the Water Industry Act 1991. As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

As to the correct basis for an award of compensation under these provisions see *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, 148 Sol Jo LB 693, [2004] All ER (D) 179 (May). See also note 8.

24 As to the meaning of 'contiguous or adjacent' see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 781.

25 Water Industry Act 1991 Sch 12 para 3(4); Water Resources Act 1991 Sch 21 para 3(4). As to the general rules concerning betterment see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 840 et seq.

## UPDATE

**471 Compensation in respect of pipe-laying works in private land**

TEXT AND NOTE 23--Reference to the Lands Tribunal is now to the Upper Tribunal; Land Compensation Act 1961 s 2 omitted: Water Industry Act 1991 Sch 12 para 3(1), Sch 21 para 3(1) (amended by SI 2009/1307).



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#### **472. Compensation in respect of discharges for works purposes.**

It is the duty of every water undertaker<sup>1</sup>, and of the Environment Agency<sup>2</sup>, to cause as little loss and damage<sup>3</sup> as possible in the exercise of the powers conferred<sup>4</sup> on that undertaker or on the Agency to discharge water for works purposes<sup>5</sup>, and to pay compensation for any loss caused or damage done in the exercise of those powers<sup>6</sup>. For these purposes, any extra expenditure which it becomes reasonably necessary for any water undertaker (other than the undertaker making the discharge), any sewerage undertaker<sup>7</sup> or any public authority<sup>8</sup> (except, in the case of discharges of water by the Agency, the Agency itself) to incur for the purpose of properly carrying out any statutory functions<sup>9</sup> and which is attributable to any discharge of water for works purposes is deemed to be a loss sustained by the undertaker or public authority and to have been caused in exercise of the powers to discharge water for works purposes<sup>10</sup>.

Any dispute as to whether compensation should be paid under these provisions, or as to the amount of any such compensation, must be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, by the President of the Institution of Civil Engineers<sup>11</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'damage' see PARA 129 note 7.

4 I.e. the powers conferred, in the case of a water undertaker, by the Water Industry Act 1991 s 165; or, in the case of the Agency, by the Water Resources Act 1991 s 163; see PARA 466.

5 Water Industry Act 1991 Sch 12 para 6(1)(a); Water Resources Act 1991 Sch 21 para 4(1)(a) (Sch 21 para 4(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

6 Water Industry Act 1991 Sch 12 para 6(1)(b); Water Resources Act 1991 Sch 21 para 4(1)(b). Compensation payable under these provisions carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from the date loss is caused or damage done: see the Planning and Compensation Act 1991 s 80(1), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58). Payments on account may be made: see the Planning and Compensation Act 1991 s 80(2), (3).

7 As to the meaning of 'sewerage undertaker' see PARA 137 note 4.

8 As to the meaning of 'public authority' in the Water Industry Act 1991 see PARA 118 note 17; and in the Water Resources Act 1991 see PARA 469 note 19.

9 As to the meaning of 'functions' in relation to an undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

10 Water Industry Act 1991 Sch 12 para 6(2); Water Resources Act 1991 Sch 21 para 4(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

11 Water Industry Act 1991 Sch 12 para 6(3); Water Resources Act 1991 Sch 21 para 4(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

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**473. Compensation in other cases.**

Specific statutory provision is also made for compensation to be paid in respect of metering works by relevant undertakers<sup>1</sup>, sewerage works<sup>2</sup>, and flood defence and drainage works<sup>3</sup>.

1 See the Water Industry Act 1991 Sch 12 para 5; and PARA 433.

2 See the Water Industry Act 1991 Sch 12 para 4; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1030.

3 See the Water Resources Act 1991 Sch 21 para 5; and PARAS 591, 597.

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## **(ii) Complaints relating to Relevant Undertakers' Works**

### **474. Complaints with respect to the exercise of works powers on private land.**

It is the duty of the Water Services Regulation Authority<sup>1</sup> to investigate any complaint made or referred to it with respect to the exercise by a relevant undertaker<sup>2</sup> of any powers conferred on that undertaker by, or by virtue of, the provisions relating to the power to lay pipes<sup>3</sup> or to carry out anti-pollution works<sup>4</sup> in land other than a street<sup>5</sup>. The Authority is not, however, required to investigate any such complaint if:

- 1107 (1) it appears to it to be vexatious or frivolous<sup>6</sup>;
- 1108 (2) the Authority is not satisfied that the complaint has been brought by the complainant to the attention of the relevant undertaker in question and that that undertaker has been given a reasonable opportunity of investigating and dealing with it<sup>7</sup>; or
- 1109 (3) the complaint was first made to the Authority or the Consumer Council for Water<sup>8</sup> more than 12 months<sup>9</sup>, or such longer period as the Authority may for special reasons allow, after the matters to which the complaint relates first came to the notice of the complainant<sup>10</sup>.

Where, in pursuance of this duty, the Authority investigates a complaint with respect to the exercise of any powers by a relevant undertaker, it is that undertaker's duty to provide the Authority with all such information<sup>11</sup> and assistance as it may reasonably require for the purposes of its investigation<sup>12</sup>; and before the Authority gives any direction<sup>13</sup> in relation to the complaint, it is the Authority's duty to consider any representations made to it by the complainant or by that undertaker with respect to the subject matter of the complaint<sup>14</sup>.

If, on such a complaint with respect to the exercise of any power by a relevant undertaker, the Authority is satisfied that that undertaker has failed adequately to consult the complainant, before and in the course of exercising those powers, about the manner in which they are exercised<sup>15</sup> or, by acting unreasonably in the manner of its exercise of those powers, has caused the complainant to sustain loss or damage<sup>16</sup> or to be subjected to inconvenience<sup>17</sup>, the Authority may direct the undertaker to pay to the complainant an amount not exceeding £5,000<sup>18</sup> in respect of that failure, loss, damage or inconvenience<sup>19</sup>. The Authority must not, however, direct a relevant undertaker to pay any amount to a complainant in respect of any loss, damage or inconvenience for which compensation is recoverable under any other enactment<sup>20</sup> except in so far as it appears to the Authority appropriate to do so by reason of any failure of the amount of any such compensation to reflect the fact that it was not reasonable for the undertaker to cause the complainant to sustain the loss or damage or to be subjected to the inconvenience<sup>21</sup>. A person<sup>22</sup> to whom any amount is required, in pursuance of a direction, to be paid by a relevant undertaker is entitled to recover that amount from that undertaker<sup>23</sup>.

1 As to the Water Services Regulation Authority see PARA 109.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

- 3    le the Water Industry Act 1991 s 159: see PARA 463.
- 4    le the Water Industry Act 1991 s 161(2): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329.
- 5    Water Industry Act 1991 s 181(1) (s 181 amended by the Water Act 2003 s 36(2)). As to codes of practice with respect to the exercise of such powers see PARA 475.
- 6    Water Industry Act 1991 s 181(2)(a) (as amended: see note 5).
- 7    Water Industry Act 1991 s 181(2)(b) (as amended: see note 5).
- 8    As to the Consumer Council for Water see PARA 115.
- 9    As to the meaning of 'month' see PARA 23 note 10.
- 10   Water Industry Act 1991 s 181(2)(c) (as amended (see note 5); and further amended by the Water Act 2003 s 101(1), Sch 7 Pt 2, para 27(1), (4)).
- 11   As to the meaning of 'information' see PARA 117 note 13.
- 12   Water Industry Act 1991 s 181(3)(a) (as amended: see note 5). This duty is enforceable by the Authority under s 18 (see PARA 163): see s 181(6) (as so amended).
- 13   le under the Water Industry Act 1991 s 181(4): see the text to notes 15-19.
- 14   Water Industry Act 1991 s 181(3)(b) (as amended: see note 5).
- 15   Water Industry Act 1991 s 181(4)(a).
- 16   As to the meaning of 'damage' see PARA 129 note 7.
- 17   Water Industry Act 1991 s 181(4)(b).
- 18   The Secretary of State or, in relation to Wales, the Welsh Ministers may by regulations substitute a different amount for the amount for the time being so specified: Water Industry Act 1991 s 181(8). The functions of the Secretary of State under the Water Industry Act 1991 s 181, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the making of regulations see PARA 21. At the date at which this volume states the law no such regulations had been made.
- 19   Water Industry Act 1991 s 181(4) (as amended: see note 5). Determinations by the Authority under s 181 may be found on the Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk). As to consideration by the Authority, with regard to a direction, of any contravention of a code of practice with respect to the exercise of such powers see PARA 475.
- 20   As to the meaning of 'enactment' see PARA 14 note 31. As to compensation see PARAS 471-473.
- 21   Water Industry Act 1991 s 181(5) (as amended: see note 5).
- 22   As to the meaning of 'person' see PARA 13 note 29.
- 23   Water Industry Act 1991 s 181(7).

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#### **475. Codes of practice with respect to works on private land.**

For the purposes of the provisions relating to complaints with respect to the exercise of works powers on private land<sup>1</sup>, it is the duty of every company holding an appointment as a relevant undertaker<sup>2</sup>, as soon as reasonably practicable after its appointment takes effect, to submit to the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup>, for approval a code of practice with respect to its exercise of any such powers<sup>5</sup>; and if required to do so by the Secretary of State or, as the case may be, the Welsh Ministers at any subsequent time, to submit proposed modifications<sup>6</sup> of that code to the Secretary of State or the Welsh Ministers for approval<sup>7</sup>.

If the Secretary of State or the Welsh Ministers consider it appropriate to do so for the purpose of promoting what appear to him or them to be desirable practices with respect to the exercise, by any company holding an appointment as a relevant undertaker, of any such powers, the Secretary of State or the Welsh Ministers may at any time by order made by statutory instrument<sup>8</sup>, in relation to that company: (1) approve any code of practice with respect to the exercise of those powers which has been submitted (whether under the above provisions or not) by that company for approval<sup>9</sup>; (2) approve any modifications of such a code which have been so submitted<sup>10</sup>; or (3) withdraw approval for any such code or modification<sup>11</sup>. However, no such order may be made unless the Secretary of State or, as the case may be, the Welsh Ministers have first consulted<sup>12</sup> all such persons<sup>13</sup> as the Secretary of State or the Welsh Ministers considers it appropriate to consult<sup>14</sup>.

A contravention<sup>15</sup> of a code of practice for the time being so approved in relation to a company does not affect the powers conferred<sup>16</sup> on that company as a relevant undertaker<sup>17</sup> or give rise to any civil or criminal liability<sup>18</sup>. Nor does such a contravention of itself entitle any person to be paid any amount by virtue of a direction<sup>19</sup> given by the Water Services Regulation Authority<sup>20</sup> on a complaint relating to the exercise of works powers on private land<sup>21</sup>; but in determining whether to give such a direction to that company and the amount to which any such direction relates, the Authority must take into account whether there has been any such contravention<sup>22</sup>.

1    le for the purposes of the Water Industry Act 1991 s 181: see PARA 474.

2    le an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17): see PARA 137 et seq. As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3    As to the Secretary of State see PARA 15 note 1.

4    The functions of the Secretary of State under the Water Industry Act 1991 s 182, in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5    Water Industry Act 1991 s 182(1)(a). The powers referred to are those under s 159 (see PARA 463) and s 161(2) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329). The duties of a relevant

undertaker under s 182(1) are enforceable by the Secretary of State or, as the case may be, the Welsh Ministers under s 18 (see PARA 163); s 182(5). A typical code of practice for a water undertaker covers the following matters: notice of works; record and condition of land; working season; supervision and site responsibility; access arrangements for owners and occupiers; trial holes and borings; temporary fencing of the working area; land drainage; location of apparatus and equipment; topsoil; watercourses; area infected by disease; trees; water supplies and other services; fishing or sporting rights; undertaker's access to the works; temporary support; facilities for workmen; explosives; cathodic protection; fossils and other articles discovered; restoration of land; hedges, fencing, banks, walls, roads and paths (permanent reinstatement); and information. The code of practice is also likely to contain a provision to the effect that the code is to be followed when it is reasonably practicable to do so; eg in an emergency it may well not be reasonably practicable to follow the requirements of the code. In practice the codes approved after the appointment of the first relevant undertakers appointed in 1989 were based (with modifications by each undertaker) on model codes produced by the Department of the Environment.

6 As to the meaning of 'modifications' see PARA 141 note 20.

7 Water Industry Act 1991 s 182(1)(b).

8 Such orders being local in nature are not recorded in this work. However, for more recent examples of such orders see the Water and Sewerage Undertakers (Pipelaying and Other Works) (Code of Practice) Order 1999, SI 1999/1546, and the Water and Sewerage Undertakers (Pipelaying and Other Works) (Code of Practice) Order 1999, SI 1999/3070.

9 Water Industry Act 1991 s 182(2)(a).

10 Water Industry Act 1991 s 182(2)(b).

11 Water Industry Act 1991 s 182(2)(c).

12 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

13 As to the meaning of 'person' see PARA 13 note 29.

14 See the Water Industry Act 1991 s 182(4).

15 As to the meaning of 'contravention' see PARA 20 note 5.

16 Ie the powers conferred by the Water Industry Act 1991 Pt VI (ss 155-192).

17 Water Industry Act 1991 s 182(3)(a).

18 Water Industry Act 1991 s 182(3)(c).

19 Ie a direction under the Water Industry Act 1991 s 181(4): see PARA 474.

20 As to the Water Services Regulation Authority see PARA 109.

21 Water Industry Act 1991 s 182(3)(b).

22 See the Water Industry Act 1991 s 182(3) (amended by the Water Act 2003 s 36(2)).

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## **(4) POWERS OF ENTRY**

### **(i) General Powers to Enter Land and Premises**

#### **476. Powers of entry for enforcement purposes.**

Any person<sup>1</sup> designated in writing<sup>2</sup> for the purpose by the Secretary of State<sup>3</sup> or, in relation to Wales, by the Welsh Ministers<sup>4</sup>, or by the Environment Agency<sup>5</sup> may:

- 1110 (1) enter any premises or vessel<sup>6</sup> for the purpose of ascertaining whether any provision of a specified enactment<sup>7</sup>, of any subordinate legislation<sup>8</sup> or other instrument made by virtue of any such enactment or of any byelaws made by the Agency<sup>9</sup> is being or has been contravened<sup>10</sup>; and
- 1111 (2) carry out such inspections, measurements and tests on any premises or vessel entered by that person or of any articles found on any such premises or vessel, and take away such samples of water or effluent<sup>11</sup> or of any land<sup>12</sup> or articles, as the Secretary of State, the Welsh Ministers or the Agency considers appropriate for the purpose mentioned in head (1) above and has authorised that person to carry out or take away<sup>13</sup>.

The powers so conferred in relation to any premises include power, in order to obtain information for the purpose mentioned in head (1) above, to carry out experimental borings or other works on those premises and to install and keep monitoring and other apparatus there<sup>14</sup>.

Water undertakers also have powers of entry for enforcement purposes<sup>15</sup>; and the Agency also has such powers of entry with respect to reservoirs<sup>16</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'writing' see PARA 22 note 1.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 s 169, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to the Environment Agency see PARA 17.

6 As to the meaning of 'vessel' see PARA 224 note 2.

7 I.e., subject to the Water Resources Act 1991 s 169(4) below, any enactment contained in the Water Resources Act 1991 and any other enactment under or for the purposes of which the Agency carries out functions: s 169(3) (amended by the Environment Act 1995 s 120, Sch 22 paras 128, 165). The powers conferred by the Water Resources Act 1991 s 169 do not have effect for the purposes of any of the Agency's pollution control functions, within the meaning of the Environment Act 1995 s 108 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 148): Water Resources Act 1991 s 169(4) (added by the Environment Act

1995 s 120, Sch 22 para 165). As to the meaning of 'enactment' see PARA 14 note 31. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

8 As to the meaning of 'subordinate legislation' see PARA 21 note 36.

9 As to such byelaws see PARAS 605-607, 709.

10 Water Resources Act 1991 s 169(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'contravene' see PARA 20 note 5. As to the exercise of these powers of entry see PARAS 482-485. As to the offence of impersonation of persons entitled to entry see PARA 481.

11 As to the meaning of 'effluent' see PARA 262 note 31.

12 As to the meaning of 'land' see PARA 14 note 21.

13 Water Resources Act 1991 s 169(1)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

14 Water Resources Act 1991 s 169(2) (substituted by the Water Act 2003 s 71). A designation in writing for the purposes of the Water Resources Act 1991 s 169 which was made before the coming into force of that substitution (ie 1 April 2004) and which was still current at that time, has effect as if given for the purposes of s 169 as substituted by the Water Act 2003 s 71: Water Act 2003 (Commencement No 1 and Transitional Provisions) Order 2004, SI 2004/641, arts 3(r), 6, Sch 3 para 6.

15 See PARA 480.

16 See PARA 294.



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#### **477. Powers of entry for certain works purposes.**

Any person<sup>1</sup> designated in writing<sup>2</sup> for the purpose by a relevant undertaker<sup>3</sup> or by the Environment Agency<sup>4</sup> may enter any premises for any of the purposes<sup>5</sup> of:

- 1112 (1) the carrying out of any survey or tests to determine (a) whether it is appropriate and practicable for the undertaker or, as the case may be, the Agency to exercise any relevant works power<sup>6</sup>; or (b) how any such power should be exercised<sup>7</sup>, or
- 1113 (2) the exercise of any such power<sup>8</sup>.

The power of a person so designated to enter any premises for the purposes of carrying out any survey or tests includes power: (i) to carry out experimental borings or other works for the purpose of ascertaining the nature of the sub-soil<sup>9</sup>; and (ii) to take away and analyse<sup>10</sup> such samples of water or effluent<sup>11</sup> or of any land<sup>12</sup> or articles as the undertaker or, as the case may be, the Agency considers necessary for the purpose of determining either of the matters mentioned in head (1) above, and has authorised that person to take away and analyse<sup>13</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'writing' see PARA 22 note 1.

3 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

4 As to the Environment Agency see PARA 17.

5 See the Water Industry Act 1991 s 168(1); Water Resources Act 1991 s 170(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the exercise of these powers of entry see PARAS 482-485. As to the offence of impersonation of persons entitled to entry see PARA 481.

6 Water Industry Act 1991 s 168(2)(a)(i); Water Resources Act 1991 s 170(2)(a)(i). 'Relevant works power' means any power conferred: (1) in relation to an undertaker, by any of the provisions of the Water Industry Act 1991 s 158 (see PARA 462), s 159 (see PARA 463), s 161 (other than s 161(3)) (pollution control: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329), s 163 (see PARA 463) and s 165 (see PARA 466); (2) in relation to the Agency, by any provisions of the Water Resources Act 1991 s 159 (see PARA 462), s 160 (see PARA 463), s 162(2), (3) (pollution control: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) and s 163 (see PARA 466); Water Industry Act 1991 s 168(5); Water Resources Act 1991 s 170(4).

7 Water Industry Act 1991 s 168(2)(a)(ii); Water Resources Act 1991 s 170(2)(a)(ii).

8 Water Industry Act 1991 s 168(2)(b); Water Resources Act 1991 s 170(2)(b).

9 Water Industry Act 1991 s 168(3)(a); Water Resources Act 1991 s 170(3)(a).

10 As to the meaning of 'analyse' see PARA 375 note 14.

11 As to the meaning of 'effluent' see PARA 262 note 31.

12 As to the meaning of 'land' see PARA 14 note 21.

13 Water Industry Act 1991 s 168(3)(b); Water Resources Act 1991 s 170(3)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). In the case of an undertaker, the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) (see *PARAS* 482-485) applies to the rights and powers conferred by s 168: s 168(4).

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#### **478. Powers to carry out surveys and to search for water.**

Without prejudice to other rights and powers of entry<sup>1</sup>, any person<sup>2</sup> designated in writing<sup>3</sup> by a water undertaker<sup>4</sup> or the Environment Agency<sup>5</sup> may enter any premises for the purpose of<sup>6</sup>:

1114 (1) carrying out any survey or tests<sup>7</sup> to determine whether it would be appropriate for the undertaker or, as the case may be, the Agency to acquire any land<sup>8</sup>, or any interest or right in or over land, for purposes connected with the carrying out of its functions<sup>9</sup>; or

1115 (2) whether it would be appropriate for the undertaker or, as the case may be, the Agency to apply for a compulsory works order<sup>10</sup> and what compulsory powers it would be appropriate to apply for in that regard<sup>11</sup>.

These powers may not be exercised in any case for purposes connected with the determination of:

1116 (a) whether, where or how a reservoir should be constructed<sup>12</sup>; or

1117 (b) whether, where or how a borehole should be sunk for the purpose of abstracting water from, or discharging water into, any underground strata<sup>13</sup>,

unless the Secretary of State<sup>14</sup> or, in relation to Wales, the Welsh Ministers<sup>15</sup> have given written authorisation in relation to that case for the exercise of those powers for those purposes<sup>16</sup>. The Secretary of State or the Welsh Ministers may not give such authorisation unless satisfied that: (i) notice<sup>17</sup> of the proposal to apply for the authorisation has been given to the owner<sup>18</sup> and to the occupier of the premises in question<sup>19</sup>; and (ii) the Secretary of State or, as the case may be, the Welsh Ministers have considered any representations or objections with respect to the proposed exercise of these powers which have been duly made to them by the owner or occupier of those premises within the period of 14 days beginning with the day after the giving of the notice, and have not been withdrawn<sup>20</sup>.

1 Without prejudice to the rights and powers conferred by the Water Industry Act 1991 s 168 (see PARA 477) or, as the case may be, by the Water Resources Act 1991 ss 169-170, 172-174 (see PARAS 476-477, 479-481); Water Industry Act 1991 s 169(1); Water Resources Act 1991 s 171(1).

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to the Environment Agency see PARA 17.

6 Water Industry Act 1991 s 169(1); Water Resources Act 1991 s 171(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). In the case of an undertaker, the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) (see PARAS 482-485) applies to the rights and powers conferred by s 169: s 169(6). As to the exercise of these powers of entry see PARAS 482-485. As to the offence of impersonation of persons entitled to entry see PARA 481.

7 This power to enter any premises for the purpose of carrying out any survey or tests includes power: (1) to carry out experimental borings or other works for the purpose of ascertaining the nature of the sub-soil, the presence of underground water in the sub-soil or the quantity or quality of any such water; (2) to install and keep monitoring or other apparatus on the premises for the purpose of obtaining the information on which any such determination as is mentioned in heads (1)-(2) in the text may be made; and (3) to take away and analyse such samples of water or of any land or articles as the undertaker or, as the case may be, the Agency considers necessary for any of the purposes so mentioned and has authorised that person to take away and analyse: Water Industry Act 1991 s 169(3); Water Resources Act 1991 s 171(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'analyse' see PARA 375 note 14. As to the meaning of 'land' see PARA 14 note 21.

8 As to powers to acquire land see PARA 453.

9 Water Industry Act 1991 s 169(2)(a); Water Resources Act 1991 s 171(2)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'functions' in relation to an undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

10 In an order under the Water Industry Act 1991 s 167 or, as the case may be, the Water Resources Act 1991 s 168: see PARA 455.

11 Water Industry Act 1991 s 169(2)(b); Water Resources Act 1991 s 171(2)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

12 As to reservoirs see PARA 277 et seq.

13 As to the meaning of 'underground strata' see PARA 187 note 5.

14 As to the Secretary of State see PARA 15 note 1.

15 By virtue of the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1:

2 (1) the functions of the Secretary of State under the Water Industry Act 1991 s 169(4) and (5) were transferred to the National Assembly for Wales as follows: (a) functions so far as relating to matters concerning the construction or enlargement of reservoirs were transferred to the Assembly in relation to Wales; (b) functions so far as relating to matters other than the construction or enlargement of reservoirs were transferred to the Assembly in relation to such parts of Wales as are outside the catchment areas of the rivers Dee, Wye and Severn; (c) functions so far as relating to matters other than the construction or enlargement of reservoirs were, in relation to such parts of Wales as are within the catchment areas of the rivers Dee, Wye and Severn, to be exercisable by the Assembly concurrently with the Secretary of State; and

3 (2) the functions of the Secretary of State under the Water Resources Act 1991 s 171, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales.

These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

16 Water Industry Act 1991 s 169(4); Water Resources Act 1991 s 171(4).

17 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

18 As to the meaning of 'owner' see PARA 22 note 9.

19 Water Industry Act 1991 s 169(5)(a); Water Resources Act 1991 s 171(5)(a).

20 Water Industry Act 1991 s 169(5)(b); Water Resources Act 1991 s 171(5)(b).

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**479. Powers of entry for other purposes authorised by the Secretary of State, the Welsh Ministers or the Environment Agency.**

Any person<sup>1</sup> designated in writing<sup>2</sup> for the purpose by the Secretary of State<sup>3</sup> or, in relation to Wales, the Welsh Ministers<sup>4</sup>, or by the Environment Agency<sup>5</sup> may enter any premises or vessel<sup>6</sup> for the purpose of:

- 1118 (1) determining whether, and if so in what manner, any power or duty conferred on the Secretary of State or the Welsh Ministers, or on the Agency, by virtue of any specified enactment<sup>7</sup>, including a power of either the Secretary of State or the Welsh Ministers to make subordinate legislation<sup>8</sup>, should be exercised or, as the case may be, performed<sup>9</sup>; or
- 1119 (2) exercising or performing any power or duty which is so conferred or imposed<sup>10</sup>.

Any person designated in writing for the purpose by either the Secretary of State or the Welsh Ministers, or by the Agency, may carry out such inspections, measurements and tests on any premises or vessel entered by that person under these powers, or of any articles found on any such premises or vessel<sup>11</sup>, and take away such samples of water or effluent<sup>12</sup> or of any land<sup>13</sup> or articles<sup>14</sup>, as the Secretary of State or the Welsh Ministers, or the Agency, considers appropriate for any of the purposes mentioned in heads (1) and (2) above and has authorised that person to carry out or take away<sup>15</sup>.

The powers which are conferred by the above provisions in relation to any premises for the purpose of enabling the Secretary of State or the Welsh Ministers, or the Agency, to determine whether or in what manner to exercise or perform any power or duty conferred or imposed on him, them or it by or under the water pollution provisions<sup>16</sup> includes power, in order to obtain the information on which that determination may be made, to carry out experimental borings or other works on those premises<sup>17</sup>, and to install and keep monitoring and other apparatus there<sup>18</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'writing' see PARA 22 note 1.

3 As to the Secretary of State see PARA 15 note 1.

4 The functions of the Secretary of State under the Water Resources Act 1991 s 172, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 As to the Environment Agency see PARA 17.

6 As to the meaning of 'vessel' see PARA 224 note 2.

7 le any enactment contained in the Water Resources Act 1991 and any other enactment under or for the purposes of which the Agency carries out functions: s 172(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The powers conferred by the Water Resources Act 1991 s 172 do not, however, have effect for the purposes of any of the Agency's pollution control functions within the meaning of the Environment Act 1995 s 108 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 148): Water Resources Act 1991 s 172(3A) (added by the Environment Act 1995 Sch 22 para 166). As to the meaning of 'enactment' see PARA 14 note 31. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

8 As to the meaning of 'subordinate legislation' see PARA 21 note 36.

9 Water Resources Act 1991 s 172(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the exercise of these powers of entry see PARAS 482-485. As to the offence of impersonation of persons entitled to entry see PARA 481.

10 Water Resources Act 1991 s 172(1)(b).

11 Water Resources Act 1991 s 172(2)(a).

12 As to the meaning of 'effluent' see PARA 262 note 31.

13 As to the meaning of 'land' see PARA 14 note 21.

14 Water Resources Act 1991 s 172(2)(b).

15 Water Resources Act 1991 s 172(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

16 'Water pollution provisions' means: (1) the provisions of the Water Resources Act 1991 Pt III (ss 82-104) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 289 et seq); (2) ss 161-161D, s 190, s 202, and s 203 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 321 et seq, 743, 745, 746); (3) s 210(1), Sch 25 para 4, and s 211 so far as relating to byelaws made under Sch 25 para 4 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 333); and (4) the Environment Act 1995 s 53(1), (2) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 89): Water Resources Act 1991 s 221(1) (definition amended by the Environment Act 1995 Sch 22 para 177(10)). See, however, note 7.

17 Water Resources Act 1991 s 172(3)(a) (s 172(3) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

18 Water Resources Act 1991 s 172(3)(b).

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#### **480. Powers of entry for other purposes authorised by water undertakers.**

Without prejudice to any other rights or powers<sup>1</sup>, any person<sup>2</sup> designated in writing<sup>3</sup> for the purpose by a water undertaker<sup>4</sup> may enter any premises<sup>5</sup> for any of the following purposes:

- 1120 (1) the carrying out of any survey or tests<sup>6</sup> for the purpose of determining whether it is appropriate or practicable for the undertaker to exercise any power under any provision relating to water supply<sup>7</sup> to disconnect any pipe<sup>8</sup> or cut off any supply of water to any premises or to carry out any works which it is authorised<sup>9</sup> to carry out<sup>10</sup>, or of determining how any such power should be exercised<sup>11</sup>;
- 1121 (2) the exercise of any such power as is mentioned in head (1) above<sup>12</sup>;
- 1122 (3) the monitoring and recording of whether water supplied to any premises for domestic or food production purposes<sup>13</sup> is wholesome at the time of supply<sup>14</sup>, or the quality of the water from any source, or combination of sources, which is or is to be used for supplying water to any premises for those purposes<sup>15</sup>, and the carrying out of any tests for that purpose<sup>16</sup>;
- 1123 (4) ascertaining whether any statutory provision<sup>17</sup> with respect to any water fittings<sup>18</sup> or with respect to the waste or misuse of water is being, or has been, contravened<sup>19</sup>;
- 1124 (5) determining whether, and if so in what manner, any power or duty conferred or imposed on any person by regulations with respect to contamination, waste and water fittings<sup>20</sup> should be exercised or performed<sup>21</sup>; or
- 1125 (6) exercising any such power or performing any such duty as is mentioned in head (5) above<sup>22</sup>.

A person who has entered any premises in the exercise of the powers conferred by heads (4) to (6) above may carry out such inspections, measurements and tests on those premises or on water fittings or other articles found on them, and may take away such samples of water or of any land and such water fittings and other articles as he has been authorised<sup>23</sup> to carry out or take away<sup>24</sup>.

Any person designated for the purpose by any water undertaker within whose area<sup>25</sup> any waterworks are situated, or by any water undertaker which takes water from any waterworks, has a right, on producing some duly authenticated document showing his authority, to enter any premises at all reasonable hours for the purpose of ascertaining whether there is, or has been, any contravention of the provisions relating to contamination of water sources<sup>26</sup> in relation to those waterworks<sup>27</sup>. During any period when a prohibition or restriction relating to the use of hosepipes<sup>28</sup> is in force, any person designated for the purpose by the water undertaker which imposed the prohibition or restriction has, on producing some duly authenticated document showing his authority, a right at all reasonable hours to enter any premises to which the prohibition or restriction applies for the purpose of ascertaining whether there is, or has been, any contravention of the prohibition or restriction<sup>29</sup>.

Separate rights of entry for metering purposes are granted<sup>30</sup>.

<sup>1</sup> The provisions of the Water Industry Act 1991 s 170 are without prejudice to the other rights and powers conferred by Pt VI (ss 155-192): s 170(8).

- 2 As to the meaning of 'person' see PARA 13 note 29.
- 3 As to the meaning of 'writing' see PARA 22 note 1.
- 4 As to the meaning of 'water undertaker' see PARA 137 note 4.
- 5 The Water Industry Act 1991 Sch 6 Pt I (paras 1-5) (see PARAS 482-484) applies to the rights of entry conferred by s 170(2) and (4) (see the text to notes 25-29); and Sch 6 Pt II (paras 6-13) (see PARAS 482-485) applies to the rights and powers conferred by the other provisions of s 170: s 170(7). As to the offence of impersonation of persons entitled to entry see PARA 481.
- 6 The power to carry out any survey or test includes power to take away such samples of water or effluent or of any land or articles as the undertaker considers necessary for the purpose of determining any of the matters mentioned in head (1) or (3) in the text and has authorised the person in question to carry out or take away: Water Industry Act 1991 s 170(5). As to the meaning of 'effluent' see PARA 262 note 31. As to the meaning of 'land' see PARA 14 note 21.
- 7 Ie any provision of the Water Industry Act 1991 ss 37-93: see PARA 319 et seq.
- 8 As to the meaning of 'pipe' see PARA 138 note 11.
- 9 Ie under the Water Industry Act 1991 s 64(4) (see PARA 352), s 66(3) (see PARA 354) or s 75 (see PARA 365).
- 10 Water Industry Act 1991 s 170(1)(a)(i).
- 11 Water Industry Act 1991 s 170(1)(a)(ii).
- 12 Water Industry Act 1991 s 170(1)(b).
- 13 As to the meaning of 'domestic purposes' see PARA 334. As to the meaning of 'food production purposes' see PARA 338 note 44: definition applied by the Water Industry Act 1991 s 170(6).
- 14 Water Industry Act 1991 s 170(1)(c)(i). As to the meaning of 'wholesome' see PARA 373 note 4; and as to when water is treated as wholesome at the time of supply see PARA 374 notes 5, 12: definitions applied by the Water Industry Act 1991 s 170(6).
- 15 Water Industry Act 1991 s 170(1)(c)(ii).
- 16 Water Industry Act 1991 s 170(1)(c).
- 17 Ie any provision contained in, or made or having effect under, the Water Industry Act 1991.
- 18 As to the meaning of 'water fittings' see PARA 134 note 6: definition applied by the Water Industry Act 1991 s 170(6).
- 19 Water Industry Act 1991 s 170(3)(a)(i). As to the meaning of 'contravene' see PARA 20 note 5. See also the Water Supply (Water Fittings) Regulations 1999, SI 1999/1148, reg 9; and PARA 367.
- 20 Ie regulations under the Water Industry Act 1991 s 74: see PARAS 366-367.
- 21 Water Industry Act 1991 s 170(3)(a)(ii). See also note 19.
- 22 Water Industry Act 1991 s 170(3)(a)(iii). See also note 19.
- 23 Ie in accordance with regulations under the Water Industry Act 1991 s 74: see PARAS 366-367.
- 24 Water Industry Act 1991 s 170(3)(b). See also note 19.
- 25 As to water undertakers' areas see PARA 318.
- 26 Ie the Water Industry Act 1991 s 72: see PARA 369.
- 27 Water Industry Act 1991 s 170(2). See also note 5.
- 28 Ie under the Water Industry Act 1991 s 76: see PARA 316.
- 29 Water Industry Act 1991 s 170(4). See also note 5.



30 See PARA 434.

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#### **481. Impersonation of persons entitled to entry.**

A person<sup>1</sup> who, without having been designated or authorised for the purpose by a relevant undertaker<sup>2</sup> or, as the case may be, by the Environment Agency<sup>3</sup>, purports to be entitled to enter any premises or vessel<sup>4</sup> in exercise of a power exercisable in pursuance of any such designation or authorisation is guilty of an offence<sup>5</sup>. It is immaterial for these purposes, where a person purports to be entitled to enter any premises or vessel, that the power which he purports to be entitled to exercise does not exist or would not be exercisable even if that person had been duly designated<sup>6</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 As to the Environment Agency see PARA 17.

4 As to the meaning of 'vessel' see PARA 224 note 2.

5 Water Industry Act 1991 s 173(1); Water Resources Act 1991 s 174(1) (s 174 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). In the case of an offence under the Water Industry Act 1991 s 173, the penalty for such an offence is, on summary conviction, a fine not exceeding level 4 on the standard scale: s 173(1). In the case of an offence under the Water Resources Act 1991 s 174, the penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum or, on conviction on indictment, a fine or imprisonment for a term not exceeding two years, or both: s 174(1)(a), (b) (amended by the Environment Act 1995 Sch 22 para 167). As to the standard scale see PARA 141 note 18. As to the statutory maximum see PARA 169 note 20. As to offences by bodies corporate see PARA 185.

6 See the Water Industry Act 1991 s 173(2); Water Resources Act 1991 s 174(2) (as amended: see note 5).

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## **(ii) Exercise of Powers of Entry**

### **482. Notice of entry.**

Without prejudice to any power exercisable by virtue of a warrant<sup>1</sup>, no person<sup>2</sup> may make an entry into any premises or vessel<sup>3</sup> by virtue of any relevant statutory right or power<sup>4</sup> except: (1) in an emergency<sup>5</sup>; or (2) at a reasonable time and after the required notice<sup>6</sup> of the intended entry has been given to the occupier of the premises or vessel<sup>7</sup>.

In relation to rights of entry under the provisions relating to waste from water sources<sup>8</sup>, certain local authority rights regarding waterworks<sup>9</sup>, a water undertaker's rights of entry to waterworks<sup>10</sup> or to enforce a temporary hosepipe ban<sup>11</sup>, separate provision is made whereby admission to any premises which are not business premises<sup>12</sup> may not be demanded as of right unless 24 hours' notice of the intended entry has been given to the occupier of the premises<sup>13</sup>.

<sup>1</sup> I.e. a warrant under the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) or the Water Resources Act 1991 Sch 20: see PARA 483.

<sup>2</sup> As to the meaning of 'person' see PARA 13 note 29.

<sup>3</sup> As to the meaning of 'vessel' see PARA 224 note 2.

<sup>4</sup> I.e. any right or power to which the Water Industry Act 1991 Sch 6 Pt II applies (see PARAS 434, 477-480) or which is conferred by the Water Resources Act 1991 ss 169-172 (see PARAS 476-479): Water Industry Act 1991 Sch 6 para 6(1); Water Resources Act 1991 Sch 20 para 1(1).

<sup>5</sup> Water Industry Act 1991 Sch 6 para 6(1)(a); Water Resources Act 1991 Sch 20 para 1(1)(a). For the purposes of the application of these provisions to any right or power conferred by the Water Industry Act 1991 s 168 or, as the case may be, to the power conferred by the Water Resources Act 1991 s 170 (see PARA 477), 'emergency' includes: (1) in relation to any entry to premises for the purposes of, or for purposes connected with, the exercise or proposed exercise of any power in relation to a street, a reference to any circumstances requiring the carrying out of emergency works within the meaning of the New Roads and Street Works Act 1991 Pt III (ss 48-106) (see s 52; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 431); and (2) in relation to any other entry to premises, a reference to any danger to property and to any interruption of a supply of water provided to any premises by any person and to any interruption of the provision of sewerage services to any premises: Water Industry Act 1991 Sch 6 para 6(3); Water Resources Act 1991 Sch 20 para 1(3). As to the meaning of 'street' see PARA 308 note 19. As to the meaning of 'sewerage services' see PARA 129 note 7.

<sup>6</sup> The required notice in most cases is seven days' notice: see the Water Industry Act 1991 Sch 6 para 6(2) (b); Water Resources Act 1991 Sch 20 para 1(2). Such notice is not, however, required for entry under the Water Resources Act 1991 s 169 (see PARA 476) or s 172 (see PARA 479), except where the premises in question are residential premises, the vessel in question is used for residential purposes or the entry in question is to be with heavy equipment: Sch 20 para 1(2). In the case of the rights and powers conferred by any of the Water Industry Act 1991 s 74(4) (see PARA 368), s 84(2), (3) (see PARA 408), s 86(4) (see PARA 126) and s 170(1)(c), (3) (see PARA 480), only 24 hours' notice is required: see Sch 6 para 6(2)(a). For the purposes of the application of Sch 6 Pt II to the rights and other powers conferred by s 172 (entry for metering purposes: see PARA 434), there is no power to make an entry in an emergency other than at a reasonable time and after the required notice: see Sch 6 para 6(5). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

<sup>7</sup> Water Industry Act 1991 Sch 6 para 6(1)(b); Water Resources Act 1991 Sch 20 para 1(1)(b).

<sup>8</sup> I.e. the Water Industry Act 1991 s 71: see PARA 370.

<sup>9</sup> I.e. the Water Industry Act 1991 s 84(1): see PARA 408.

- 10     le under the Water Industry Act 1991 s 170(2): see PARA 480.
- 11     le the right of entry under the Water Industry Act 1991 s 170(4): see PARA 480.
- 12     'Business premises' means any factory, within the meaning of the Factories Act 1961 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 318 et seq), or any place in which persons are employed otherwise than in domestic service: Water Industry Act 1991 Sch 6 para 1(2).
- 13     Water Industry Act 1991 Sch 6 para 1(1).

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### **483. Warrant to exercise right or power of entry.**

If it is shown to the satisfaction of a justice of the peace<sup>1</sup> on sworn information in writing<sup>2</sup> that:

1126 (1) there is reasonable ground for entry to premises for any purpose for which certain statutory rights are exercisable<sup>3</sup>; or

1127 (2) there are reasonable grounds for the exercise in relation to any premises or vessel<sup>4</sup> of a specified right or power<sup>5</sup>,

and that in either case one or more of the statutory conditions<sup>6</sup> is fulfilled in relation to the premises or vessel in question, the justice may issue a warrant<sup>7</sup>. In a case falling within head (1) above, the warrant authorises the person entitled to entry to enter the premises, if need be by force<sup>8</sup>, and it continues in force until the purpose for which the entry is necessary has been fulfilled<sup>9</sup>. In a case falling within head (2) above, the warrant authorises the relevant authority<sup>10</sup> to designate a person who is authorised to exercise the right or power in relation to those premises or that vessel, in accordance with the warrant and, if need be, by force<sup>11</sup>, and it continues in force until the purposes for which it was issued have been fulfilled<sup>12</sup>.

A justice of the peace may not issue a warrant in a case in which he is satisfied that admission to the premises, or the exercise of a statutory right or power in relation to the premises or vessel, has been refused or that refusal is apprehended, unless he is also satisfied that notice of intention to apply for a warrant has been given to the occupier or that the giving of such notice would defeat the object of the entry or proposed entry<sup>13</sup>. Certain other restrictions are imposed on the issuing of a warrant<sup>14</sup>.

1 As to justices of the peace see **MAGISTRATES** vol 29(2) (Reissue) PARA 501 et seq.

2 As to the meaning of 'writing' see PARA 22 note 1.

3 Water Industry Act 1991 Sch 6 para 2(1)(b). The rights of entry referred to are those to which the Water Industry Act 1991 Sch 6 Pt I (paras 1-5) applies: see PARA 482. The mere fact that a power to enter and inspect premises exists is not a reasonable ground for entry: *Vines v Governors of North London Collegiate and Camden Schools for Girls* (1899) 63 JP 244, DC.

4 As to the meaning of 'vessel' see PARA 224 note 2.

5 Water Industry Act 1991 Sch 6 para 7(1)(a); Water Resources Act 1991 Sch 20 para 2(1)(a). The rights or powers referred to are a right or power to which the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) applies (see PARA 482 note 4) or a power conferred by the Water Resources Act 1991 ss 169-172 (see PARAS 476-480).

6 The statutory conditions are: (1) in relation to a right to which the Water Industry Act 1991 Sch 6 Pt I (paras 1-5) applies, that (a) admission to the premises has been refused to the person having the right to enter them; (b) such refusal is apprehended; (c) the premises are unoccupied or the occupier is temporarily absent; (d) the case is one of urgency; (e) an application for admission would defeat the object of the entry (see the Water Industry Act 1991 Sch 6 para 2(1)(a), (2)(a)-(e)); (2) in relation to a right or power to which Sch 6 Pt II (paras 6-13) applies, or a power conferred by the Water Resources Act 1991 ss 169-172, that (a) the exercise of the right or power in relation to the premises or vessel has been refused; (b) such a refusal is reasonably apprehended; (c) the premises are unoccupied; (d) the occupier is temporarily absent from the premises; (e) the case is one of urgency; or (f) an application for admission to the premises or vessel would defeat the object of the proposed entry (see the Water Industry Act 1991 Sch 6 para 7(1)(b), (2)(a)-(f); Water Resources Act 1991 Sch 20 para 2(2)(a)-(f)). As to the meaning of 'person' see PARA 13 note 29.

7 See the Water Industry Act 1991 Sch 6 paras 2(1), 7(1)(b); Water Resources Act 1991 Sch 20 para 2(1)(b).

8 Water Industry Act 1991 Sch 6 para 2(1).

9 Water Industry Act 1991 Sch 6 para 2(4).

10 'Relevant authority' means: (1) in relation to a right or power to which the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) applies, the person who, by virtue of the provision by which the right or power is conferred, is entitled to designate the person by whom it may be exercised (Sch 6 para 13(1)(a)); (2) in relation to a power conferred by the Water Resources Act 1991 ss 169-172, the Secretary of State or, in relation to Wales, the Welsh Ministers, or the Environment Agency, according to who is entitled, by virtue of the provision by which the power is conferred, to designate the person by whom it may be exercised (Water Resources Act 1991 Sch 20 para 8(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128)). The functions of the Secretary of State under the Water Resources Act 1991 Sch 20 and the Water Industry Act 1991 Sch 6, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the Environment Agency see PARA 17.

11 See the Water Industry Act 1991 Sch 6 para 7(1); Water Resources Act 1991 Sch 20 para 2(1). A person so designated must produce evidence of his designation and other authority before he exercises the right or power: Water Industry Act 1991 Sch 6 para 8; Water Resources Act 1991 Sch 20 para 3. A water undertaker is required by its conditions of appointment to provide a special means of identification for its authorised officers when they visit customers' premises. As to conditions of appointment see PARA 142. The instruments of appointment of the water undertakers were accessible on the Water Services Regulation Authority's website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk).

12 Water Industry Act 1991 Sch 6 para 7(5); Water Resources Act 1991 Sch 20 para 2(5).

13 See the Water Industry Act 1991 Sch 6 paras 2(3)(a), (c), 7(3); Water Resources Act 1991 Sch 20 para 2(3). In the case of a warrant under the Water Industry Act 1991 Sch 6 Pt I (paras 1-5) he may, alternatively, be satisfied that the premises are unoccupied or the occupier is temporarily absent, or that the case is one of urgency: see Sch 6 para 2(3)(b). As to notice of entry see PARA 483.

14 For the purposes of the application of the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) to the rights and powers conferred by s 169 in a case to which s 169(4) applies (see PARA 478), or for the purposes of the application of the Water Resources Act 1991 Sch 20 to the powers conferred by s 171 in a case to which s 171(4) applies (see PARA 478), a justice of the peace may not issue a warrant unless he is satisfied that the Secretary of State or, in relation to Wales, the Welsh Ministers have given authorisation for those purposes in relation to that case: see the Water Industry Act 1991 Sch 6 para 7(4); Water Resources Act 1991 Sch 20 para 2(4). See also note 10. As to additional powers and duties of persons making entry see PARA 484.

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#### **484. Supplementary powers and duties of person making entry.**

A person<sup>1</sup> entitled or authorised to enter any premises or vessel<sup>2</sup> by virtue of a statutory right or power<sup>3</sup> or of a warrant<sup>4</sup> may take with him<sup>5</sup> onto the premises or vessel such other persons and such equipment<sup>6</sup> as may be necessary<sup>7</sup>; and must leave the premises<sup>8</sup> or vessel as effectually secured against trespassers as he found those premises or that vessel<sup>9</sup>.

Any person who wilfully obstructs any person upon whom a right of entry has been conferred<sup>10</sup> or who intentionally obstructs another person acting in the exercise of a statutory right or power<sup>11</sup>, is guilty of an offence<sup>12</sup>.

Any person who is admitted to any premises in compliance with certain statutory provisions relating to rights of entry<sup>13</sup> or in compliance with a relevant warrant<sup>14</sup> is guilty of an offence if he discloses to any person, except in respect of any disclosure made in the performance of his duty<sup>15</sup>, any information<sup>16</sup> obtained by him there with regard to any manufacturing process or trade secret<sup>17</sup>. This offence is in addition to the general statutory restrictions on the disclosure of information<sup>18</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'vessel' see PARA 224 note 2.

3 I.e. a right to which the Water Industry Act 1991 Sch 6 Pt I (paras 1-5) applies (see PARA 482), a right or power to which Sch 6 Pt II (paras 6-13) applies (see PARA 482 note 4) or a power conferred by the Water Resources Act 1991 ss 169-172 (see PARAS 476-480): see the Water Industry Act 1991 Sch 6 paras 3, 9; the Water Resources Act 1991 Sch 20 para 4.

4 As to warrants see PARA 483.

5 I.e. subject, in the case of a right or power exercisable under a warrant, to the terms of that warrant: see the Water Industry Act 1991 Sch 6 para 9; the Water Resources Act 1991 Sch 20 para 4. No such qualification is made in the case of an entry by virtue of the Water Industry Act 1991 Sch 6 Pt I: see Sch 6 para 3.

6 I.e. except in the case of an entry by virtue of the Water Industry Act 1991 Sch 6 Pt I (paras 1-5), where no express power to take equipment is conferred: see Sch 6 para 3.

7 Water Industry Act 1991 Sch 6 paras 3, 9; Water Resources Act 1991 Sch 20 para 4.

8 In the case of an entry by virtue of the Water Industry Act 1991 Sch 6 Pt I (paras 1-5) this duty applies in relation to unoccupied premises only: see the Water Industry Act 1991 Sch 6 para 2(5).

9 See the Water Industry Act 1991 Sch 6 paras 2(5), 10; Water Resources Act 1991 Sch 20 para 5. For the purposes of the Water Industry Act 1991 Sch 6 para 10 (entry under a right or power to which Sch 6 Pt II (paras 6-13) applies) or the Water Resources Act 1991 Sch 20 para 5, a person enters any premises or vessel by virtue of a right or power to which the Water Industry Act 1991 Sch 6 Pt II or the Water Resources Act 1991 Sch 20 applies notwithstanding that he has failed, whether by virtue of the waiver of the requirement by the occupier of them or otherwise, to comply with any requirement to enter at a reasonable time or after giving notice of his intended entry (see PARA 482), or with the requirement to produce evidence of his designation or other authority (see PARA 483): Water Industry Act 1991 Sch 6 para 13(3); Water Resources Act 1991 Sch 20 para 8(3). References for these purposes to a right or power to which the relevant provisions apply include references to a right or power exercisable by virtue of a warrant under them: see the Water Industry Act 1991 Sch 6 para 13(2); the Water Resources Act 1991 Sch 20 para 8(2).

10 I.e. by virtue of any provision of the Water Industry Act 1991 relating to a right of entry to which Sch 6 Pt I (paras 1-5) applies (see PARA 482) or by virtue of a warrant under Sch 6 Pt I: Sch 6 para 4(a), (b).

11     le a right or power to which the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) applies (see PARA 482 note 4) or a power to which the Water Resources Act 1991 Sch 20 applies: Water Industry Act 1991 Sch 6 para 12; Water Resources Act 1991 Sch 20 para 7.

12     Water Industry Act 1991 Sch 6 paras 4, 12; Water Resources Act 1991 Sch 20 para 7. The penalty for such an offence is: (1) under the Water Industry Act 1991 Sch 6 para 4, on summary conviction, a fine not exceeding level 1 on the standard scale (Sch 6 para 4); (2) under Sch 6 para 12, on summary conviction, a fine not exceeding level 3 on the standard scale (Sch 6 para 12); and (3) under the Water Resources Act 1991 Sch 20 para 7 (a) on summary conviction, a fine not exceeding the statutory maximum; or (b) on conviction on indictment, a fine or imprisonment for a term not exceeding two years, or both (Sch 20 para 7 (amended by the Environment Act 1995 s 120(1), Sch 22 para 188)). As to the standard scale see PARA 141 note 18. As to the statutory maximum see PARA 169 note 20.

13     le any provision of the Water Industry Act 1991 relating to a right of entry to which Sch 6 Pt I (paras 1-5) applies: Sch 6 para 5(1)(a).

14     le a warrant under the Water Industry Act 1991 Sch 6 Pt I (paras 1-5) (see PARA 482): see Sch 6 para 5(1) (b).

15     Water Industry Act 1991 Sch 6 para 5(2).

16     As to the meaning of 'information' see PARA 117 note 13.

17     Water Industry Act 1991 Sch 6 para 5(1). This provision is without prejudice to s 206 (general restrictions on disclosure of information: see PARA 183): Sch 6 para 5(1). The penalty for such an offence is: (1) on summary conviction, imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum or to both; (2) on conviction on indictment, imprisonment for a term not exceeding three months or to a fine or to both: Sch 6 para 5(4)(a), (b). As from a day to be appointed heads (1) and (2) are repealed and the penalty for such an offence will be, on summary conviction, a fine not exceeding level 5 on the standard scale: Sch 6 para 5(4) (prospectively amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 2, para 159). At the date at which this volume states the law no such day had been appointed. As to the application of these provisions to the right conferred by the Water Industry Act 1991 s 171 (entry for sewerage purposes) see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1027.

18     As to those general restrictions see PARA 183.



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### **(iii) Compensation in respect of Rights of Entry**

#### **485. Compensation in respect of rights of entry.**

Where any person <sup>1</sup> exercises any statutory right or power in connection with entry into any premises or vessel<sup>2</sup>, it is the duty of the relevant authority<sup>3</sup> to make full compensation to any person who has sustained loss or damage<sup>4</sup> by reason of:

- 1128 (1) the exercise by the designated person of that right or power or of any power to take any person or equipment with him<sup>5</sup> when entering the premises or vessel in relation to which the right or power is exercised<sup>6</sup>; or
- 1129 (2) the performance of, or failure of the designated person to perform, the duty imposed on him<sup>7</sup> to leave those premises or that vessel secured against trespassers<sup>8</sup>.

Compensation is not, however, so payable in respect of any loss or damage if the loss or damage is attributable to the default of the person who sustained it, or is loss or damage in respect of which compensation is payable by virtue of any other statutory provision<sup>9</sup>.

Any dispute as to a person's entitlement to compensation under these provisions, or as to the amount of any such compensation, must be referred to the arbitration of a single arbitrator appointed by agreement between the relevant authority and the person who claims to have sustained the loss or damage<sup>10</sup>. In default of agreement, such a dispute must be settled: (a) by the President of the Lands Tribunal<sup>11</sup> where the relevant authority is the Secretary of State<sup>12</sup> or the Welsh Ministers<sup>13</sup>; (b) by the Secretary of State or, in relation to Wales, the Welsh Ministers, where the Environment Agency<sup>14</sup> is the relevant authority<sup>15</sup>; and (c) by the Secretary of State or, in relation to Wales, the Welsh Ministers, in any other case<sup>16</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 I.e a right or power to which the Water Industry Act 1991 Sch 6 Pt II (paras 6-13) applies (see PARA 482 note 4) or a power conferred by the Water Resources Act 1991 ss 169-172 (see PARAS 476-480): see the Water Industry Act 1991 Sch 6 para 11(1); the Water Resources Act 1991 Sch 20 para 6(1). As to the meaning of 'vessel' see PARA 224 note 2.

3 As to the meaning of 'relevant authority' see PARA 483 note 10. In this context this expression also includes a person who is entitled by means of a warrant to designate the person by whom the right or power may be exercised: see the Water Industry Act 1991 Sch 6 para 13(1)(b); the Water Resources Act 1991 Sch 20 para 8(1). As to warrants see PARA 483.

4 As to the meaning of 'damage' see PARA 129 note 7.

5 As to this right or power see PARA 484.

6 Water Industry Act 1991 Sch 6 para 11(1)(a); Water Resources Act 1991 Sch 20 para 6(1)(a).

7 I.e by virtue of the Water Industry Act 1991 Sch 6 para 10 or, as the case may be, the Water Resources Act 1991 Sch 20 para 5: see PARA 484.

8 Water Industry Act 1991 Sch 6 para 11(1)(b); Water Resources Act 1991 Sch 20 para 6(1)(b).

9 Water Industry Act 1991 Sch 6 para 11(2); Water Resources Act 1991 Sch 20 para 6(2). The statutory provisions referred to in the text are any other provision of the Water Industry Act 1991 or, as the case may be, the Water Resources Act 1991.

10 Water Industry Act 1991 Sch 6 para 11(3); Water Resources Act 1991 Sch 20 para 6(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

11 As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

12 As to the Secretary of State see PARA 15 note 1.

13 Water Industry Act 1991 Sch 6 para 11(3)(a); Water Resources Act 1991 Sch 20 para 6(3)(a). The functions of the Secretary of State under the Water Industry Act 1991 Sch 6 and the Water Resources Act 1991 Sch 20, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

14 As to the Environment Agency see PARA 17.

15 Water Resources Act 1991 Sch 20 para 6(3)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

16 Water Industry Act 1991 Sch 6 para 11(3)(b).

## **UPDATE**

### **485 Compensation in respect of rights of entry**

TEXT AND NOTES 11, 13--For 'President of the Lands Tribunal' read 'Upper Tribunal': Water Industry Act 1991 Sch 6 para 11(3)(a), Sch 20 para 6(3)(a) (amended by SI 2009/1307).

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## **(5) INTERFERENCE WITH AND PROTECTION FOR WORKS AND UNDERTAKINGS**

### **(i) Interference with Works etc**

#### **486. Offences of interference with works etc.**

If any person<sup>1</sup>:

1130 (1) without the consent of the water undertaker<sup>2</sup> or, as the case may be, of the Environment Agency<sup>3</sup>:

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7. (a) intentionally or recklessly interferes with any resource main<sup>4</sup>, water main or other pipe<sup>5</sup> vested in any water undertaker, with any resource main or other pipe vested in the Agency, or with any structure, installation or apparatus belonging to any water undertaker<sup>6</sup> or to the Agency<sup>7</sup>; or
8. (b) by any act or omission negligently interferes with any such main or other pipe or with any such structure, installation or apparatus so as to damage it or so as to have an effect on its use or operation<sup>8</sup>;

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1131 (2) without the consent of the licensed water supplier<sup>9</sup>:

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9. (a) intentionally or recklessly interferes with any pipe or any structure, installation or apparatus which is vested in any licensed water supplier (in the case of a pipe) or belongs to any such supplier (in any other case), and is used in connection with the carrying on by the supplier of the activities authorised by its licence<sup>10</sup>; or
10. (b) by any act or omission negligently interferes with any such pipe or with any such structure, installation or apparatus so as to damage it or so as to have an effect on its use or operation<sup>11</sup>,

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that person is guilty of an offence<sup>12</sup>. A person is not, however, guilty of any such an offence by reason of anything done in an emergency to prevent loss or damage<sup>13</sup> to persons or property<sup>14</sup>. Nor is he guilty of such an offence by reason of his opening or closing the stopcock<sup>15</sup> fitted to a service pipe<sup>16</sup> by means of which water is supplied to any premises by a water undertaker or licensed water supplier if (i) he has obtained the consent of every consumer<sup>17</sup> whose supply is affected by the opening or closing of that stopcock or, as the case may, of every other consumer whose supply is so affected<sup>18</sup>; and (ii) in the case of opening a stopcock belonging to a water undertaker if the stopcock was closed otherwise than by the undertaker<sup>19</sup>, or in the case of a stopcock belonging to a licensed water supplier if the stopcock was closed otherwise than by the supplier<sup>20</sup> or, if the stopcock was closed by the supplier and the person in question<sup>21</sup> is the water undertaker whose supply system<sup>22</sup> is used for the purpose of the supply made by the supplier<sup>23</sup>.

Any person who:

- 1132 (A) without the consent of the water undertaker, attaches any pipe or apparatus to any resource main, water main or other pipe vested in a water undertaker, or to any service pipe which does not belong to such an undertaker but is a pipe by means of which water is supplied by such an undertaker to any premises<sup>24</sup>;
- 1133 (B) without the consent of the Agency, attaches any pipe or apparatus to any resource main or other pipe vested in the Agency<sup>25</sup>;
- 1134 (C) without the consent of the water undertaker, makes any alteration in a service pipe by means of which water is supplied by a water undertaker to any premises, or in any apparatus attached to any such pipe<sup>26</sup>;
- 1135 (D) without the consent of the water undertaker or, as the case may be, of the Agency, uses any pipe or apparatus which has been attached or altered in contravention<sup>27</sup> of heads (A) to (C) above<sup>28</sup>;
- 1136 (E) without the consent of the licensed water supplier, attaches any pipe or apparatus to any pipe which is vested in a licensed water supplier and used in connection with the carrying on by the supplier of the activities authorised by its licence<sup>29</sup>;
- 1137 (F) without the consent of the licensed water supplier, attaches any pipe or apparatus to any service pipe which does not belong to such a supplier or a water undertaker but which is a pipe by means of which water is supplied by such a supplier to any premises<sup>30</sup>;
- 1138 (G) without the consent of the licensed water supplier, makes any alteration in a service pipe by means of which water is so supplied, or in any apparatus attached to any such pipe<sup>31</sup>; or
- 1139 (H) without the consent of the licensed water supplier, uses any pipe or apparatus which has been attached or altered in contravention of heads (E) to (G) above<sup>32</sup>,

is guilty of an offence<sup>33</sup>. It is, however, a defence in proceedings against any person for an offence by virtue of head (D) or head (H) above for that person to show that he did not know, and had no grounds for suspecting, that the pipe in question had been attached or altered in contravention of the prohibitions mentioned in those heads<sup>34</sup>.

An offence under head (1) or heads (A) to (D) above constitutes a breach of a duty owed to the water undertaker in question or, as the case may be, to the Agency, and any such breach of duty which causes the undertaker or the Agency to sustain loss or damage is actionable at the suit of that undertaker or, as the case may be, of the Agency<sup>35</sup>.

If any person wilfully or negligently injures or suffers to be injured any water fitting<sup>36</sup> belonging to a water undertaker, he is guilty of an offence<sup>37</sup>. A water undertaker may do all such work as is necessary for repairing any such injury<sup>38</sup>, and recover the expenses reasonably incurred by the undertaker in doing so from the offender summarily as a civil debt<sup>39</sup>.

If any person wilfully or negligently injures or suffers to be injured any water fitting which belongs to a licensed water supplier<sup>40</sup> and is used in connection with the carrying on by the supplier of the activities authorised by its licence<sup>41</sup>, he is guilty of an offence<sup>42</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the Environment Agency see PARA 17.

4 As to the meaning of 'resource main' see PARA 179 note 4.

- 5 As to the meanings of 'water main' and 'pipe' see PARA 138 note 11.
- 6 For these purposes, references to apparatus belonging to a water undertaker do not include references to any meter which belongs to such an undertaker and is used by it for the purpose of determining the amount of any charges which have been fixed by the undertaker by reference to volume: Water Industry Act 1991 s 174(9). As to the meaning of 'meter' see PARA 337 note 11. As to the meaning of 'fixing charges in relation to any premises by reference to volume' see PARA 337 note 11. As to interference with meters see PARA 442.
- 7 Water Industry Act 1991 s 174(1)(a); Water Resources Act 1991 s 176(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128.
- 8 Water Industry Act 1991 s 174(1)(b); Water Resources Act 1991 s 176(1)(b).
- 9 As to the meaning of 'licensed water supplier' see PARA 152.
- 10 Water Industry Act 1991 s 174(1A)(a) (s 174(1A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (2)). As to water supply licences see PARA 152 et seq.
- 11 Water Industry Act 1991 s 174(1A)(b) (as added: see note 10).
- 12 Water Industry Act 1991 s 174(1), (1A); Water Resources Act 1991 s 176(1). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: Water Industry Act 1991 s 174(1), (1A); Water Resources Act 1991 s 176(1). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.
- 13 As to the meaning of 'damage' see PARA 129 note 7.
- 14 Water Industry Act 1991 s 174(2)(a) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (3) (a)); Water Resources Act 1991 s 176(2)(a). It seems, also, that an offence would not be committed by a consumer who, without interfering with the supply, effects repairs in a proper and competent manner to a main, communication pipe or other apparatus of the undertakers where the undertakers have failed to do so within a reasonable period and the failure is not unavoidable: see *Cope v Sharpe (No 2)* [1912] 1 KB 496. However, a consumer taking such action must avoid contravening the Water Industry Act 1991 s 73(1)(c) (see PARA 364), and the provisions set out in this paragraph. Turning on a valve which has been turned off by the undertakers in order to prevent waste or contamination, or to disconnect or cut off a supply eg for non-payment of charges, is interference with the supply. If the main or apparatus interfered with is in a highway, a person breaking open the surface must show lawful authority or excuse for so doing: see the New Roads and Street Works Act 1991 s 51(1); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 423.
- 15 As to the meaning of 'stopcock' see PARA 138 note 11 (definition applied in the case of the Water Resources Act 1991 by s 176(7)).
- 16 As to the meaning of 'service pipe' see PARA 179 note 8 (definition applied in the case of the Water Resources Act 1991 by s 176(7)).
- 17 As to the meaning of 'consumer' see PARA 122 note 35: definition applied in the case of the Water Resources Act 1991 by s 176(7). In the Water Industry Act 1991 s 174 'consumer': (1) in relation to a supply of water provided by a water undertaker to any premises, means a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of that supply of water would fall; (2) in relation to a supply of water provided by a licensed water supplier to any premises, means a person who is for the time being the person on whom liability to pay charges to the supplier in respect of that supply of water would fall: s 174(8A) (added by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (9)). As to water charges see PARA 417 et seq.
- 18 Water Industry Act 1991 s 174(2)(b)(i); Water Resources Act 1991 s 176(2)(b)(i).
- 19 Water Industry Act 1991 s 174(2)(b)(ii), (2A)(a) (s 174(2)(b)(ii) amended, (2A) added, by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (3)(b), (4)). In the Water Resources Act 1991 the wording is 'in the case of opening a stopcock, the stopcock was closed otherwise than by the undertaker': s 176(2)(b)(ii).
- 20 Water Industry Act 1991 s 174(2)(b)(ii), (2A)(b)(i) (as amended and added: see note 19).
- 21 Ie for the purposes of the Water Industry Act 1991 s 174(2).
- 22 As to the meaning of 'water undertaker's supply system' see PARA 152 note 8: definition applied by the Water Industry Act 1991 s 174(2A) (as added: see note 19).
- 23 Water Industry Act 1991 s 174(2)(b)(ii), (2A)(b)(ii) (as amended and added: see note 19).

24 Water Industry Act 1991 s 174(3)(a).

25 Water Resources Act 1991 s 176(3)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

26 Water Industry Act 1991 s 174(3)(b).

27 As to the meaning of 'contravention' see PARA 20 note 5.

28 Water Industry Act 1991 s 174(3)(c) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (5)); Water Resources Act 1991 s 176(3)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

29 Water Industry Act 1991 s 174(3A)(a) (s 174(3A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (6)).

30 Water Industry Act 1991 s 174(3A)(b) (as added: see note 29).

31 Water Industry Act 1991 s 174(3A)(c) (as added: see note 29).

32 Water Industry Act 1991 s 174(3A)(d) (as added: see note 29).

33 Water Industry Act 1991 s 174(3), (3A) (as added: see note 29); Water Resources Act 1991 s 176(3). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: Water Industry Act 1991 s 174(3), (3A) (as so added); Water Resources Act 1991 s 176(3). An offence is committed if a person affixes a tap to shut off the water while the house is cleared (*Williams v Llandudno District Council* (1897) 14 TLR 18, DC), or connects up a house owned by him with the pipes of another house owned by him (*Kyffin v Metropolitan Water Board* (1908) 72 JP 517, DC; see also *Philp v Dunfermline Magistrates* (1902) 4 F (J) 34), or temporarily affixes a hosepipe to draw off water (*Cambridge University and Town Waterworks Co v Hancock* (1910) 74 JP 477, DC).

34 Water Industry Act 1991 s 174(4) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (7)); Water Resources Act 1991 s 176(4).

35 Water Industry Act 1991 s 174(6); Water Resources Act 1991 s 176(5) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The amount so recoverable from a person who has committed an offence under heads (A) to (D) above includes such amount as may be reasonable in respect of any water wasted, misused or improperly consumed in consequence of the commission of the offence: Water Industry Act 1991 s 174(7); Water Resources Act 1991 s 176(6).

36 As to the meaning of 'water fittings' see PARA 134 note 6: definition applied by the Water Industry Act 1991 s 174(9) (amended by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (10)).

37 Water Industry Act 1991 s 174(5). The penalty for such an offence is, on summary conviction, a fine not exceeding level 1 on the standard scale: s 174(5).

38 Water Industry Act 1991 s 174(8)(a).

39 Water Industry Act 1991 s 174(8)(b). As to the recovery of expenses see PARA 131 note 6. As to the summary recovery of civil debts see **MAGISTRATES** vol 29(2) (Reissue) PARA 826.

40 Water Industry Act 1991 s 174(5A)(a) (s 174(5A) added by the Water Act 2003 s 101(1), Sch 8 paras 2, 39(1), (8)).

41 Water Industry Act 1991 s 174(5A)(b) (as added: see note 40).

42 Water Industry Act 1991 s 174(5A) (as added: see note 40). The penalty for such an offence is, on summary conviction, a fine not exceeding level 1 on the standard scale: s 174(5A) (as so added).

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#### **487. Powers of other bodies to interfere with works etc.**

Various bodies have statutory powers to interfere with mains, pipes and other installations and apparatus vested in a relevant undertaker<sup>1</sup> or a licensed water supplier<sup>2</sup> or in the Environment Agency<sup>3</sup>. These bodies include electricity and gas suppliers<sup>4</sup>, urban authorities<sup>5</sup>, planning authorities<sup>6</sup> and railway and canal undertakers<sup>7</sup>, although this list does not purport to be exhaustive. A building belonging to a relevant undertaker or to the Environment Agency and held or used by it for the purposes of its undertaking is not, however, subject to building regulations unless it is a house or a building used as an office or a showroom<sup>8</sup>.

Navigation, harbour and conservancy authorities<sup>9</sup> have certain statutory powers to divert the Agency's watercourses<sup>10</sup>.

Where any such body causes damage to a water main vested in a relevant undertaker, the ordinary principles of liability and causation will apply<sup>11</sup>.

1 As to relevant undertakers see PARA 137 et seq.

2 As to licensed water suppliers see PARA 152 et seq.

3 As to the Environment Agency see PARA 17.

4 See **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 842, 1287.

5 See **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 400.

6 Nothing in the Water Industry Act 1991, the Water Resources Act 1991 or in any other enactment relating to the functions of a relevant undertaker or of the Agency is to be construed as authorising the carrying out of any development, within the meaning of the Town and Country Planning Act 1990, without the grant of such planning permission as may be required by that 1990 Act: see the Water Industry Act 1991 s 190; Water Resources Act 1991 s 183(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). These provisions are without prejudice to the operation of the Town and Country Planning Act 1990 s 90 (planning permission deemed to be granted in certain cases: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 238) in relation to any provision made by or under the Water Industry Act 1991, the Water Resources Act 1991 or any other enactment which by virtue of those Acts or of the Water Act 1989 relates to these functions: Water Industry Act 1991 s 190; Water Resources Act 1991 s 183 (as so amended). As to planning permission and the control of development see generally **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 213 et seq. The consent of the local planning authority is generally needed before a person carries out works which affect a tree subject to a tree preservation order; but in practice such orders often contain provision removing the need for such consent when certain works are carried out by a water undertaker. As to tree preservation orders see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 850 et seq.

7 See PARA 799; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 291 et seq.

8 See the Building Act 1984 s 4; and **BUILDING** vol 4(2) (2002 Reissue) PARA 313. The Agency, every water undertaker and every sewerage undertaker are deemed to be statutory undertakers for the purposes of the Building Act 1984 and their undertakings statutory undertakings: see the Water Act 1989 s 190(1), Sch 25 para 1(1), (2)(xxxi) (amended by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 3, Sch 2 para 4).

9 As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

10 See PARA 604.

11 See eg *Thames Water Utilities Ltd v London Regional Transport* [2004] EWHC 2021 (TCC), 95 ConLR 127, [2004] All ER (D) 96 (Aug). As to negligence and breach of statutory duty see **DAMAGES; NEGLIGENCE; TORT** vol 97 (2010) PARAS 491, 495 et seq.



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#### **488. Building over water mains.**

A legal procedure is provided to control building over drains, sewers and disposal mains<sup>1</sup>. There is no equivalent procedure controlling building over water mains, but easements for water mains will normally govern such matters<sup>2</sup>. If the owner of land proposes to build on it in a way which is likely to damage a water undertaker's pipe, or will render it more difficult to effect repairs to a water undertaker's pipe<sup>3</sup>, the undertaker may be entitled to an injunction to restrain such interference<sup>4</sup>.

1 The erection or extension of a building or work involving the underpinning of a building must be carried out in a way that is not detrimental to the building or building extension or to the continued maintenance of the drain, sewer or disposal main; but this applies only to work carried out (1) over a drain, sewer or disposal main which is shown on any map of sewers; or (2) on any site or in such a manner as may result in interference with the use of, or obstruction of the access of any person to, any drain, sewer or disposal main which is shown on any map of sewers: see the Building Regulations 2000, SI 2000/2531, reg 4, Sch 1 Pt H para H4 (Sch 1 Pt H substituted by SI 2001/3335); and **BUILDING** vol 4(2) (2002 Reissue) PARA 308.

2 As to powers to lay water mains see PARAS 462, 463.

3 As to powers to repair pipes in private land see PARA 463. As to an undertaker's duty to move pipes see PARA 489.

4 See *Abingdon Corpn v James* [1940] Ch 287, [1940] 1 All ER 446.

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#### **489. Undertaker's duty to move pipes etc in certain cases.**

Where any relevant pipe<sup>1</sup> or other apparatus is for the time being kept installed by a relevant undertaker<sup>2</sup> on, under or over any land<sup>3</sup>, any person<sup>4</sup> with an interest in that land or in adjacent land may by notice<sup>5</sup> to the undertaker require the undertaker to alter or remove that pipe or apparatus on the ground that the alteration or removal of that pipe or apparatus is necessary to enable that person to carry out a proposed improvement<sup>6</sup> of the land in which he has an interest<sup>7</sup>. Where such a notice is served on a relevant undertaker, it is that undertaker's duty to comply with the requirement contained in the notice except to the extent that that requirement is unreasonable<sup>8</sup>; but nothing in these provisions requires a relevant undertaker to alter or remove any pipe or apparatus which is kept installed in, under or over any street<sup>9</sup>.

Where a relevant undertaker carries out any works by virtue of such a notice having been served by any person, the undertaker is entitled to recover any expenses reasonably incurred in carrying out those works from that person<sup>10</sup>; and an undertaker may make it a condition of complying with the duty to which it is subject by virtue of such a notice served by any person that such security as the undertaker may reasonably require has been provided for the discharge of an obligation by that person to meet those expenses<sup>11</sup>.

1 As to the meaning of 'relevant pipe' see PARA 462 note 5: definition applied by the Water Industry Act 1991 s 185(9).

2 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

3 As to the meaning of 'land' see PARA 14 note 21.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

6 'Improvement', in relation to any land, includes any development or change of use but does not include an improvement with respect to the supply of water, or the provision of sewerage services, to any premises: Water Industry Act 1991 s 185(9). As to the meaning of 'sewerage services' see PARA 129 note 7. As to development and change of use of land see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 217 et seq.

7 Water Industry Act 1991 s 185(1).

8 Water Industry Act 1991 s 185(2). The duty of a relevant undertaker under these provisions is enforceable under s 18 (see PARA 163) by the Water Services Regulation Authority: s 185(8) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

9 Water Industry Act 1991 s 185(3). As to the meaning of 'street' see PARA 308 note 19.

10 Water Industry Act 1991 s 185(5). As to the recovery of expenses see PARA 131 note 6.

11 See the Water Industry Act 1991 s 185(4). Where any sums have been deposited with a relevant undertaker by way of security for the discharge of any obligation, the undertaker must pay interest at such rate as may be determined either (1) by the undertaker with the approval of the Water Services Regulation Authority; or (2) in default of a determination under head (1), by the Authority, on every sum of 50p so deposited for every three months during which it remains in the hands of the undertaker: s 185(6) (s 185(6), (7) amended by the Water Act 2003 s 36(2)). An approval or determination by the Authority for these purposes may be given or made in relation to a particular case or description of cases or generally and may be revoked at any time: s 185(7) (as so amended). As to the meaning of 'month' see PARA 23 note 10.



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## **(ii) Protection for Particular Undertakings**

### **490. In general.**

Nothing in the Water Industry Act 1991 conferring power on an relevant undertaker<sup>1</sup>, and nothing in any of the provisions of the Water Resources Act 1991 conferring power on the Environment Agency<sup>2</sup>, to carry out any works<sup>3</sup> confers power to do anything, except with the consent<sup>4</sup> of the persons<sup>5</sup> carrying on a protected undertaking<sup>6</sup>, which, whether directly or indirectly, so interferes or will so interfere (1) with works or property vested in or under the control of the persons carrying on that undertaking, in their capacity as such<sup>7</sup>; or (2) with the use of any such works or property<sup>8</sup>, as to affect injuriously those works or that property or the carrying on of that undertaking<sup>9</sup>.

Any dispute as to whether anything done or proposed to be done interferes, or will interfere, with a protected undertaking as mentioned above, must be referred to arbitration, as must any dispute as to whether any consent for these purposes is being unreasonably withheld or any condition subject to which any such consent has been given was unreasonable<sup>10</sup>.

Nothing in any provision of the Water Industry Act 1991 conferring power on a relevant undertaker to carry out any works, or in any provision of the Water Resources Act 1991 conferring power on the Agency to carry out any works<sup>11</sup>, or in any of the flood defence provisions<sup>12</sup> of that Act, confers power to do anything which prejudices the exercise of any statutory power, authority or jurisdiction from time to time vested in or exercisable by any persons carrying on a protected undertaking<sup>13</sup>.

A special procedure<sup>14</sup> applies to every relevant undertaker, and to the Agency, for the purposes of any works involving the alteration of electronic communications apparatus which are carried out by that undertaker or by the Agency in the exercise of any of the powers<sup>15</sup> conferred by any enactment<sup>16</sup>.

Nothing in the flood defence provisions of the Water Resources Act 1991<sup>17</sup> authorises any person, except with the consent<sup>18</sup> of the railway company in question, to interfere with any railway bridge or any other work connected with a railway<sup>19</sup>, or the structure, use or maintenance of a railway or the traffic on it<sup>20</sup>. Any dispute as to whether anything so interferes, or will so interfere, as to whether any consent for these purposes is being unreasonably withheld, or as to whether any condition subject to which any such consent has been given was reasonable, must be referred to the arbitration of a single arbitrator to be appointed by agreement between the parties to the dispute or, in default of agreement, by the President of the Institution of Civil Engineers<sup>21</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Environment Agency see PARA 17.

3 Ie including the provisions of any order under the Water Resources Act 1991 s 108 (transfer of functions in relation to main river: see PARA 575) by virtue of which any such power is conferred: see the Water Resources Act 1991 Sch 22 para 1(6).

4 A consent for these purposes may be given subject to reasonable conditions, but such consent must not be unreasonably withheld: Water Industry Act 1991 Sch 13 para 1(3); Water Resources Act 1991 Sch 22 para 1(2).

5 As to the meaning of 'person' see PARA 13 note 29.

6 The following are protected undertakings for these purposes: (see the Water Industry Act 1991 Sch 13 para 1(5) (amended by the Coal Industry Act 1994 s 67(1), Sch 9 para 42; the Environment Act 1995 s 120(1), Sch 22 para 127; SI 2001/1149; the Transport Act 2000 s 37, Sch 5 para 14; the Communications Act 2003 s 406(1), Sch 17 para 111; the Gas Act 1995 s 16(1), Sch 4 para 2(2)(m); the Utilities Act 2000 s 76(7); the Energy Act 2004 s 143(1) Sch 19 para 17); the Water Resources Act 1991 Sch 22 para 1(4) (amended by the Coal Industry Act 1994 Sch 9 para 43(1); the Transport Act 2000 Sch 5 para 15; SI 2001/1149; the Communications Act 2003 Sch 17 para 114; the Gas Act 1995 s 16(1), Sch 4 para 2(2); the Utilities Act 2000 s 76(7); the Energy Act 2004 s 143(1), Sch 19 para 18)):

- 4 (1) the undertakings of the Civil Aviation Authority, the Coal Authority, a universal service provider (so far as it is the provider's undertaking in relation to the provision of a universal postal service) and, in relation to a relevant undertaker, the undertaking of the Environment Agency;
- 5 (2) the undertaking of any water undertaker or sewerage undertaker (ie of any 'relevant undertaker');
- 6 (3) any undertaking consisting in the provision of an electronic communications network;
- 7 (4) any airport to which the Airports Act 1986 Pt V (ss 57-62) (see **AIR LAW** vol 2 (2008) PARA 189) applies;
- 8 (5) the undertaking of any gas transporter within the meaning of the Gas Act 1986 Pt I (ss 4AA-48) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 805);
- 9 (6) the undertaking of any person authorised by a licence under the Electricity Act 1989 Pt I (ss 3A-64) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065) to generate, supply or participate in the transmission of electricity;
- 10 (7) the undertaking of any navigation, harbour or conservancy authority or of any internal drainage board;
- 11 (8) the undertaking of any railway undertakers or railway company;
- 12 (9) any public utility undertaking carried on by a local authority under any Act or under any order having the force of an Act;
- 13 (10) the undertaking of any licensed operator within the meaning of the Coal Industry Act 1994 (see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 91 et seq);
- 14 (11) the undertaking of a person who holds a licence under the Transport Act 2000 Pt I Ch I (ss 1-40) (air traffic services: **AIR LAW** vol 2 (2008) PARA 139 et seq) to the extent that it is the person's undertaking as licence holder.

In head (1) above, 'universal service provider' has the same meaning as in the Postal Services Act 2000; and the reference to the provision of a universal postal service is to be construed in accordance with that Act (see **POST OFFICE**): Water Industry Act 1991 Sch 13 para 1(5A); Water Resources Act 1991 Sch 22 para 1(4A) (both added by added by SI 2001/1149). Any reference, in relation to any such airport as is mentioned in head (4) above, to the persons carrying on the undertaking is a reference to the airport operator: Water Industry Act 1991 Sch 13 para 1(6); Water Resources Act 1991 Sch 22 para 1(5). As to the Civil Aviation Authority see **AIR LAW** vol 2 (2008) PARA 50. As to the Coal Authority see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 52. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3. As to internal drainage boards see PARA 569 et seq. As to the meaning of 'railway undertakers' see PARA 466 note 8. As to the meaning of 'local authority' for the purposes of the Water Industry Act 1991 see PARA 118 note 17, and for the purposes of the Water Resources Act 1991 see PARA 187 note 2. For the purposes of the Water Resources Act 1991 Sch 22, 'railway company' means the British Railways Board, Transport for London or any subsidiary of Transport for London, or any other person authorised by any enactment, or any order, rule or regulation made under any enactment, to construct, work or carry on a railway: Sch 22 para 6 (amended by SI 2003/1615). As to the meaning of 'enactment' see PARA 14 note 31. As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to Transport for London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 269-321.

7 Water Industry Act 1991 Sch 13 para 1(1)(a); Water Resources Act 1991 Sch 22 para 1(1)(a).

- 8 Water Industry Act 1991 Sch 13 para 1(1)(b); Water Resources Act 1991 Sch 22 para 1(1)(b).
- 9 Water Industry Act 1991 Sch 13 para 1(1); Water Resources Act 1991 Sch 22 para 1(1) (amended by the Environment Act 1995 Sch 22 para 128). The Water Industry Act 1991 Sch 13 para 1(1) has effect in its application to the relevant sewerage provisions as if any use of, injury to or interference with any sluices, floodgates, sewers, groynes, sea defences or other works which are vested in or under the control of the Environment Agency or an internal drainage board were such an interference with works or property vested in or under the control of the Agency or that board as to affect injuriously the works or property or the carrying on of the undertaking of the Agency or of that board: Sch 13 para 1(2) (amended by the Environment Act 1995 Sch 22 para 127). As to the meaning of 'relevant sewerage provisions' see PARA 455 note 14.
- 10 See the Water Industry Act 1991 Sch 22 para 1(4); Water Resources Act 1991 Sch 22 para 1(3). The arbitration is to be by a single arbitrator appointed by agreement by the parties to the dispute or, in default of agreement, by the President of the Institution of Civil Engineers: see the Water Industry Act 1991 Sch 13 para 1(4); Water Resources Act 1991 Sch 22 para 1(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.
- 11 Ie including the provisions of any order under the Water Resources Act 1991 s 108 (see PARA 575): see Sch 22 para 1(6) (applied by Sch 22 para 2(3)).
- 12 As to the meaning of 'flood defence provisions' see PARA 20 note 2.
- 13 Water Industry Act 1991 Sch 13 para 2; Water Resources Act 1991 Sch 22 para 2(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). However, nothing in the Water Resources Act 1991 Sch 22 para 2 is to be taken to exclude the application of s 109 (structures in, over or under a main river: see PARA 603) to any work executed by persons carrying on a protected undertaking (Sch 22 para 2(2)); and Sch 22 para 2 is without prejudice to any power under the Water Resources Act 1991 to transfer the functions of any authority (Sch 22 para 2(4)).
- 14 Ie the procedure provided by the Telecommunications Act 1984 Sch 2 para 23: see **TELECOMMUNICATIONS** vol 97 (2010) PARA 186.
- 15 Ie including, in the case of a statutory water company, the powers conferred by the Statutory Water Companies Act 1991 s 1 (see PARA 134), and in the case of the Agency the powers conferred by the Environment Act 1995 s 37 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 73). As to the meaning of 'statutory water company' see PARA 134 note 1.
- 16 Water Industry Act 1991 Sch 13 para 4 (amended by the Communications Act 2003 Sch 17 para 111); Water Resources Act 1991 Sch 22 para 5 (amended by the Environment Act 1995 s 120(1), Sch 22 paras 128, 189; and by the Communications Act 2003 Sch 17 para 114).
- 17 Ie without prejudice to the provisions of the Water Resources Act 1991 Sch 22 paras 1-3: see the text to notes 1-13; and PARA 491.
- 18 A consent for these purposes may be given subject to reasonable conditions but must not be unreasonably withheld: Water Resources Act 1991 Sch 22 para 4(2).
- 19 Water Resources Act 1991 Sch 22 para 4(1)(a).
- 20 Water Resources Act 1991 Sch 22 para 4(1)(b).
- 21 Water Resources Act 1991 Sch 22 para 4(3). This provision is expressed to be subject to Sch 22 para 5: see the text to notes 14-16. The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see note 10.

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#### **491. Special protection for certain undertakings in respect of street works.**

The powers under the street works provisions<sup>1</sup> to break up or open a street are not exercisable where the street is not a highway maintainable at public expense<sup>2</sup> and it is under the control or management of, or is maintainable by, railway undertakers<sup>3</sup> or a railway company<sup>4</sup> or by a navigation authority<sup>5</sup>, or it forms part of a level crossing belonging to such undertakers or such a company, or to such an authority or to any other person<sup>6</sup>, except with the consent<sup>7</sup> of the undertakers or company, or of the navigation authority or, as the case may be, of the person to whom the level crossing belongs<sup>8</sup>. This restriction does not, however, apply to any exercise of those powers for the carrying out of emergency works<sup>9</sup>.

Any dispute as to whether a consent for these purposes should be given or withheld, or as to whether the conditions to which any such consent is made subject are reasonable, must be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, by the President of the Institution of Civil Engineers<sup>10</sup>.

If any relevant undertaker<sup>11</sup> or the Environment Agency<sup>12</sup> contravenes<sup>13</sup> these requirements for consent without reasonable excuse, it is guilty of an offence<sup>14</sup>.

Certain statutory provisions relating to the protection of tramways<sup>15</sup> apply in relation to any exercise of a power conferred by the street works provisions as they apply in relation to the powers mentioned in them and as if references therein to a tramway included references to a trolley vehicle system<sup>16</sup>.

1 'Street works provisions' means: (1) so much of the Water Industry Act 1991 s 158 (see PARA 462), s 161 (pollution control works: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) and s 162 (metering works: see PARA 433) as relates to powers exercisable in relation to streets (Sch 13 para 3(7)); or (2) the Water Resources Act 1991 s 159 (see PARA 462) and s 162(2) (pollution control works: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 329) (Sch 22 para 3(7)). As to the meaning of 'street' see PARA 308 note 19.

2 Ie within the meaning of the Highways Act 1980: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 248.

3 As to the meaning of 'railway undertakers' see PARA 466 note 8.

4 As to the meaning of 'railway company' see PARA 490 note 6.

5 Water Industry Act 1991 Sch 13 para 3(1)(a); Water Resources Act 1991 Sch 22 para 3(1)(a). As to the meaning of 'navigation authority' see PARA 189 note 1.

6 Water Industry Act 1991 Sch 13 para 3(1)(b); Water Resources Act 1991 Sch 22 para 3(1)(b). As to the meaning of 'person' see PARA 13 note 29.

7 A consent given for these purposes may be made subject to such reasonable conditions as may be specified by the person giving it but must not be unreasonably withheld: Water Industry Act 1991 Sch 13 para 3(3); Water Resources Act 1991 Sch 22 para 3(3).

8 Water Industry Act 1991 Sch 13 para 3(1); Water Resources Act 1991 Sch 22 para 3(1).

9 Water Industry Act 1991 Sch 13 para 3(2); Water Resources Act 1991 Sch 22 para 3(2). 'Emergency works' has the same meaning as in the New Roads and Street Works Act 1991 (see **HIGHWAYS, STREETS AND BRIDGES**

vol 21 (2004 Reissue) PARA 431): Water Industry Act 1991 Sch 13 para 3(2); Water Resources Act 1991 Sch 22 para 3(2).

10 Water Industry Act 1991 Sch 13 para 3(4); Water Resources Act 1991 Sch 22 para 3(4). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

11 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

12 As to the Environment Agency see PARA 17.

13 As to the meaning of 'contravene' see PARA 20 note 5.

14 Water Industry Act 1991 Sch 13 para 3(5); Water Resources Act 1991 Sch 22 para 3(5) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: Water Industry Act 1991 Sch 13 para 3(5); Water Resources Act 1991 Sch 22 para 3(5). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate see PARA 185.

15 In the Tramways Act 1870 s 32(1)-(5) (repealed, except as incorporated in, or otherwise applied by, any Act of Parliament or Provisional Order, by the Transport and Works Act 1992 ss 65(1)(b), 68, Sch 4 Pt I): see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1552.

16 Water Industry Act 1991 Sch 13 para 3(6); Water Resources Act 1991 Sch 22 para 3(6).



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## (6) MINERAL RIGHTS

### 492. The mining codes.

The relations of relevant undertakers and of the Environment Agency with the owners, lessees and occupiers of mines and minerals<sup>1</sup> are governed by special statutory provisions sometimes referred to as the 'mining codes'<sup>2</sup>. These provisions are similar in policy to, and have much in common with, the provisions relating to other undertakings such as railways<sup>3</sup>, but differ considerably in detail<sup>4</sup>.

1 As to the meaning of 'minerals' see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 12 et seq. See also *Earl of Lonsdale v A-G* [1982] 3 All ER 579, [1982] 1 WLR 887.

2 See the Water Industry Act 1991 Sch 14; the Water Resources Act 1991 Sch 23; and PARAS 493-498. In the case of compulsory acquisition of land by virtue of the Water Industry Act 1991 or the Water Resources Act 1991 (see PARAS 453-454), the provisions of the Water Industry Act 1991 Sch 14 or, as the case may be, the Water Resources Act 1991 Sch 23, have effect instead of the Acquisition of Land Act 1981 Sch 2 (see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 137 et seq): see the Water Industry Act 1991 s 188; Water Resources Act 1991 s 182 (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

3 The code in relation to railways is the Railways Clauses Consolidation Act 1845 ss 77-85.

4 See **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 137 et seq. The provisions contained in the Water Industry Act 1991 Sch 14 and the Water Resources Act 1991 Sch 23 correspond to those of the Railways Clauses Consolidation Act 1845 ss 77, 81, 83.

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### **493. Acquisition of mineral rights.**

Where a relevant undertaker<sup>1</sup>, or, as the case may be, the Environment Agency<sup>2</sup>:

1140 (1) acquires any land<sup>3</sup>, whether compulsorily<sup>4</sup> in exercise of any statutory power<sup>5</sup> or otherwise<sup>6</sup>; and

1141 (2) carries out any works in relation to any land for the purposes of, or in connection with, the carrying out of any of its functions<sup>7</sup>,

that undertaker or the Agency does not, by virtue only of its acquisition of the land or the carrying out of the works, become entitled to any mines or minerals<sup>8</sup> lying under the land<sup>9</sup>. Accordingly, any such mines or minerals are deemed to be excepted from any instrument by virtue of which the land vests in the relevant undertaker or, as the case may be, in the Agency, unless express provision to the contrary is contained either in the conveyance (where the land vests in the undertaker or Agency by virtue of a conveyance)<sup>10</sup>, or in the order authorising the compulsory acquisition (where the land is acquired in pursuance of any power of compulsory acquisition)<sup>11</sup>. A relevant undertaker or the Agency is, however, entitled to such parts of any mines or minerals that lie under the land as it may be necessary for it to dig, carry away or use in carrying out any works for the purposes of constructing, making, erecting or laying any part of its undertaking<sup>12</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Environment Agency see PARA 17. As to the power of the Agency to join in or act on behalf of one or more relevant undertakers for the purpose of acquiring land or carrying out works see PARAS 453, 455 note 2.

3 As to the meaning of 'land' see PARA 14 note 21.

4 For the purposes of the Water Industry Act 1991 Sch 14 and the Water Resources Act 1991 Sch 23, land is treated as acquired by a relevant undertaker or, as the case may be, by the Agency in pursuance of powers of compulsory acquisition if: (1) it was so acquired by a water authority or any predecessor of such a water authority (or additionally, in the case of an undertaker, by a predecessor of a statutory water company); and (2) it is now vested in that undertaker or, as the case may be, in the Agency in accordance with a scheme under the Water Act 1989 Sch 2 (see PARA 108) or otherwise (or additionally, in the case of an undertaker, a scheme under the Water Industry Act 1991 Sch 2 (see PARA 141)): Water Industry Act 1991 Sch 14 para 7(4); Water Resources Act 1991 Sch 23 para 7(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). In relation to any land so treated as acquired in pursuance of powers of compulsory acquisition (or additionally, in relation to an undertaker, any land acquired by a statutory water company before 1 September 1989 in pursuance of any such powers), references in the Water Industry Act 1991 Sch 14 and the Water Resources Act 1991 Sch 23 to the order authorising the acquisition include references to any local statutory provision which immediately before 1 September 1989 had effect in relation to that land for the purposes of any provisions corresponding to the provisions of the Water Industry Act 1991 Sch 14 or the Water Resources Act 1991 Sch 23: Water Industry Act 1991 Sch 14 para 7(5); Water Resources Act 1991 Sch 23 para 7(5). As to the meaning of 'water undertaker' see PARA 137 note 4. As to the meaning of 'statutory water company' see PARA 134 note 1. As to the meaning of 'local statutory provision' see PARA 14 note 24.

5 Ie any power conferred by or under the Water Industry Act 1991 or, as the case may be, the Water Resources Act 1991: see PARAS 453-454.

6 Water Industry Act 1991 Sch 14 para 1(1)(a); Water Resources Act 1991 Sch 23 para 1(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 Water Industry Act 1991 Sch 14 para 1(1)(b); Water Resources Act 1991 Sch 23 para 1(1)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'functions' in relation to a relevant undertaker see PARA 133 note 5. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

8 'Mines' means mines of coal, ironstone, slate or other minerals: Water Industry Act 1991 Sch 14 para 7(1); Water Resources Act 1991 Sch 23 para 7(1). As to the meaning of 'minerals' see PARA 492 note 1.

9 Water Industry Act 1991 Sch 14 para 1(2); Water Resources Act 1991 Sch 23 para 1(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

10 Water Industry Act 1991 Sch 14 para 1(2)(a); Water Resources Act 1991 Sch 23 para 1(2)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest in property by any instrument, except a will: see the Law of Property Act 1925 s 205(ii) (definition applied by the Water Industry Act 1991 Sch 14 para 7(1); and by the Water Resources Act 1991 Sch 23 para 7(1)).

11 Water Industry Act 1991 Sch 14 para 1(2)(b); Water Resources Act 1991 Sch 23 para 1(2)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The powers of compulsory acquisition referred to are those conferred by or under the Water Industry Act 1991 or the Water Resources Act 1991: see PARAS 453-454.

12 Water Industry Act 1991 Sch 14 para 1(3); Water Resources Act 1991 Sch 23 para 1(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). See *Consett Waterworks Co v Ritson* (1889) 22 QBD 318 (revsd on other grounds 22 QBD 702, CA); and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 144.

For the purposes of the Water Industry Act 1991 Sch 14 and the Water Resources Act 1991 Sch 23, the undertaking of a relevant undertaker or, as the case may be, of the Agency, is taken to consist of so much of any of the following as is for the time being vested in or held by that undertaker, or by the Agency, for the purposes of, or in connection with, the carrying out of any of its functions, ie: (1) any buildings, reservoirs, wells, boreholes or other structures; and (2) any pipes or other underground works particulars of which fall, or would fall, to be incorporated in any records kept under the Water Industry Act 1991 s 198 (see PARA 179) or s 199 (sewer maps: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1009) or, as the case may be, under the Water Resources Act 1991 s 195 (see PARA 179); Water Industry Act 1991 Sch 14 para 7(2); Water Resources Act 1991 Sch 23 para 7(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'pipe' see PARA 138 note 11.

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#### **494. Requirement of notice to work underlying mines.**

If the owner<sup>1</sup> of any mines or minerals underlying any part of the undertaking<sup>2</sup> of a relevant undertaker or, as the case may be, of the Environment Agency, proposes to work them<sup>3</sup>, he must serve notice<sup>4</sup> of his intention to do so on the undertaker or, as the case may be, on the Agency, at least 30 days before the commencement of working<sup>5</sup>. Upon receipt of the notice, the relevant undertaker or the Agency may cause the mines and minerals to be inspected by a person<sup>6</sup> designated by it for the purpose<sup>7</sup>; and where the relevant undertaker or, as the case may be, the Agency:

- 1142 (1) considers that the working of the underlying mines or minerals is likely to damage any part of its undertaking<sup>8</sup>;
- 1143 (2) is willing to compensate the owner of the mines or minerals for the restriction imposed by virtue of these provisions<sup>9</sup>; and
- 1144 (3) serves notice to that effect on that owner before the end of the period of 30 days before the commencement of working<sup>10</sup>,

the owner must not work the mines or minerals except to such extent as may be determined by the relevant undertaker or, as the case may be, by the Agency, and that undertaker or the Agency must so compensate the owner<sup>11</sup>. Any dispute as to the amount of any compensation so payable must be referred to and determined by the Lands Tribunal<sup>12</sup>.

If, before the end of the 30 day period mentioned above<sup>13</sup>, no notice has been served under head (3) above by the relevant undertaker or, as the case may be, the Agency, the entitlement of the owner of the mines and minerals to work them is an entitlement to work them by proper methods and in the usual manner of working such mines or minerals in the district in question<sup>14</sup>. If any damage to the undertaking of a relevant undertaker or, as the case may be, of the Agency is caused by the working of any mines or minerals underlying any part of that undertaking otherwise than in an authorised manner<sup>15</sup>, the owner of the mines or minerals must forthwith repair the damage at his own expense<sup>16</sup>; and the relevant undertaker or the Agency may, without waiting for the owner to perform his duty, repair the damage and may recover the expenses reasonably incurred by it in doing so from the owner<sup>17</sup>.

1 'Owner', in relation to mines and minerals, includes a lessee or occupier: Water Industry Act 1991 s 188, Sch 14 para 7(1); Water Resources Act 1991 s 182, Sch 23 para 7(1). As to the meaning of 'mines' see PARA 493 note 8. As to the meaning of 'minerals' see PARA 492 note 1.

2 As to the meaning of 'undertaking' see PARA 493 note 12. 'Underlying', in relation to any part of the undertaking of a relevant undertaker or, as the case may be, of the Environment Agency, means lying under, or within the designated distance from, that part of that undertaking: Water Industry Act 1991 Sch 14 para 7(1); Water Resources Act 1991 Sch 23 para 7(1). 'Designated distance', in relation to any part of such undertaking, means 37 metres: Water Industry Act 1991 Sch 14 para 7(1); Water Resources Act 1991 Sch 23 para 7(1). Where, however: (1) any part of such an undertaking was constructed, made, erected or laid in pursuance of an order made under any enactment or is situated on land acquired by the relevant undertaker or, as the case may be, by the Agency in pursuance of any powers of compulsory acquisition; or (2) the order authorising the works or acquisition designates any distance for the purposes of any enactment relating to mines or minerals underlying that part of the undertaking, then for these purposes that distance is the designated distance in relation to that part of the undertaking, instead of the specified 37 metres: Water Industry Act 1991 Sch 14 para 7(6); Water Resources Act 1991 Sch 23 para 7(6) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the Environment Agency see PARA 17. As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'land' see PARA 14 note 21. As to

when land is treated as compulsorily acquired for these purposes see PARA 493 note 4. As to the rights of support from minerals beyond the prescribed distance see *London and North Western Rly Co v Howley Park Coal and Cannel Co* [1911] 2 Ch 97, CA (affd sub nom *Howley Park Coal and Cannel Co v London and North Western Rly Co* [1913] AC 11, HL), and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 146.

3 In the Water Industry Act 1991 Sch 14 and the Water Resources Act 1991 Sch 23 references to the working of any mines or minerals include references to the draining of mines and to the winning or getting of minerals: Water Industry Act 1991 Sch 14 para 7(3); Water Resources Act 1991 Sch 23 para 7(3).

4 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

5 Water Industry Act 1991 Sch 14 para 2(1); Water Resources Act 1991 Sch 23 para 2(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

6 As to the meaning of 'person' see PARA 13 note 29.

7 Water Industry Act 1991 Sch 14 para 2(2); Water Resources Act 1991 Sch 23 para 2(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to rights of entry for these purposes see PARA 497.

8 Water Industry Act 1991 Sch 14 para 2(3)(a); Water Resources Act 1991 Sch 23 para 2(3)(a).

9 Water Industry Act 1991 Sch 14 para 2(3)(b); Water Resources Act 1991 Sch 23 para 2(3)(b).

10 Water Industry Act 1991 Sch 14 para 2(3)(c); Water Resources Act 1991 Sch 23 para 2(3)(c).

11 Water Industry Act 1991 Sch 14 para 2(3); Water Resources Act 1991 Sch 23 para 2(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to compensation relating to severance see PARA 496.

12 Water Industry Act 1991 Sch 14 para 2(4); Water Resources Act 1991 Sch 23 para 2(4). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

13 Ie the 30 day period mentioned in the Water Industry Act 1991 Sch 14 para 2(1); Water Resources Act 1991 Sch 23 para 2(1): see the text to notes 1-5.

14 Water Industry Act 1991 Sch 14 para 2(5); Water Resources Act 1991 Sch 23 para 2(5) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

15 Ie otherwise than as authorised by the Water Industry Act 1991 Sch 14 para 2 or, as the case may be, the Water Resources Act 1991 Sch 23 para 2.

16 Water Industry Act 1991 Sch 14 para 2(6)(a); Water Resources Act 1991 Sch 23 para 2(6)(a).

17 Water Industry Act 1991 Sch 14 para 2(6)(b); Water Resources Act 1991 Sch 23 para 2(6)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to rights of entry for these purposes see PARA 497. As to the recovery of expenses see PARA 131 note 6.

## UPDATE

### 494 Requirement of notice to work underlying mines

TEXT AND NOTE 12--Reference to the Lands Tribunal is now to the Upper Tribunal: Water Industry Act 1991 Sch 14 para 2(4), Sch 23 para 2(4) (amended by SI 2009/1307).

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#### **495. Mining communications.**

If the working of any mines or minerals<sup>1</sup> is prevented by reason of the statutory provisions relating to mineral rights<sup>2</sup>, the owner<sup>3</sup> of the mines or minerals may cut and make such communication works<sup>4</sup> through the mines or minerals, or the strata in which they are situated, as are required for the ventilation, drainage and working of mines or minerals which are not underlying<sup>5</sup> any part of the undertaking<sup>6</sup> of the relevant undertaker<sup>7</sup> in question or, as the case may be, of the Environment Agency<sup>8</sup>. In a case where the part of the undertaking in question was constructed, made, erected or laid in pursuance of an order made under any enactment<sup>9</sup> or is situated on land<sup>10</sup> acquired by the relevant undertaker or, as the case may be, by the Agency in pursuance of any powers of compulsory acquisition<sup>11</sup>, and the order authorising the works or acquisition designates dimensions or sections for the communication works<sup>12</sup>, those works must not exceed those dimensions or fail to conform to those sections<sup>13</sup>; and in any other case they may not be more than 2.44 metres in height or 2.44 metres in width<sup>14</sup>.

Communication works cut or made under these provisions must not be cut or made on the land where the part of the undertaking is situated so as to cause damage to that part of the undertaking<sup>15</sup>. Where works carried out under these provisions by the owner of any mines or minerals cause loss or damage<sup>16</sup> to the owner<sup>17</sup> or occupier of land lying over the mines or minerals, the relevant undertaker or, as the case may be, the Agency must pay full compensation to him for the loss or damage<sup>18</sup> unless he is also the owner of the mines<sup>19</sup>.

1 As to the meaning of references to the working of mines or minerals see PARA 494 note 3. As to the meaning of 'mines' see PARA 493 note 8. As to the meaning of 'minerals' see PARA 492 note 1.

2 Ie by reason of the Water Industry Act 1991 Sch 14 paras 1, 2; or the Water Resources Act 1991 Sch 23 paras 1, 2: see PARAS 493-494.

3 As to the meaning of 'owner', in relation to mines and minerals, see PARA 494 note 1.

4 'Communication works' means airways, headways, gateways or water levels: Water Industry Act 1991 Sch 14 para 3(6); Water Resources Act 1991 Sch 23 para 3(6).

5 As to the meaning of 'underlying' see PARA 494 note 2.

6 As to the meaning of 'undertaking' see PARA 493 note 12.

7 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

8 Water Industry Act 1991 Sch 14 para 3(1); Water Resources Act 1991 Sch 23 para 3(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the Environment Agency see PARA 17.

9 As to the meaning of 'enactment' see PARA 14 note 31.

10 As to the meaning of 'land' see PARA 14 note 21.

11 Water Industry Act 1991 Sch 14 para 3(2)(a)(i); Water Resources Act 1991 Sch 23 para 3(2)(a)(i) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to when land is treated as compulsorily acquired for these purposes see PARA 493 note 4.

12 Water Industry Act 1991 Sch 14 para 3(2)(a)(ii); Water Resources Act 1991 Sch 23 para 3(2)(a)(ii).

13 Water Industry Act 1991 Sch 14 para 3(2)(a); Water Resources Act 1991 Sch 23 para 3(2)(a).

- 14 Water Industry Act 1991 Sch 14 para 3(2)(b); Water Resources Act 1991 Sch 23 para 3(2)(b).
- 15 Water Industry Act 1991 Sch 14 para (3)(3); Water Resources Act 1991 Sch 23 para 3(3).
- 16 As to the meaning of 'damage' see PARA 129 note 7.
- 17 As to the meaning of 'owner' see PARA 22 note 9.
- 18 Water Industry Act 1991 Sch 14 para 3(4); Water Resources Act 1991 Sch 23 para 3(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 19 See the Water Industry Act 1991 Sch 14 para 3(5); Water Resources Act 1991 Sch 23 para 3(5).

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#### **496. Compensation relating to severance.**

Where mines or minerals<sup>1</sup> underlying<sup>2</sup> any part of the undertaking<sup>3</sup> of a relevant undertaker<sup>4</sup> or of the Environment Agency<sup>5</sup> are situated so as, on two or more sides of that land<sup>6</sup>, to extend beyond the land on which that part of the undertaking is situated, the relevant undertaker or, as the case may be, the Agency must from time to time pay to the owner of the mines or minerals<sup>7</sup> any expenses and losses incurred by him in consequence of:

- 1145 (1) the severance by the undertaking of the land lying over the mines<sup>8</sup>;
- 1146 (2) the interruption of continuous working of the mines<sup>9</sup> in consequence of the statutory restrictions<sup>10</sup>;
- 1147 (3) the mines being so worked in accordance with restrictions imposed by virtue of the Water Industry Act 1991 or the Water Resources Act 1991 or any order made thereunder<sup>11</sup>,

and must pay for any minerals not purchased by the relevant undertaker or, as the case may be, by the Agency, which cannot be got or won by reason of the part of the undertaking in question being situated where it is or by reason of the requirement to avoid damage<sup>12</sup> to any part of that undertaking<sup>13</sup>.

Any dispute as to whether any sum should be paid under these provisions, or as to the amount payable, must be referred to the arbitration<sup>14</sup> of a single arbitrator appointed by agreement between the parties or, in default of agreement, by the Secretary of State<sup>15</sup> or, in relation to Wales, by the Welsh Ministers<sup>16</sup>.

1 As to the meaning of 'mines' see PARA 493 note 8. As to the meaning of 'minerals' see PARA 492 note 1.

2 As to the meaning of 'underlying' see PARA 494 note 2.

3 As to the meaning of 'undertaking' see PARA 493 note 12.

4 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

5 As to the Environment Agency see PARA 17.

6 As to the meaning of 'land' see PARA 14 note 21.

7 As to the meaning of 'owner', in relation to mines and minerals, see PARA 494 note 1.

8 Water Industry Act 1991 Sch 14 para 4(1)(a); Water Resources Act 1991 Sch 23 para 4(1)(a).

9 As to the meaning of references to the working of mines or minerals see PARA 494 note 3.

10 Water Industry Act 1991 Sch 14 para 4(1)(b); Water Resources Act 1991 Sch 23 para 4(1)(b). The statutory restrictions referred to are those in the Water Industry Act 1991 Sch 14 para 2(3) or the Water Resources Act 1991 Sch 23 para 2(3): see PARA 494.

11 Water Industry Act 1991 Sch 14 para 4(1)(c); Water Resources Act 1991 Sch 23 para 4(1)(c).

12 This means damage anticipated by the undertaker (or the Agency) in consequence of which it has stopped the works, and not injury anticipated by the owner, lessee or occupier, who cannot recover for such anticipated damage until it arises: *Holliday v Wakefield Corpn* [1891] AC 81, HL. See also **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 169.



13 Water Industry Act 1991 Sch 14 para 4(1); Water Resources Act 1991 Sch 23 para 4(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Any payment under these provisions is in addition to any compensation under the Water Industry Act 1991 Sch 14 para 2 or the Water Resources Act 1991 Sch 23 para 2 (see PARA 494): Water Industry Act 1991 Sch 14 para 4(1); Water Resources Act 1991 Sch 23 para 4(1). As to compensation for severance generally see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 810 et seq.

14 The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

15 As to the Secretary of State see PARA 15 note 1.

16 Water Industry Act 1991 Sch 14 para 4(2); Water Resources Act 1991 Sch 23 para 4(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The functions of the Secretary of State under the Water Industry Act 1991 Sch 14 and the Water Resources Act 1991 Sch 23, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

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#### **497. Powers of entry.**

Any person<sup>1</sup> designated in writing<sup>2</sup> for the purpose by a relevant undertaker<sup>3</sup> or, as the case may be, by the Environment Agency<sup>4</sup> may, for any of the specified purposes: (1) enter on any land<sup>5</sup> in which the mines or minerals<sup>6</sup> in question are, or are thought to be, being worked<sup>7</sup>, and which is in or near to the land where any part of the undertaking<sup>8</sup> of that undertaker or, as the case may be, of the Agency is situated<sup>9</sup>; (2) enter the mines and any works connected with them<sup>10</sup>. The purposes for which such entry may be made are:

- 1148 (a) carrying out any inspection<sup>11</sup> where the owner of underlying mines or minerals<sup>12</sup> has served notice of his intention to work them<sup>13</sup>;
- 1149 (b) ascertaining whether any mines or minerals have been worked so as to damage the undertaking of the relevant undertaker in question or, as the case may be, of the Agency<sup>14</sup>; and
- 1150 (c) carrying out any works and taking any other steps which the relevant undertaker in question or, as the case may be, the Agency is authorised to carry out or take<sup>15</sup> to repair damage caused by unauthorised working<sup>16</sup>.

A person so authorised to enter any premises may make use of any equipment belonging to the owner of the mines or minerals in question<sup>17</sup>; and may use all necessary means for discovering the distance from any part of the undertaking of the relevant undertaker or, as the case may be, of the Agency to the parts of the mines or the minerals which are being, or are about to be, worked<sup>18</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'writing' see PARA 22 note 1.

3 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

4 As to the Environment Agency see PARA 17.

5 As to the meaning of 'land' see PARA 14 note 21.

6 As to the meaning of 'mines' see PARA 493 note 8. As to the meaning of 'minerals' see PARA 492 note 1.

7 As to the meaning of references to the working of mines or minerals see PARA 494 note 3.

8 As to the meaning of 'undertaking' see PARA 493 note 12.

9 Water Industry Act 1991 Sch 14 para 5(1)(a); Water Resources Act 1991 Sch 23 para 5(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

10 Water Industry Act 1991 Sch 14 para 5(1)(b); Water Resources Act 1991 Sch 23 para 5(1)(b). The Water Industry Act 1991 Sch 6 Pt II (paras 6-13) or, as the case may be, the Water Resources Act 1991 Sch 20 (supplemental provisions relating to powers of entry: see PARAS 482-485) applies to the rights and powers conferred by the Water Industry Act 1991 Sch 14 para 5 or the Water Resources Act 1991 Sch 23 para 5: see the Water Industry Act 1991 Sch 14 para 5(4); Water Resources Act 1991 Sch 23 para 5(4).

11 I.e an inspection under the Water Industry Act 1991 Sch 14 para 2(2) or the Water Resources Act 1991 Sch 23 para 2(2): see PARA 494.

12 As to the meaning of 'owner', in relation to mines and minerals, see PARA 494 note 1.

13 Water Industry Act 1991 Sch 14 para 5(2)(a); Water Resources Act 1991 Sch 23 para 5(2)(a).

14 Water Industry Act 1991 Sch 14 para 5(2)(b); Water Resources Act 1991 Sch 23 para 5(2)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

15 le under the Water Industry Act 1991 Sch 14 para 2(6) or the Water Resources Act 1991 Sch 23 para 2(6): see PARA 494.

16 Water Industry Act 1991 Sch 14 para 5(2)(c); Water Resources Act 1991 Sch 23 para 5(2)(c) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

17 Water Industry Act 1991 Sch 14 para 5(3)(a); Water Resources Act 1991 Sch 23 para 5(3)(a).

18 Water Industry Act 1991 Sch 14 para 5(3)(b); Water Resources Act 1991 Sch 23 para 5(3)(b).

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**498. No exemption for injury to mines and minerals.**

Nothing in any provision of the Water Industry Act 1991 or the Water Resources Act 1991, or of any order made under those Acts, is to be construed as exempting a relevant undertaker<sup>1</sup> or, as the case may be, the Environment Agency<sup>2</sup> from any liability to which it would otherwise have been subject in respect of any damage to any mines or minerals<sup>3</sup> underlying<sup>4</sup> any part of its undertaking<sup>5</sup>, or in respect of any loss sustained in relation to any such mines or minerals by a person<sup>6</sup> having an interest in them<sup>7</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'mines' see PARA 493 note 8. As to the meaning of 'minerals' see PARA 492 note 1.

4 As to the meaning of 'underlying' see PARA 494 note 2.

5 As to the meaning of 'undertaking' see PARA 493 note 12.

6 As to the meaning of 'person' see PARA 13 note 29.

7 Water Industry Act 1991 Sch 14 para 6; Water Resources Act 1991 Sch 23 para 6 (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

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## 8. COAST PROTECTION

### (1) IN GENERAL

#### 499. Duty of the Crown.

It is the royal duty of the Crown to preserve the realm from the inroads of the sea by appropriate defences; and every subject has a corresponding right, although the duty is a duty of imperfect obligation, since there is no process of law by which it may be enforced<sup>1</sup>. Statutory powers conferred on coast protection authorities<sup>2</sup> and the default powers of the Secretary of State<sup>3</sup>, and in relation to Wales, the Welsh Ministers<sup>4</sup> operate to ensure that sufficient measures are taken against encroachment by the sea<sup>5</sup>. Moreover, local legislation may have imposed express duties for the construction or maintenance of defences against incoming water<sup>6</sup>; and ministerial guidance has been issued requiring maritime local authorities and land drainage and flood defence bodies to prepare shoreline management plans<sup>7</sup>.

1 *A-G v Tomline* (1880) 14 ChD 58, CA. See also *Isle of Ely Case* (1609) 10 Co Rep 141a; *Hudson v Tabor* (1877) 2 QBD 290, CA; *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, PC; *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548, [1936] 3 All ER 908, CA; *Hunwick v Essex Rivers Catchment Board* [1952] 1 All ER 765. It seems that the Crown Proceedings Act 1947 s 1 has not altered the position, as a petition of right would not, it is thought, have lain before that Act. Cf *Lyme Regis Corp v Henley* (1834) 2 Cl & Fin 331, HL, cited in PARA 500 note 6.

2 See the Coast Protection Act 1949 s 4; and PARA 512. As to coast protection authorities see PARA 508 et seq. As to the powers of a drainage authority to construct sea defences see PARA 589.

3 As to the Secretary of State see PARA 15 note 1.

4 As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

5 See the Coast Protection Act 1949 s 29(1), (2); and PARA 507.

6 See eg *Sephton v Lancashire River Board* [1962] 1 All ER 183, [1962] 1 WLR 623 (duty to maintain embankment under local Act). As to the powers and duties of drainage authorities (ie the Environment Agency or internal drainage boards) to maintain drainage works see PARA 589. Such a statutory duty to maintain a sea wall does not carry with it a duty to maintain an anciently dedicated highway along the top of the wall: see *Hunwick v Essex Rivers Catchment Board* [1952] 1 All ER 765. Nothing in the Coast Protection Act 1949 or the royal prerogative expressly or impliedly confers on a coast protection authority the right to obstruct or stop up a highway: *LE Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604. A drainage authority will be held liable as occupier of sea defence works to a person injured by sea defence works which have not been properly maintained: *Collier v Anglian Water Authority* (1983) Times, 26 March, CA. Cf *Hunwick v Essex Rivers Catchment Board* above (duty to keep sea defence in repair extended only to restraint of sea water, not to usage as a highway). As to occupiers' liability in connection with a coastal defence structure see further *Staples v West Dorset District Council* (1995) 93 LGR 536, CA.

7 See PARA 647.

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### **500. Duty and liability of persons owning, occupying or using land.**

Since a person derives his title to his land from the Crown, he can only take it subject to the Crown's duties, and he may be restrained from using the land in contravention of the public right not to be deprived of a natural barrier against the sea<sup>1</sup>. The courts have jurisdiction to restrain a person from removing the natural barrier, and proceedings for this purpose may be brought at the instance of any other person whose land suffers special damage or would be exposed to the inroads of the sea<sup>2</sup>. Moreover, to make a gap in or a hole under an ancient sea wall with the object of letting sea water on to land behind the wall is an illegal act, since it prevents the wall operating as the Crown intended<sup>3</sup>.

The person who has thus succeeded to the Crown's duty is not bound to do actual work to protect his land, or to prevent his neighbour's land from being inundated, and at common law no duty of maintenance of sea barriers for the benefit of others is put on a frontager save by prescription<sup>4</sup>. Obligation to repair, or to contribute to the cost of repairing, sea walls can however arise by statute<sup>5</sup>, by charter<sup>6</sup>, by prescription<sup>7</sup> or by contract<sup>8</sup>. If any person proposes to carry out coast protection work<sup>9</sup>, other than work of maintenance or repair, the consent of the coast protection authority<sup>10</sup> is required before the work is done<sup>11</sup>.

If a person interferes with a sea wall he may be liable at common law in negligence for damage done by water overflowing the barrier if he does not take sufficient precautions<sup>12</sup>; and as regards the height of a barrier giving protection against tidal water, he should keep the barrier up to the height at which it has been maintained as a result of long experience, even though in recent years a lower height has in fact been sufficient to bar the tides<sup>13</sup>.

1 *A-G v Tomline* (1880) 14 ChD 58 CA; *Canvey Island Comrs v Preedy* [1922] 1 Ch 179; *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548, [1936] 3 All ER 908, CA. As regards a claim lying at the instance of a party who has suffered special damage see *Lyme Regis Corp v Henley* (1834) 2 Cl & Fin 331 at 354, HL, per Park J. As to the duty of the Crown to provide sea defences see PARA 499.

2 See the authorities cited in note 1.

3 See *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548, [1936] 3 All ER 908, CA.

4 *Hudson v Tabor* (1877) 2 QBD 290, CA. See also the cases cited in note 7.

5 See the Coast Protection Act 1949 s 15(1), (2); and PARA 546. For an example of liability arising out of statutory obligations of maintenance see eg *Bramlett v Tees Conservancy Comrs* (1885) 49 JP 214; and cf PARA 499 note 6. For an instance of the incidence of a rate for defraying the expenses of works see *B Aerodrome Ltd v Dell* [1917] 2 KB 380, DC. As to coast protection charges see PARA 540 et seq.

6 See *Lyme Regis Corp v Henley* (1834) 2 Cl & Fin 331, HL. This ground of liability might, perhaps, be regarded as an illustration of the maxim *qui sentit commodum sentire debet et onus* (he who obtains the benefit should assume the burden), for it was put on the ground that where the Crown, for the public benefit, has made a certain grant imposing public duties and that grant has been accepted, the public may enforce the performance of those duties by indictment, and individuals peculiarly injured may do so by civil proceedings: see *Lyme Regis Corp v Henley* above at 355.

7 See *Hudson v Tabor* (1877) 2 QBD 290, CA; *Fobbing Sewers Comrs v R* (1886) 11 App Cas 449, HL. This liability, for which a legal origin will be presumed where the liability has long been asserted and submitted to (*London and North Western Ry Co v Fobbing Levels Sewers Comrs* (1896) 66 LJQB 127, DC), has been held to extend to a mortgagor in possession by a tenant (*R v Baker* (1867) LR 2 QB 621), or a lessee (*Griffin's Case* (1564) Dal 71), and attaches to all parts of the land, thus passing when the unit of property is sold to several

different purchasers (*London and North Western Ry Co v Fobbing Levels Sewers Comrs* above). The liability can extend to repairs of damage due to extraordinary tempest (*R v Leigh* (1839) 10 Ad & El 398), but when a sea wall has been kept in good repair against the flow of the sea, all persons interested, not merely the immediate frontager, must in general be taxed with the cost of its reparation when breached by a sudden and unusual increase of water (*Keighley's Case* (1609) 10 Co Rep 139a; *R v Somerset Sewers Comrs* (1799) 8 Term Rep 312; *Fobbing Sewers Comrs v R* above at 462 per Lord Watson). Whether a new wall should be erected or an old one repaired is a question of what is necessary to avoid the danger: *Isle of Ely Case* (1609) 10 Co Rep 141a. The common law obligation is subject to the Coast Protection Act 1949 (see eg s 15(1), (2); and PARA 546), which excludes the obligation to maintain works constructed under a works scheme or for the maintenance or repair of which provision is made by a scheme under s 13 (see PARA 529).

8 See eg *Morland v Cook* (1868) LR 6 Eq 252; and cf *Sephton v Lancashire River Board* [1962] 1 All ER 183, [1962] 1 WLR 623.

9 As to the meaning of 'coast protection work' see PARA 505 note 9.

10 As to the meaning of 'coast protection authority' see PARA 508.

11 See the Coast Protection Act 1949 s 16; and PARA 548.

12 As to liability for overflow see PARA 662.

13 *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 ChD 503, CA, where a dock company cut a way through a sea wall to its docks but omitted to keep the banks of the cut up to the level of the rest of the walls, namely 4 feet 2 inches above Trinity high-water mark, and an extraordinary tide rising 4 feet 5 inches above that mark overflowed to the plaintiff's premises. An extraordinary natural event does not cease to be an act of God merely because it has happened before; it is enough that it is extraordinary and such as could not reasonably be anticipated: *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* above at 515-516 per Fry J.

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### **501. Common law rights of persons owning, occupying or using land.**

At common law a person may<sup>1</sup> erect groynes or such other defences as are necessary for the protection of his land on the sea coast, even if such erections have the effect of rendering it necessary for his neighbour to do the same<sup>2</sup>; but in the case of non-tidal or navigable rivers he must not do any act in the trough or bed of the river which might injure another riparian proprietor, or interfere with navigation<sup>3</sup>. These principles, known as the 'common enemy rule'<sup>4</sup>, have recently been reaffirmed by the Court of Appeal<sup>5</sup>. The common enemy rule has been held to be inoffensive to the human rights legislation<sup>6</sup> because it strikes a proper balance between the competing interests of landowners<sup>7</sup>.

1 Coast protection may not, however, be carried out without the consent of the coast protection authority: see the Coast Protection Act 1949 s 16(1); and PARA 548.

2 *R v Pagham, Sussex, Sewers Comrs* (1828) 2 Man & Ry KB 468.

3 *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, HL; *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL; *A-G v Earl of Lonsdale* (1868) LR 7 Eq 377; and see PARAS 102, 705. It is not necessary for the complainant to prove that he has suffered damage or is likely to do so, but mere apprehension of damage is not sufficient ground for a claim if the act complained of is on the bank and not in the bed of the river: *Bickett v Morris* above. As to the right of a riparian owner to build up banks to prevent flooding see PARA 662.

4 See *R v Pagham, Sussex, Sewers Comrs* (1828) 2 Man & Ry KB 468 per Lord Tenterden CJ.

5 See *Arscott v Coal Authority* [2004] EWCA Civ 892, 148 Sol Jo LB 880, [2004] All ER (D) 194 (Jul).

6 Ie the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8 (right to respect for private and family life), Pt II art 1 (protection of property). As to the principles of human rights see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

7 *Arscott v Coal Authority* [2004] EWCA Civ 892 at [46], 148 Sol Jo LB 880, [2004] All ER (D) 194 (Jul) per Laws LJ.



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## 502. The Coast Protection Act 1949.

The statute law relating to the protection of the coast of Great Britain<sup>1</sup> against erosion and encroachment by the sea is contained in the Coast Protection Act 1949<sup>2</sup>. The provisions of that Act are binding on the Crown and apply in relation to any Crown land<sup>3</sup> as they apply in relation to any other land<sup>4</sup>.

Nothing in the Coast Protection Act 1949 or in any order made under it:

- 1151 (1) affects the powers conferred on the Admiralty under the Dockyard Ports Regulation Act 1865<sup>5</sup>;
  - 1152 (2) affects any right conferred by or in accordance with the electronic communications code on the operator of an electronic communications code network<sup>6</sup> or any duty of any such operator under that code<sup>7</sup>;
  - 1153 (3) authorises or requires any person<sup>8</sup>:
- 60
- 11. (a) to carry out any work of alteration, improvement, repair, maintenance, demolition or removal on any works constructed or maintainable by the Environment Agency<sup>9</sup> or an internal drainage board<sup>10</sup>; or
  - 12. (b) to carry out any work on land on which the sowing or planting of vegetation is carried out or vegetation is maintained by such a body<sup>11</sup>,
- 61
- 1154 unless (in either case) that body consents or the work is to be done by, or under a scheme prepared by, a coast protection board<sup>12</sup> on which the body concerned is represented and is to be carried out in the area of that coast protection board<sup>13</sup>;
  - 1155 (4) authorises or requires any person to carry out any work or do anything in contravention of the legislation<sup>14</sup> relating to ancient monuments<sup>15</sup>.

Nothing in the Coast Protection Act 1949 expressly or impliedly authorises a coast protection authority<sup>16</sup> to obstruct or stop up a highway<sup>17</sup>.

There is a close relationship between the law relating to coast protection and that relating to flood defence, the latter being covered elsewhere in this title<sup>18</sup>.

1 As to the meaning of 'Great Britain' see PARA 22 note 5.

2 The law relating to coast protection is contained in the Coast Protection Act 1949 Pt I (ss 1-33), and in the supplementary provisions of Pt IV (ss 41-50): see the text to notes 3-15; and PARA 504 et seq. Seashore works detrimental to navigation are regulated by Pt II (ss 34-36A): see PARA 533 et seq. Part III (ss 37-40) (repealed) made certain arrangements for the management of Crown foreshore. Parts I, II do not extend to Northern Ireland: s 50(2).

3 'Crown land' means land an interest in which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or land an interest in which belongs to a government department or is held in trust for Her Majesty for the purposes of a government department: Coast Protection Act 1949 s 32(5). 'Land' includes land covered by water: s 49(1). As to the Crown see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 353; **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 1 et seq. As to the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq. As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq.

- 4 Coast Protection Act 1949 s 32(1). For exceptions see PARAS 59 note 12, 519 the text to notes 11-12, 541 the text to note 17.
- 5 Coast Protection Act 1949 s 47(a). As to the Dockyard Ports Regulation Act 1865 see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARAS 614, 689, 693, 699.
- 6 As to the electronic communications code and as to electronic communications code network operators see **TELECOMMUNICATIONS** vol 97 (2010) PARAS 151, 174.
- 7 Coast Protection Act 1949 s 47(b) (substituted by the Telecommunications Act 1984 s 109(1), Sch 4 para 27; amended by the Communications Act 2003 s 406(1), Sch 17 para 19).
- 8 As to the meaning of 'person' see PARA 13 note 29.
- 9 As to the Environment Agency see PARA 17.
- 10 Coast Protection Act 1949 s 47(c)(i) (s 47(c) substituted by the Water Act 1989 s 190(1), Sch 25 para 11(7); and amended by SI 1996/593). As to internal drainage boards see PARA 569 et seq.
- 11 Coast Protection Act 1949 s 47(c)(ii) (as substituted and amended: see note 10).
- 12 As to coast protection boards see PARA 508 et seq.
- 13 Coast Protection Act 1949 s 47(c) (as substituted and amended: see note 10).
- 14 le the Ancient Monuments and Archaeological Areas Act 1979: see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1002 et seq.
- 15 Coast Protection Act 1949 s 47(d) (substituted by the Ancient Monuments and Archaeological Areas Act 1979 s 64(2), Sch 4 para 2).
- 16 As to coast protection authorities see PARA 508.
- 17 *LE Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604. Further, there was nothing that could be done under the royal prerogative relating to sea defences which could not be done under the Coast Protection Act 1949: *LE Walwin & Partners Ltd v West Sussex County Council* above. As to the obstruction of highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 322 et seq; and as to the stopping up or diversion of highways see PARA 781 et seq.
- 18 As to the law relating to flood defence see PARA 556 et seq. For a discussion of the relationship between these areas of law see Howarth *Flood Defence Law* (2002) p 204 et seq.

## UPDATE

### 502 The Coast Protection Act 1949

TEXT AND NOTES 5, 7, 15--Coast Protection Act 1949 s 47(a), (b), (d) repealed: Marine and Coastal Access Act 2009 Sch 22 Pt 2 (not yet in force).

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### **503. Conservation of natural habitats.**

The Secretary of State<sup>1</sup> and the Welsh Ministers<sup>2</sup> must exercise their functions<sup>3</sup> relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive<sup>4</sup> and the Wild Birds Directive<sup>5</sup>; and they and every other competent authority<sup>6</sup> in the exercise of any of their functions, must have regard to the requirements of these Directives so far as they may be affected by the exercise of those functions<sup>7</sup>. In relation to marine areas<sup>8</sup> any competent authority having functions relevant to marine conservation must exercise those functions so as to secure compliance with the requirements of the Directives<sup>9</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716 (with certain exceptions not relevant to this title), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the meaning of 'functions' see PARA 679 note 7.

4 Ie EC Council Directive 92/43 (OJ L206, 22.7.92, p 7) of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

5 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(2); and PARA 679. The Wild Birds Directive is EC Council Directive 79/409 (OJ L103, 25.4.1979, p 1) on the conservation of wild birds.

6 A coast protection authority is a competent authority. As to the meaning of 'competent authority' see PARA 679 note 15.

7 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(4); and PARA 679.

8 As to the meaning of 'marine area' see PARA 679 note 11.

9 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(3); and PARA 679.

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#### **504. Repeal or amendment of local Acts.**

If it appears to the Secretary of State<sup>1</sup>, or in relation to Wales, the Welsh Ministers<sup>2</sup>, that any provision of a local Act<sup>3</sup> in force on 24 November 1949<sup>4</sup> is inconsistent with any of the provisions of Part I of the Coast Protection Act 1949<sup>5</sup>, or is no longer required, or requires to be amended<sup>6</sup>, the Secretary of State or, as appropriate, the Welsh Ministers may by order<sup>7</sup> repeal or amend the local Act provision as they may consider appropriate; and the order may contain such incidental, consequential or supplemental provisions as appear to the Secretary of State or to the Welsh Ministers expedient for its purposes<sup>8</sup>.

1 The Coast Protection Act 1949 refers to 'the minister' defined as the Minister of Health: see s 49(1). These functions are now vested in the Secretary of State for Environment, Food and Rural Affairs: see the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No 1) Order 1951, SI 1951/142; Minister of Local Government and Planning (Change of Style and Title) Order 1951, SI 1951/1900; Secretary of State for Wales and Minister of Land and Natural Resources Order 1965, SI 1965/319; Secretary of State for the Environment Order 1970, SI 1970/1681; Transfer of Functions (Secretary of State and Minister of Agriculture, Fisheries and Food) Order 1985, SI 1985/442; Secretaries of State for Transport, Local Government and the Regions and for Environment, Food and Rural Affairs Order 2001, SI 2001/2568. As to the Secretary of State generally see PARA 15 note 1.

2 The functions of the Secretary of State under the Coast Protection Act 1949 s 31, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 'Local Act' includes a provisional order confirmed by Parliament and any enactment in a public general Act, being an enactment which amends a local Act: Coast Protection Act 1949 s 49(1). As to the meaning of 'enactment' see PARA 14 note 31.

4 Ie the date of commencement of the Coast Protection Act 1949.

5 Ie the Coast Protection Act 1949 Pt I (ss 1-33).

6 Ie having regard to the powers and duties conferred and imposed by the Coast Protection Act 1949 Pt I.

7 The power to make such orders is exercisable by statutory instrument: Coast Protection Act 1949 s 31(4). Such an order is to be made in accordance with Sch 1 (see PARA 505) (see s 31(2)); and such orders, if made in relation to England, are now subject to special parliamentary procedure in cases of objection (see s 31(3)). At the date at which this title states the law, no such order had been made. As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 See the Coast Protection Act 1949 s 31(1).

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## 505. Regulations and orders.

Any power conferred<sup>1</sup> on the Secretary of State<sup>2</sup>, or in relation to Wales, the Welsh Ministers<sup>3</sup> to make regulations is exercisable by statutory instrument<sup>4</sup>.

Any power conferred on the Secretary of State or the Welsh Ministers, or on ministers or on a coast protection authority<sup>5</sup> to make an order or give any directions includes a power exercisable in like manner, and subject to the like conditions, to revoke or vary the order or directions<sup>6</sup>.

Orders providing for the constitution of coast protection boards<sup>7</sup> and orders repealing or amending local Acts<sup>8</sup> must be made in accordance with the statutory procedure<sup>9</sup>. Certain of those orders<sup>10</sup> are subject to special parliamentary procedure<sup>11</sup>.

Orders not confirmed by Parliament must be publicised<sup>12</sup> and provision is made for questioning their validity<sup>13</sup>.

1    Ie by the Coast Protection Act 1949.

2    As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

3    Most of the functions of the Secretary of State under the Coast Protection Act 1949 (including those under Sch 1 (see notes 9-13) in so far as they were conferred on 'the minister' (see PARA 504 note 1) but not on any other Minister of the Crown) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. Where functions are so transferred this is noted in the paragraphs concerned. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4    Coast Protection Act 1949 s 44(1). Every such instrument made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament: s 44(1). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5    As to the meaning of 'coast protection authority' see PARA 508.

6    Coast Protection Act 1949 s 44(2).

7    Ie an order under the Coast Protection Act 1949 s 2 (see PARA 510): see s 2(7).

8    Ie an order under the Coast Protection Act 1949 s 31 (see PARA 504): see s 31(2).

9    The statutory procedure is that set out in the Coast Protection Act 1949 Sch 1. Before making any such order, the Secretary of State, the Welsh Ministers and, where appropriate, the ministers concerned (ie where an order is required to be made jointly: see s 2(7) (see PARA 510), s 31(2) (see PARA 504) and Sch 1 para 3), must prepare a draft, and publish notice in the London Gazette and in such other manner as they think best adapted for informing persons affected of their intention to make the order, of the place where copies of the draft may be inspected and of the time (which must be not less than 28 days) within which and the manner in which objections to the draft may be made: Sch 1 para 1. Notice of these matters must also be served on (1) the council of every county, county borough, or county district of the area affected by the order; (2) the Environment Agency and on any sea defence commissioners, coast protection board, internal drainage board, harbour authority, local fisheries committee, conservancy authority or navigation authority known to be exercising jurisdiction in that area; (3) any local authority known to be responsible for the maintenance of any highway in that area; and (4) if that area contains any railway, canal or inland navigation formerly vested in the British Railways Board or vested in the British Waterways Board, on the appropriate body: see Sch 1 para 1(a)-(d) (amended by the Local Government Act 1972 s 272(1), Sch 30; the Water Act 1989 s 190(1), Sch 25 para

11(8); the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(7); SI 1996/593; and by virtue of the Transport Act 1962 ss 31(1), 32(1), Sch 2 Pt I). As to the responsibility of local authorities for the maintenance of highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 56-62, 64-69. As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to the British Waterways Board see PARA 725 et seq.

'The ministers concerned' has the same meaning as in the Coast Protection Act 1949 s 2(8) (see PARA 510 note 7): Sch 1 para 4. 'The area affected by the order' means: (a) if the order provides for the constitution of a coast protection board, the area for which it will be the coast protection authority; (b) if the order varies the constitution of such a board but does not alter the area for which it is the coast protection authority, that area; (c) if the order alters the board's area, that area and any other area proposed by the order to be included in the board's area; and (d) if the order repeals or amends any provision of a local Act, any area in relation to which any power or duty conferred or imposed by that provision is exercisable: Sch 1 para 4(a)-(d). Before making the order the Secretary of State or the Welsh Ministers, and, where appropriate, the ministers concerned must consider objections duly made to the draft, and may cause a local inquiry to be held: Sch 1 para 2. As to local inquiries see PARA 506.

As to the meaning of 'person' see PARA 13 note 29. As to the service of documents see PARA 22. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the Environment Agency see PARA 17. As to coast protection boards see PARA 508. As to the meaning of 'local Act' see PARA 504 note 3. 'Sea defence commissioners' means a body established by or under a local Act wholly or mainly for the purpose of carrying out coast protection work: s 49(1). 'Local fisheries committee' means a committee established under the Sea Fisheries Regulation Act 1966 ss 1, 2 (see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 964): Coast Protection Act 1949 s 49(1); Interpretation Act 1978 s 17(2)(a).

'Conservancy authority' includes all persons entrusted with the function of conserving, maintaining or improving the navigation of a tidal water (a tidal water being any part of the sea and any part of a river within the ebb and flow of the tide at ordinary spring tides, and not being a harbour): Merchant Shipping Act 1995 ss 255(1), 313(1); definition applied by the Coast Protection Act 1949 s 49(1). 'Harbour authority' means, in relation to a harbour, the person who is the statutory harbour authority for the harbour, or if there is no statutory harbour authority for the harbour, the person (if any) who is the proprietor of the harbour or who is entrusted with the function of managing, maintaining or improving the harbour; 'harbour' includes estuaries, navigable rivers, piers, jetties and other works in or at which ships can obtain shelter or ship and unship goods or passengers; and 'statutory harbour authority' means a harbour authority within the meaning of the Harbours Act 1964 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 619): Merchant Shipping Act 1995 s 313(1); definition applied by the Coast Protection Act 1949 s 49(1). 'Navigation authority' means any person or body of persons having powers under any enactment or statutory order to work or maintain a canal or other inland navigation, including a navigation in tidal water: s 49(1). As to internal drainage boards see PARA 569 et seq. As to the meaning of 'enactment' see PARA 14 note 31.

'Coast protection work' means any work of construction, alteration, improvement, repair, maintenance, demolition or removal for the purpose of the protection of any land, and includes the sowing or planting of vegetation for that purpose: s 49(1). As to the meaning of 'land' see PARA 502 note 3. 'Protection' means protection against erosion or encroachment by the sea: s 49(1). 'Sea' includes the waters of any channel, creek, bay or estuary and of any river so far up that river as the tide flows; and 'seashore' means the bed and shore of the sea, and of every channel, creek, bay or estuary, and of every river as far up that river as the tide flows, and any cliff, bank, barrier, dune, beach, flat or other land adjacent to the shore; except that (i) for the purposes of Pt II (ss 34-36A) (see PARA 533 et seq) the expression 'sea' includes any part of the sea within the seaward limits of the territorial sea of the United Kingdom, and the expression 'seashore' must be construed accordingly; (ii) for the purposes of Pt I (ss 1-33) the expression 'sea' does not include any of the specified waters and the expression 'seashore' does not include the bed or shore of any of those waters: s 49(1), (2), (2A) (definitions in s 49(1) amended, s 49(2A) added, by the Merchant Shipping Act 1988 s 36). As to the specified waters see the Coast Protection Act 1949 Sch 4 (amended by SI 1958/2146; SI 1965/204; SI 1975/1365; SI 1983/1203; SI 1983/1503; SI 1992/1549; SI 1993/1149; SI 1997/2675; SI 2003/1915). As to territorial waters see PARA 31. As to the meaning of 'United Kingdom' see PARA 22 note 5.

10     le an order under the Coast Protection Act 1949 s 2 (see PARA 510) in the circumstances mentioned in note 11 (s 2(7)(a)); and an order under s 31 (see PARA 504) unless the order relates only to the constitution or functions of sea defence commissioners, or provides for their dissolution, and is made on their application or on the application of a coast protection authority with their concurrence (s 31(2) proviso).

11     See the Coast Protection Act 1949 Sch 1 para 5. After the order has been made the Secretary of State must give notice of it and of its effect to each of the bodies entitled to notice of the draft order which has objected to the draft and not withdrawn its objection: Sch 1 para 5. In such a case the order does not have effect before the expiration of 28 days from the date of the notice, and if within that period any such body gives to the Secretary of State notice of objection to the order the order is subject to special parliamentary procedure (see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq): Sch 1 para 5.

12     After making the order the Secretary of State, the Welsh Ministers and, where appropriate, the ministers concerned must publish notice in the London Gazette and in such other manner as they think best adapted for

informing persons affected that the order has been made, naming a place where a copy may be seen: Coast Protection Act 1949 Sch 1 para 6. This applies not only to orders under s 2 (see PARA 510) (s 2(7)(b)) and s 31 (see PARA 504) (s 31(2)), but also to orders under s 8(5) (confirmation of works schemes: see PARA 525) (s 8(7)), unless a direction is given that different provisions are to apply (see s 8(7) proviso). In the case of an order subject to special parliamentary procedure, the notice must not be published until the expiration of the 28-day period referred to in note 11, and the notice must state whether or not the order is subject to that procedure: Sch 1 para 6 proviso.

13 If any person aggrieved by the order desires to question its validity on the grounds that it is not within the powers of the Coast Protection Act 1949 or that any requirement of that Act has not been complied with he may within six weeks of the first publication of the notice (see note 12) apply to the High Court, and if it is satisfied that the order is not within the statutory powers or that the applicant's interests have been substantially prejudiced by any statutory requirement not having been complied with, the court may quash the order either generally or so far as it affects the applicant: Sch 1 para 7. However, this does not apply to an order which is confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARAS 925-926); and has effect in relation to any other order which is subject to special parliamentary procedure as if for the reference to the date of the publication of the notice there were substituted a reference to the date on which the order becomes operative: Coast Protection Act 1949 Sch 1 para 7 proviso. No order subject to the procedure set out above may otherwise be questioned: Sch 1 para 7. As to judicial review in such circumstances see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

## **UPDATE**

### **505 Regulations and orders**

NOTE 9--Coast Protection Act 1949 Sch 1 para 1(b) further amended: Marine and Coastal Access Act 2009 Sch 14 para 5 (not yet in force).

Coast Protection Act 1949 Sch 1 para 1(b) repealed in part; and definition of 'local fisheries committee' in Coast Protection Act 1949 s 49(1) repealed: Marine and Coastal Access Act 2009 Sch 22 Pt 4 (in force in relation to Wales: SI 2010/630).

Definitions of 'sea' and 'seashore' in Coast Protection Act 1949 s 49(1) further amended: Marine and Coastal Access Act 2009 Sch 8 para 1(3) (not yet in force).

Coast Protection Act 1949 s 49(2A) repealed: Marine and Coastal Access Act 2009 Sch 22 Pt 2 (not yet in force).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/8. COAST PROTECTION/(1) IN GENERAL/506. Local inquiries.

## **506. Local inquiries.**

The Secretary of State<sup>1</sup>, or in relation to Wales, the Welsh Ministers<sup>2</sup>, or the Secretary of State for Transport<sup>3</sup> may cause a local inquiry to be held in any case where it appears to them advisable to do so in connection with any matter arising under the Coast Protection Act 1949<sup>4</sup>. Notice of any such inquiry must be given in such manner as the Secretary of State concerned or, as the case may be, the Welsh Ministers may direct, and all persons<sup>5</sup> interested are permitted to attend, and to be heard at, the inquiry<sup>6</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 The functions of the Secretary of State, but not those of the Secretary of State for Transport, under the Coast Protection Act 1949 s 46, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 The Coast Protection Act 1949 refers to the 'Minister of Transport'. As to the transfer of the functions of the Minister of Transport to the Secretary of State for Transport see the Secretary of State for the Environment Order 1970, SI 1970/1681; the Secretary of State for Transport Order 1976, SI 1976/1775; the Minister of Transport Order 1979, SI 1979/571; the Transfer of Functions (Transport) Order 1981, SI 1981/238; the Secretary of State for the Environment, Transport and the Regions Order 1997, SI 1997/2971. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

4 Coast Protection Act 1949 s 46(1). The Local Government Act 1972 s 250(2)-(5) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) applies to all such inquiries; but s 250(4), which requires the Secretary of State's or Welsh Ministers' costs to be defrayed by the parties, does not apply unless so directed by the one of those at whose instance the inquiry is held: see Coast Protection Act 1949 s 46(3).

5 As to the meaning of 'person' see PARA 13 note 29.

6 Coast Protection Act 1949 s 46(2).



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### **507. Default powers.**

If complaint is made to the Secretary of State<sup>1</sup>, or in relation to Wales, the Welsh Ministers<sup>2</sup> that a coast protection authority<sup>3</sup> has failed to take sufficient measures for the protection<sup>4</sup> of any land<sup>5</sup> in its area, or the Secretary of State or, as the case may be, the Welsh Ministers is of the opinion that an investigation should be made into the need for any such measures or the sufficiency of any measures so taken, the Secretary of State or the Welsh Ministers may cause a local inquiry to be held into the matter<sup>6</sup>. Where the Secretary of State or the Welsh Ministers is satisfied, after an inquiry has been held, that there has been such a failure on the part of an authority, he or they may make an order<sup>7</sup> declaring the authority to be in default and directing it to exercise such of its powers as may be specified in the order in such a manner and within such time as may be so specified<sup>8</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 The functions of the Secretary of State under the Coast Protection Act 1949 s 29, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the meaning of 'coast protection authority' see PARA 508.

4 As to the meaning of 'protection' see PARA 505 note 9.

5 As to the meaning of 'land' see PARA 502 note 3.

6 Coast Protection Act 1949 s 29(1). As to local inquiries see PARA 506.

7 As to orders see PARA 505.

8 Coast Protection Act 1949 s 29(2).

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## **(2) COAST PROTECTION AUTHORITIES**

### **(i) Constitution**

#### **508. Establishment of authorities.**

Where it appears to the Secretary of State<sup>1</sup>, or in relation to Wales, the Welsh Ministers<sup>2</sup> expedient for the protection<sup>3</sup> of land<sup>4</sup> in any area, he or they may make an order<sup>5</sup> providing for the constitution of a board, known as a coast protection board, to be the coast protection authority for that area<sup>6</sup>. Subject to the provisions of any such order, the council of each maritime district<sup>7</sup> is the coast protection authority for its district<sup>8</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 The functions of the Secretary of State (as 'the minister': see PARA 504 note 1) under the Coast Protection Act 1949 s 2, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the meaning of 'protection' see PARA 505 note 9.

4 As to the meaning of 'land' see PARA 502 note 3.

5 The power to make such an order is exercisable by statutory instrument: Coast Protection Act 1949 s 2(9). Any such order must be made in accordance with Sch 1 (see PARA 505): see s 2(7). As to such orders see further PARAS 509-511. Such orders, being local in nature, are not recorded in this work.

6 Coast Protection Act 1949 s 2(1). As to representation on coast protection boards see PARA 509.

7 'Maritime district' means a district or Welsh county or county borough any part of which adjoins the sea: Coast Protection Act 1949 s 49(1) (definition amended by the Local Government Act 1972 s 272, Sch 30; Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(6)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the meaning of 'sea' see PARA 505 note 9.

8 See the Coast Protection Act 1949 s 1(1) (amended by the Local Government Act 1972 s 272(1), Sch 30).

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### **509. Representation on coast protection boards.**

A coast protection board<sup>1</sup> consists of representatives of the council of every maritime district<sup>2</sup> any part of which is within the area for which the board is constituted, and, if the order<sup>3</sup> so provides, of representatives of such one or more as may be specified in the order of the following bodies and persons<sup>4</sup>:

- 1156 (1) the council of any county, other than one in Wales, any part of which is within the area<sup>5</sup>;
- 1157 (2) the Environment Agency<sup>6</sup> and any sea defence commissioners<sup>7</sup>, internal drainage board<sup>8</sup>, harbour authority, local fisheries committee, conservancy authority or navigation authority<sup>9</sup> having any powers or duties in relation to any part of the area<sup>10</sup>;
- 1158 (3) any authority responsible for the maintenance of any highway within the area if the highway is likely to be injuriously affected by the action of the sea<sup>11</sup>;
- 1159 (4) in the case of any area containing any railway, canal or inland navigation vested in the successor to the British Railways Board, or vested in the British Waterways Board, the appropriate body if likely to be injuriously affected by the action of the sea<sup>12</sup>; and
- 1160 (5) any other body or person having powers or duties relating to the protection<sup>13</sup> of land<sup>14</sup> in the area conferred or imposed by or under any enactment<sup>15</sup> other than the Coast Protection Act 1949<sup>16</sup>.

1 As to the establishment of coast protection boards see PARA 508.

2 As to the meaning of 'maritime district' see PARA 508 note 7.

3 As to orders see PARAS 508, 510, 511.

4 Coast Protection Act 1949 s 2(2) (amended by the Local Government Act 1972 s 272(1), Sch 30). As to the meaning of 'person' see PARA 13 note 29.

5 Coast Protection Act 1949 s 2(2)(a) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(1)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

6 As to the Environment Agency see PARA 17.

7 As to the meaning of 'sea defence commissioners' see PARA 505 note 9.

8 As to internal drainage boards see PARA 569 et seq.

9 As to the meanings of 'harbour authority', 'local fisheries committee', 'conservancy authority' and 'navigation authority' see PARA 505 note 9.

10 Coast Protection Act 1949 s 2(2)(b) (amended by the Water Act 1989 s 190(1), Sch 25 para 11(1); SI 1996/593).

11 Coast Protection Act 1949 s 2(2)(c) (amended by the Local Government Act 1972 Sch 30). As to the meaning of 'sea' see PARA 505 note 9. As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

12 See the Coast Protection Act 1949 s 2(2)(d) (amended by virtue of the Transport Act 1962 s 32(1), Sch 2 Pt I). As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to the British Waterways Board see PARA 725 et seq.

13 As to the meaning of 'protection' see PARA 505 note 9.

14 As to the meaning of 'land' see PARA 502 note 3.

15 As to the meaning of 'enactment' see PARA 14 note 31.

16 Coast Protection Act 1949 s 2(2)(e).

## **UPDATE**

### **509 Representation on coast protection boards**

TEXT AND NOTES--Coast Protection Act 1949 s 2(2) further amended: Marine and Coastal Access Act 2009 s 193(2).

TEXT AND NOTE 10--Coast Protection Act 1949 s 2(2)(b) further amended: Marine and Coastal Access Act 2009 Sch 14 para 2(a) (not yet in force).

Coast Protection Act 1949 s 2(2)(b) repealed in part: Marine and Coastal Access Act 2009 Sch 22 Pt 4 (in force in relation to Wales: SI 2010/630).

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### **510. Orders constituting coast protection boards.**

If it appears expedient to the Secretary of State<sup>1</sup>, or in relation to Wales, the Welsh Ministers<sup>2</sup>, an order which provides for the constitution of a coast protection board<sup>3</sup> may be made so as to relate only to such functions<sup>4</sup> under the Coast Protection Act 1949 as may be specified in the order, or to the exercise of such functions only in such particular case as may be so specified<sup>5</sup>.

An order which provides for the inclusion in a coast protection board of representatives of a specified body<sup>6</sup> must be made jointly by the ministers concerned<sup>7</sup>.

An order revoking an order constituting a board may contain such provisions for the dissolution of the board constituted by the order revoked, and for the disposal of its property, rights and liabilities, as appear expedient to the Secretary of State, the Welsh Ministers or, as the case may be, the ministers concerned<sup>8</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 The functions under the Coast Protection Act 1949 s 2 of the Secretary of State (as 'the minister': see PARA 504 note 1), but not the functions of any other Minister of the Crown (which includes the Treasury), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Treasury' see PARA 108 note 6.

3 Ie an order under the Coast Protection Act 1949 s 2: see PARA 508.

4 'Functions' includes powers and duties: Coast Protection Act 1949 s 49(1).

5 Coast Protection Act 1949 s 2(3).

6 Ie any of the bodies referred to in the Coast Protection Act 1949 s 2(2)(b)-(e): see PARA 509.

7 Coast Protection Act 1949 s 2(4). 'The ministers concerned' means: (1) in relation to the Environment Agency or an internal drainage board, a local fisheries committee or a harbour authority for a harbour which is a fishery harbour for the purposes of the Sea Fish Industry Act 1951 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 612), the Secretary of State or, in relation to Wales, the Welsh Ministers (Coast Protection Act 1949 s 2(8)(a) (amended by the Water Act 1989 s 190(1), Sch 25 para 11(1); the Transport and Works Act 1992 s 65(2); and by virtue of SI 2001/3503; and SI 1996/593)); (2) in relation to the Tweed Commissioners, the Secretary of State and the Secretary of State for Scotland (Coast Protection Act 1949 s 2(8)(b)); (3) in relation to any other harbour authority, a conservancy, navigation or highway authority, the successor to the British Railways Board or the British Waterways Board, the Secretary of State or, in relation to Wales, the Welsh Ministers and the Secretary of State for Transport (see s 2(8)(c) (amended by virtue of the Transport Act 1962 s 32(1), Sch 2 Pt I)); (4) in relation to any other body, the Secretary of State or, in relation to Wales, the Welsh Ministers and any other minister concerned with the exercise by that body of its powers under the relevant enactment (Coast Protection Act 1949 s 2(8)(d)). Any question arising under head (4) above must be determined by the Treasury: s 2(8). See also note 2. As to the Environment Agency see PARA 17. As to internal drainage boards see PARA 569 et seq. As to the meanings of 'harbour authority', 'local fisheries committee', 'conservancy authority' and 'navigation authority' see PARA 505 note 9. As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq. As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to the British Waterways Board see PARA 725 et seq. 'Tweed Commissioners' means the Commissioners appointed under the Tweed Fisheries Act 1857: Coast Protection Act 1949 s 49(1). As to the meaning of 'enactment' see PARA 14 note 31.

8 Coast Protection Act 1949 s 2(6).

## **UPDATE**

### **510 Orders constituting coast protection boards**

NOTE 7--Coast Protection Act 1949 s 2(8)(a) further amended: Marine and Coastal Access Act 2009 s 193(3), Sch 14 para 2(b) (Sch 14 para 2(b) not yet in force).

Coast Protection Act 1949 s 2(8)(a) repealed in part: Marine and Coastal Access Act 2009 Sch 22 Pt 4 (in force in relation to Wales: SI 2010/630).

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### **511. Contents of order.**

An order providing for the constitution of a coast protection board<sup>1</sup> may:

- 1161 (1) prescribe the representation of the constituent authorities<sup>2</sup> on the board and make provision with respect to the appointment, tenure of office and vacation of office of the board's members, officers and servants, authorise the remuneration of such officers and servants, and make provision with respect to their pension rights<sup>3</sup>;
- 1162 (2) provide for the incorporation of the board with power to hold land<sup>4</sup> for the purposes of its powers and duties<sup>5</sup>;
- 1163 (3) authorise the board to defray or contribute to expenses of carrying out coast protection work<sup>6</sup> or of contributing to the cost of such work, being expenses incurred by any of the constituent authorities before the making of the order<sup>7</sup>;
- 1164 (4) make provision for the raising, by borrowing or otherwise, of any money required by the board for the purposes of its functions<sup>8</sup> and, in particular, provide for the apportionment among the constituent authorities of any expenses of the board, empower the board to issue precepts to them requiring payment of the amounts apportioned to them respectively and provide for the enforcement of such precepts<sup>9</sup>;
- 1165 (5) contain any incidental or consequential provisions which appear to the Secretary of State<sup>10</sup>, or in relation to Wales, the Welsh Ministers<sup>11</sup>, or the ministers concerned<sup>12</sup>, to be necessary or expedient for the purposes of the order, including provisions as to the manner in which the expenses of a constituent authority under head (4) above are to be defrayed and provisions applying to the board any enactment<sup>13</sup> which applies to a coast protection authority<sup>14</sup>, not being a coast protection board, by reason that it is a local authority for the purposes of that enactment<sup>15</sup>.

An order constituting or dissolving a coast protection board<sup>16</sup> must make such provision, if any, as the Secretary of State or, in relation to Wales, the Welsh Ministers may require regarding the transfer, compensation and pension rights of officers and servants of the authorities concerned<sup>17</sup>.

1    Ie an order under the Coast Protection Act 1949 s 2: see PARAS 508-510.

2    'Constituent authority' in relation to a coast protection board means a body or person represented on the board by virtue of an order under the Coast Protection Act 1949 s 2 (see PARA 509): s 49(1). As to the meaning of 'person' see PARA 13 note 29.

3    Coast Protection Act 1949 s 2(5)(a).

4    As to the meaning of 'land' see PARA 502 note 3.

5    Coast Protection Act 1949 s 2(5)(b).

6    As to the meaning of 'coast protection work' see PARA 505 note 9.

7    Coast Protection Act 1949 s 2(5)(c).

8 As to the meaning of 'functions' see PARA 510 note 4.

9 Coast Protection Act 1949 s 2(5)(d).

10 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

11 The functions under the Coast Protection Act 1949 ss 2, 30 (see the text to notes 16-17) of the Secretary of State (as 'the minister': see PARA 504 note 1), but not the functions under s 2 of any other Minister of the Crown, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

12 As to the meaning of 'the ministers concerned' see PARA 510 note 7.

13 As to the meaning of 'enactment' see PARA 14 note 31.

14 As to the meaning of 'coast protection authority' see PARA 508.

15 Coast Protection Act 1949 s 2(5)(e).

16 References to an order constituting a coast protection board include references to an order varying the constitution of such a board: see the Coast Protection Act 1949 s 30(2) (s 30 amended by the Local Government Act 1972 s 272(1), Sch 30).

17 Coast Protection Act 1949 s 30(1) (as amended: see note 16). 'The authorities concerned' means: (1) in relation to an order constituting a coast protection board, the constituent or appointing authorities; (2) in relation to an order varying the constitution of such a board, the board, the constituent or appointing authorities and any authority which, on the variation taking effect, will be one of the constituent or appointing authorities; and (3) in relation to an order dissolving a board, the board and the constituent or appointing authorities: Coast Protection Act 1949 s 30(3)(a)-(c) (as so amended).



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## **(ii) General Powers of Coast Protection Authorities**

### **512. In general.**

A coast protection authority<sup>1</sup> has such powers and may perform such duties in connection with the protection<sup>2</sup> of land<sup>3</sup> in its area as are conferred or imposed on coast protection authorities by the Coast Protection Act 1949<sup>4</sup>.

A coast protection authority has power to carry out such coast protection work<sup>5</sup>, whether within or outside its area, as may appear to it to be necessary or expedient for the protection of any land in its area<sup>6</sup>. A coast protection authority may enter into an agreement with any other person<sup>7</sup> for the carrying out by either party, on such terms as to payment or otherwise as may be specified in the agreement, of any coast protection work which the authority has power to carry out<sup>8</sup>, and may acquire land<sup>9</sup>. However, these provisions have effect only for the purpose of removing any limitation imposed by law on the capacity of an authority by virtue of its constitution, and do not authorise any act or omission on the part of an authority which otherwise is actionable at the suit of any person on any ground other than such a limitation<sup>10</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'protection' see PARA 505 note 9.

3 As to the meaning of 'land' see PARA 502 note 3.

4 Coast Protection Act 1949 s 1(2).

5 As to the meaning of 'coast protection work' see PARA 505 note 9.

6 Coast Protection Act 1949 s 4(1). This provision is expressed to be subject to the provisions of the Coast Protection Act 1949 ss 5-49: see PARA 513 et seq. Coast protection works may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

7 As to the meaning of 'person' see PARA 13 note 29.

8 Coast Protection Act 1949 s 4(2).

9 See the Coast Protection Act 1949 s 4(3); and PARA 519.

10 Coast Protection Act 1949 s 4(4). This provision is expressed to be without prejudice to the powers conferred on coast protection authorities by ss 5-49 (see PARA 513 et seq): s 4(4).

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### **513. Sale of materials.**

A coast protection authority<sup>1</sup> may sell any materials<sup>2</sup> which have been severed by it from any land<sup>3</sup> when carrying out work in the exercise of the powers conferred on it<sup>4</sup> as a coast protection authority if the materials are not claimed by the person<sup>5</sup> to whom they belong within 14 days from the date of severance<sup>6</sup>. Where a coast protection authority sells any such materials, it must pay the proceeds to the person to whom the materials belonged<sup>7</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 'Materials' includes minerals and turf, but does not include seaweed: Coast Protection Act 1949 s 49(1). 'Minerals' includes coal and stone and any metallic or other mineral substance: s 49(1).

3 As to the meaning of 'land' see PARA 502 note 3.

4 Ie by the Coast Protection Act 1949 Pt I (ss 1-33).

5 As to the meaning of 'person' see PARA 13 note 29.

6 Coast Protection Act 1949 s 23(1).

7 Coast Protection Act 1949 s 23(2).

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#### **514. Powers of entry and inspection.**

Any person<sup>1</sup> authorised by a coast protection authority<sup>2</sup> has, on producing, if so required, some duly authenticated document showing his authority, a right at all reasonable hours:

- 1166 (1) to enter upon any land<sup>3</sup> on which the authority is empowered<sup>4</sup> to carry out work<sup>5</sup>;
- 1167 (2) to enter upon any land to which entry is reasonably necessary in order to obtain access to any such land as is mentioned in head (1) above<sup>6</sup>;
- 1168 (3) to enter upon, inspect or survey any land for the purpose of determining whether, and if so in what manner, any functions of the authority<sup>7</sup> are to be exercised, or whether any provision of any enactment<sup>8</sup> relating to such functions or any notice, order, direction or byelaw served, given or made under any such enactment is being or has been complied with<sup>9</sup>; and
- 1169 (4) without prejudice to the generality of head (3) above, to enter upon any land in order to estimate the amount of any compensation<sup>10</sup> or the value of any interest in the land<sup>11</sup>.

Admission to any land used for residential purposes must not, however, be demanded as of right unless 24 hours' notice of the intended entry has been given to the occupier<sup>12</sup>. Any person entitled to enter upon any land by virtue of these rights of entry may take with him such other persons as may be necessary, and on leaving any unoccupied land which he has entered must leave it as effectually secured as he found it<sup>13</sup>.

Except with the consent of the appropriate authority<sup>14</sup>, these provisions do not authorise any person to enter upon any Crown land<sup>15</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'coast protection authority' see PARA 508.

3 As to the meaning of 'land' see PARA 502 note 3. As to warrants for entry see PARA 515. It is an offence to obstruct a person exercising a right of entry: see PARA 515. It is an offence for a person exercising rights of entry to disclose certain information: see PARA 516.

4 Ie under the Coast Protection Act 1949, except under the general powers conferred by s 4 (see PARAS 512, 519): see s 25(1)(a).

5 See the Coast Protection Act 1949 s 25(1)(a). Any power of entry under head (1) or head (2) in the text includes power to authorise the entry or passage of other necessary persons, vehicles, plant and materials and the carrying out of work for facilitating their passage: s 25(6). The compensation provisions of s 19 (see PARAS 530-531) apply to depreciation and disturbance caused by the exercise of powers under those heads: s 25(2). As to the meaning of 'materials' see PARA 513 note 2.

6 See the Coast Protection Act 1949 s 25(1)(b). See also note 5.

7 Ie under the Coast Protection Act 1949. As to the meaning of 'functions' see PARA 510 note 4.

8 As to the meaning of 'enactment' see PARA 14 note 31.

9 Coast Protection Act 1949 s 25(1)(c).

10 le for the purposes of the Coast Protection Act 1949 Pt I (ss 1-33). As to compensation see s 19; and PARAS 530-531.

11 Coast Protection Act 1949 s 25(1)(d).

12 Coast Protection Act 1949 s 25(3).

13 Coast Protection Act 1949 s 25(5).

14 'Appropriate authority' means: (1) in the case of land belonging to Her Majesty in right of the Crown, the Crown Estate Commissioners or other government department having the management of that land; (2) in the case of land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor of the duchy; (3) in the case of land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the duchy, appoints; and (4) in the case of land belonging to, or held in trust for Her Majesty for the purposes of, a government department, the minister in charge of that department: Coast Protection Act 1949 s 32(5)(a)-(d) (amended by virtue of the Crown Estate Act 1956 s 1 (repealed)). Any question arising as to which is the appropriate authority is to be determined by the Treasury: Coast Protection Act 1949 s 32(5). As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 280 et seq. As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq. As to the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq. As to the meaning of 'Treasury' see PARA 108 note 6.

15 See the Coast Protection Act 1949 s 32(3). As to the meaning of 'Crown land' see PARA 502 note 3.

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### **515. Refusal or obstruction of entry.**

If it is shown to the satisfaction of a justice of the peace<sup>1</sup>, on sworn information in writing<sup>2</sup>:

1170 (1) that admission to any land<sup>3</sup> which any person<sup>4</sup> is entitled to enter<sup>5</sup> has either been refused to that person, or that refusal is apprehended, or that the land is unoccupied or that the occupier is temporarily absent, or that the case is one of urgency<sup>6</sup>; and

1171 (2) that there is reasonable ground for entry on the land for the purpose for which entry is required<sup>7</sup>,

the justice may by warrant under his hand authorise that person to enter on the land, if need be by force<sup>8</sup>. A warrant must not, however, be issued unless the justice is satisfied that notice of the intention to apply for a warrant has been given to the occupier, or that the land is unoccupied, or that the occupier is temporarily absent, or that the case is one of urgency<sup>9</sup>. Every such warrant when granted continues in force until the purpose for which the entry is necessary has been satisfied<sup>10</sup>.

Any person who wilfully obstructs a person exercising a right of entry<sup>11</sup> is guilty of an offence<sup>12</sup>.

1 As to justices of the peace see **MAGISTRATES** vol 29(2) (Reissue) PARA 501 et seq.

2 As to the meaning of 'writing' see PARA 22 note 1.

3 As to the meaning of 'land' see PARA 502 note 3.

4 As to the meaning of 'person' see PARA 13 note 29.

5 I.e. under the Coast Protection Act 1949 s 25: see PARA 514.

6 Coast Protection Act 1949 s 25(4)(a).

7 Coast Protection Act 1949 s 25(4)(b).

8 Coast Protection Act 1949 s 25(4).

9 Coast Protection Act 1949 s 25(4) proviso.

10 Coast Protection Act 1949 s 25(7).

11 I.e. a right conferred by or under the Coast Protection Act 1949 s 25: see the text to notes 1-10, and PARA 514.

12 Coast Protection Act 1949 s 25(8). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see s 43 (amended by virtue of the Criminal Justice Act 1982 ss 35, 37, 38, 46). As to the standard scale see PARA 141 note 18.

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#### **516. Restriction on disclosure of information.**

If any person<sup>1</sup> who, in compliance with the provisions of the Coast Protection Act 1949 or of a warrant issued under it<sup>2</sup>, is admitted into a factory or workplace and discloses to any person (otherwise than in the performance of his duty) any information obtained by him there with regard to any manufacturing process or trade secret<sup>3</sup>, he is guilty of an offence<sup>4</sup>.

If any member or officer of a coast protection authority<sup>5</sup> to whom, by reason of his official position, any information so obtained is disclosed, discloses that information to any person (otherwise than in the performance of his duty)<sup>6</sup>, he is likewise guilty of an offence<sup>7</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to warrants see PARA 515. As to powers of entry see PARA 514.

3 Coast Protection Act 1949 s 25(9)(a).

4 Coast Protection Act 1949 s 25(9). The penalty for an offence under s 25(9) is, on summary conviction, a fine not exceeding level 3 on the standard scale or imprisonment for a term not exceeding three months: s 25(9) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As from a day to be appointed the reference to 'imprisonment for a term not exceeding three months' is repealed: Coast Protection Act 1949 s 25(9) (prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. As to the standard scale see PARA 141 note 18.

5 As to the meaning of 'coast protection authority' see PARA 508.

4 As to the meaning of 'coast protection authority' see PARA 42 note 1.

6 Coast Protection Act 1949 s 25(9)(b).

7 Coast Protection Act 1949 s 25(9). The penalty for such an offence is that set out in note 4.

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### **517. Assistance by the Secretary of State or the Welsh Ministers.**

Where a coast protection authority<sup>1</sup> desires to carry out any coast protection work<sup>2</sup> on land<sup>3</sup> belonging to it and the work is work which it is empowered to carry out under its general powers<sup>4</sup> but is prevented from doing so by reason of any covenant or other restriction affecting its enjoyment of the land, it may apply to the Secretary of State<sup>5</sup> or in relation to Wales, the Welsh Ministers<sup>6</sup> for an order authorising it to carry out the work<sup>7</sup>. The application must contain particulars of the proposed work and of any land required to be entered or across which the rights in question are required to be exercised, and such further particulars as the Secretary of State or the Welsh Ministers may in any particular case require; and the authority must serve notice<sup>8</sup> of the application on any person known to it to be entitled to enforce the covenant or restriction<sup>9</sup>.

Any person on whom notice of an application is served may, within four weeks after the service of that notice, serve notice of objection on the authority and the Secretary of State or the Welsh Ministers; and where such notice is served and not withdrawn, the Secretary of State or the Welsh Ministers must give the objector and the authority an opportunity of being heard by a person appointed for the purpose<sup>10</sup>. At any time after the Secretary of State or the Welsh Ministers is satisfied that the time for serving notice of objection has expired and that every objector has had an opportunity of being heard, the Secretary of State or the Welsh Ministers may, after considering the report of any person appointed to hear objections, make an order authorising the authority to carry out the work or enter on the land or exercise the rights, as the case may be, subject to any conditions which the Secretary of State or the Welsh Ministers may specify in the order<sup>11</sup>. The order may require the authority to pay to any person affected such compensation as may be provided for in the order<sup>12</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'coast protection work' see PARA 505 note 9.

3 As to the meaning of 'land' see PARA 502 note 3.

4 I.e. under the Coast Protection Act 1949 s 4: see PARA 512.

5 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

6 The functions of the Secretary of State under the Coast Protection Act 1949 s 28, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

7 Coast Protection Act 1949 s 28(2). As to orders see PARA 505. Such orders, being local in nature, are not recorded in this work.

8 As to the service of documents see PARA 22.

9 Coast Protection Act 1949 s 28(3).

10 Coast Protection Act 1949 s 28(4).

11 Coast Protection Act 1949 s 28(5).

12 Coast Protection Act 1949 s 28(5). As to compensation see further PARAS 530-531.



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### **(iii) Land**

#### **518. Information as to ownership of land.**

For the purpose of performing any of its functions<sup>1</sup>, a coast protection authority<sup>2</sup> may require the occupier of any land<sup>3</sup>, and any person<sup>4</sup> who either directly or indirectly receives rent in respect of any land, to state in writing<sup>5</sup> the nature of his own interest in it and the name and address of any other person known to him as having an interest in it, whether as freeholder, mortgagee<sup>6</sup>, owner<sup>7</sup>, lessee or otherwise<sup>8</sup>. Any person failing to give any information so required, or knowingly making any misstatement in respect of it, is guilty of an offence<sup>9</sup>.

1 le its functions under the Coast Protection Act 1949 Pt I (ss 1-33). As to the meaning of 'functions' see PARA 510 note 4.

2 As to the meaning of 'coast protection authority' see PARA 508.

3 As to the meaning of 'land' see PARA 502 note 3.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'writing' see PARA 22 note 1.

6 'Mortgage' includes any charge or lien for securing money or money's worth, and 'mortgagee' is to be construed accordingly: Coast Protection Act 1949 s 49(1).

7 'Owner' in relation to any land means the person for the time being receiving the rackrent of it, whether on his own account or as agent or trustee for any other person, or who would so receive that rent if the land were let at a rackrent: Coast Protection Act 1949 s 49(1).

8 Coast Protection Act 1949 s 26(1).

9 See the Coast Protection Act 1949 s 26(2). The penalty for such an offence is, on summary conviction, a fine not exceeding level 1 on the standard scale: s 26(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 141 note 18.

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## 519. Acquisition of land.

A coast protection authority<sup>1</sup> may acquire, whether by purchase, lease or exchange, any land<sup>2</sup>, whether within or outside its area: (1) which it requires for the purpose of carrying out on it any coast protection work<sup>3</sup> which it has power<sup>4</sup> to carry out<sup>5</sup>; or (2) for the protection<sup>6</sup> of which the authority proposes to carry out such work, not being work of maintenance or repair<sup>7</sup>.

The Secretary of State<sup>8</sup> or, in relation to Wales, the Welsh Ministers<sup>9</sup> may authorise a coast protection authority to acquire compulsorily any land which it is thus authorised to acquire by agreement<sup>10</sup>. However, no interest in Crown land<sup>11</sup> may be acquired compulsorily except with the consent of the appropriate authority<sup>12</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'land' see PARA 502 note 3.

3 As to the meaning of 'coast protection work' see PARA 505 note 9.

4 See under the Coast Protection Act 1949 Pt I (ss 1-33).

5 Coast Protection Act 1949 s 4(3)(a). Land acquired for a paved access way behind a sea wall was held not to be acquired for coast protection work: see *Webb v Minister of Housing and Local Government* [1965] 2 All ER 193, [1965] 1 WLR 755, CA.

6 As to the meaning of 'protection' see PARA 505 note 9.

7 Coast Protection Act 1949 s 4(3)(b). As to works of maintenance or repair see PARA 528. As to powers of appropriation and disposal in respect of such land see PARA 521.

8 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

9 The functions of the Secretary of State under the Coast Protection Act 1949 s 14, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

10 Coast Protection Act 1949 s 14(1). The Acquisition of Land Act 1981 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 556 et seq) applies in relation to any such compulsory purchase: Coast Protection Act 1949 s 14(1) (amended by the Acquisition of Land Act 1981 s 34(1), (3), Sch 4 paras 1, 7(1), Sch 6 Pt I). Land mentioned in head (2) in the text may be compulsorily acquired only if it appears that its value immediately after the completion of the work will be greater than it would be if the work had not been carried out, and in estimating its value at that time it is to be assumed, as respects the works proposed to be constructed, altered or improved, that they will in future be maintained without expense to any person entitled to an interest in the land: Coast Protection Act 1949 s 14(1) proviso. Any dispute arising under this provision is to be determined by arbitration on the application of any person concerned; and this requirement is deemed to be a requirement of the Acquisition of Land Act 1981 for the purposes of s 23(3) (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 612): Coast Protection Act 1949 s 14(2) (amended by the Acquisition of Land Act 1981 Sch 4 para 7(1)). As to the meaning of 'person' see PARA 13 note 29. As to arbitration see PARA 532.

11 As to the meaning of 'Crown land' see PARA 502 note 3.

12 See the Coast Protection Act 1949 s 32(2). As to the meaning of 'appropriate authority' see PARA 514 note 14.

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## **520. Acquisition of rights of passage.**

Where, for providing convenient access to land<sup>1</sup> on which any coast protection work<sup>2</sup> has been or is proposed to be carried out, it appears to a coast protection authority<sup>3</sup> necessary to obtain a right of passage<sup>4</sup> over other land, the authority may, by agreement or compulsorily, secure the creation of such a right in its favour either in perpetuity or for such term (whether fixed or determinable by notice) as it considers requisite<sup>5</sup>. The authority may also acquire by agreement, whether by way of purchase, lease or exchange, any land it requires for providing convenient access to land on which any coast protection work has been or is proposed to be carried out, or may purchase compulsorily<sup>6</sup> any land so required<sup>7</sup>.

1 As to the meaning of 'land' see PARA 14 note 21.

2 As to the meaning of 'coast protection work' see PARA 505 note 9.

3 As to the meaning of 'coast protection authority' see PARA 508.

4 'Right of passage' means a right of passage for persons, vehicles, plant and materials, and includes a right to carry out work for facilitating their passage: Coast Protection Act 1949 s 27(2). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'materials' see PARA 513 note 2.

5 Coast Protection Act 1949 s 27(1). The provisions of the Lands Clauses Acts as to the acquisition of land by agreement or compulsorily, the provisions of the Lands Tribunal Act 1949, the Land Compensation Act 1961 and the Acquisition of Land Act 1981 and the provisions of the Coast Protection Act 1949 relating to the acquisition of land apply, with such adaptations, exceptions and modifications as may be prescribed by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers, to securing the creation of such rights of passage as those provisions apply to the acquisition of land: s 27(3) (amended by the Acquisition of Land Act 1981 s 34(1), Sch 4 para 1). Without prejudice to the generality of the Coast Protection Act 1949 s 27(3), regulations so made may provide: (1) in the case of rights created for a term, for the payment of compensation either in one sum periodically, or partly in one way and partly in the other; (2) for authorising or requiring the coast protection authority to carry out such measures for reinstating the land as may be specified by or under the regulations, and for adjusting compensation accordingly: s 27(4). As to the making of regulations see PARA 505. At the date at which this volume states the law no such regulations had been made. As to provisions relating to the acquisition of land see generally **COMPULSORY ACQUISITION OF LAND**. The functions of the Secretary of State under the Coast Protection Act 1949 s 27, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

6 Ie under the Coast Protection Act 1949 s 14(1): see PARA 519.

7 Coast Protection Act 1949 s 27(5).

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## **521. Use of land acquired for coast protection work.**

Land<sup>1</sup> acquired by a coast protection authority<sup>2</sup>, whether by agreement or compulsorily, being land for the protection of which coast protection work<sup>3</sup> (other than work of maintenance or repair<sup>4</sup>) is carried out<sup>5</sup>, may be disposed of and appropriated in accordance with the relevant provisions of the local government legislation<sup>6</sup>.

The power of the council of a district in England, or of the council of a county or county borough in Wales<sup>7</sup>, under any other enactment<sup>8</sup> than the Coast Protection Act 1949 to provide concert halls, entertainment rooms, reading rooms, pavilions, restaurants or other places for the provision of meals or refreshments, bandstands, public conveniences or other buildings, on land belonging or let to it, to lay out public parks, pleasure grounds or recreation grounds on such land, or to adapt or use land for any other public purpose, is exercisable in relation to any land acquired by the council under the coast protection legislation<sup>9</sup> for the purpose of carrying out on it any coast protection work, notwithstanding that the land continues to be required for that purpose, or for works constructed in the course of carrying out the work<sup>10</sup>. That power must not, however, be exercised so as to interfere with the use of the land for the purpose of carrying out on it of coast protection work, or with the maintenance or repair of such work, so long as it is required for that purpose or so long as the works are required to be maintained<sup>11</sup>.

1 As to the meaning of 'land' see PARA 502 note 3.

2 As to the meaning of 'coast protection authority' see PARA 508. As to the acquisition of land see PARA 519.

3 As to the meaning of 'coast protection work' see PARA 505 note 9.

4 As to works of maintenance or repair see PARA 528.

5 I.e. land falling within the Coast Protection Act 1949 s 4(3)(b): see PARA 519.

6 See the Coast Protection Act 1949 s 22(1). The relevant provisions are those of the Local Government Act 1972 ss 122, 123, 126, 127 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 513 et seq): Coast Protection Act 1949 s 22(1); Interpretation Act 1978 s 17(2)(a).

7 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

8 As to the meaning of 'enactment' see PARA 14 note 31.

9 I.e. under the Coast Protection Act 1949 Pt I (ss 1-33).

10 Coast Protection Act 1949 s 22(2) (amended by the Local Government Act 1972 s 272(1), Sch 30; and by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(4)).

11 Coast Protection Act 1949 s 22(2).

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### **(3) COAST PROTECTION WORK AND SCHEMES**

#### **(i) General Powers**

##### **522. Powers used for coast protection work.**

Coast protection authorities<sup>1</sup> have wide general powers to carry out coast protection work<sup>2</sup>, subject to specific statutory provisions<sup>3</sup>. These powers include powers of compulsory acquisition of land<sup>4</sup>. Although the Coast Protection Act 1949 provides for work to be carried out either by use of general powers or by use of 'works schemes'<sup>5</sup>, in practice works are now carried out using general powers except where it is necessary to obtain compulsory powers to carry out operations on land which is not owned by the authority<sup>6</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'coast protection work' see PARA 505 note 9.

3 See the Coast Protection Act 1949 ss 4, 5; and PARAS 512, 519, 523. As to limitations on the power see *Webb v Minister of Housing and Local Government* [1965] 2 All ER 193, [1965] 1 WLR 755, CA.

4 See the Coast Protection Act 1949 s 4(3); and PARA 519.

5 See PARA 524.

6 Works schemes were discontinued by Ministry of Housing and Local Government Circular 41/62 except in the cases described in the text.

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### **523. Prerequisites to carrying out coast protection work.**

Subject to the provisions of the Coast Protection Act 1949 as to works schemes<sup>1</sup>, a coast protection authority<sup>2</sup> proposing to carry out any coast protection work<sup>3</sup>, other than work of maintenance or repair<sup>4</sup>, must publish in one or more local newspapers circulating in its area, and in such other manner, if any, as the Secretary of State<sup>5</sup> or, in relation to Wales, the Welsh Ministers<sup>6</sup> may prescribe by regulations<sup>7</sup> or in any particular case direct, notice of that proposal<sup>8</sup>, including an estimate of the cost of the work and a sufficient indication that notice of objection to the proposal may be served<sup>9</sup>.

Similar notices must be served<sup>10</sup> on the Environment Agency<sup>11</sup> and on any internal drainage board<sup>12</sup> in whose district any of the work is to be carried out<sup>13</sup>, and also on other prescribed bodies<sup>14</sup> and such other authorities or persons as the Secretary of State or, as appropriate, the Welsh Ministers may direct in any particular case<sup>15</sup>.

Where notice has been so published by an authority, any person may serve on the Secretary of State or, as the case may be, the Welsh Ministers and on the authority in the prescribed manner<sup>16</sup> and within the prescribed period<sup>17</sup> notice of objection to the proposal<sup>18</sup>. Where notice of objection has been so served and not withdrawn, and the ground of objection is that the proposed work will be detrimental to the protection<sup>19</sup> of any land specified in the notice, or will interfere with the objector exercising his statutory functions, other than functions<sup>20</sup> under the Coast Protection Act 1949, the Secretary of State or, as the case may be, the Welsh Ministers<sup>21</sup> must either cause a local inquiry to be held<sup>22</sup>, or give the objector and all other persons appearing to them to be affected by the proposal an opportunity of being heard by a person appointed for the purpose<sup>23</sup>. After considering the report of the person appointed to hold the inquiry or to hear objections, the Secretary of State or the Welsh Ministers<sup>24</sup> must determine the objection<sup>25</sup>.

As soon as may be after the time for serving notices of objection has expired, the Secretary of State or the Welsh Ministers<sup>26</sup> must either approve the proposal or direct the authority not to carry out the proposed work, or impose such modifications of the proposal or such conditions as to the carrying out of the work as they may think fit, having regard to the determination of the objections<sup>27</sup>.

Nothing in the above provisions prevents a coast protection authority from carrying out, without those provisions having been complied with, any coast protection work which appears to it to be urgently necessary for the protection of any land in its area; but where work is so carried out the coast protection authority must, before or as soon as possible after commencing the work, give notice of the nature of the work to the Environment Agency, where it is not represented on the coast protection authority<sup>28</sup>, and to any internal drainage board which is not so represented and in whose district the work is to be or has been carried out<sup>29</sup>.

1 As to works schemes see PARAS 524-527. The Coast Protection Act 1949 s 5 does not apply to any proposal to carry out work provided for by a works scheme: see s 9(4). As to the use of general powers rather than works schemes see PARA 522.

2 As to the meaning of 'coast protection authority' see PARA 508.

- 3 As to the meaning of 'coast protection work' see PARA 505 note 9. Coast protection work may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).
- 4 As to works of maintenance or repair see PARA 528.
- 5 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.
- 6 The functions under the Coast Protection Act 1949 s 5 of the Secretary of State (as 'the minister': see PARA 504 note 1), but not the functions under s 5(4) (see note 21) of any other Minister of the Crown, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.
- 7 As to the making of regulations see PARA 505. The Coast Protection (Notices) (England) Regulations 2002, SI 2002/1278, and the Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, have been made: see notes 8, 10, 14, 16, 17.
- 8 For the prescribed form of notice see the Coast Protection (Notices) (England) Regulations 2002, SI 2002/1278, reg 2, Schedule; the Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 3, Schedule. In both cases, a form substantially to the same effect as that prescribed may be used: see the Coast Protection (Notices) (England) Regulations 2002, SI 2002/1278, reg 2; the Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 3.
- 9 See the Coast Protection Act 1949 s 5(1).
- 10 As to the service of documents see PARA 22. In relation to Wales, if the person on whom it is required to be served agrees to accept service of that document by electronic means, any copy of a notice of a proposal to carry out coast protection work may, in addition to any other method of service authorised by the Coast Protection Act 1949, be served by means of electronic communication; and any reference in the Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, to writing, however expressed, in relation to such a document, is to be construed as including a reference to a form capable of being stored on a computer, transmitted to and from a computer, and read by means of a computer: reg 6(1), (2)(b). For these purposes, 'electronic communication' has the meaning assigned to that term in the Electronic Communications Act 2000 s 15(1) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 947): Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 2. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'writing' see PARA 22 note 1.
- 11 As to the Environment Agency see PARA 17.
- 12 As to internal drainage boards see PARA 569 et seq.
- 13 Coast Protection Act 1949 s 5(1) (amended by the Water Act 1989 s 190(1), Sch 25 para 11(2); and SI 1996/593).
- 14 In such other authorities or persons as may be specified in regulations made by the Secretary of State or the Welsh Ministers: Coast Protection Act 1949 s 5(2).

In relation to England, notice must be served on: (1) every county, district and borough council, the Common Council of the City of London and the Council of the Isles of Scilly in England and every county and county borough council in Wales upon whose area of jurisdiction the proposed work may have an impact and on any harbour authority within whose area of jurisdiction any of the work is to be carried out; (2) English Nature, the Historic Buildings and Monuments Commission for England and the Countryside Agency; and (3) every other navigation authority, harbour authority, conservancy authority, local fisheries committee and person known by the coast protection authority to have an interest in any land on which any of the work is to be carried out or which that authority considers likely to be affected by the work: Coast Protection (Notices) (England) Regulations 2002, SI 2002/1278, reg 3.

In relation to Wales, notice must be served on: (a) any local authority whose area is likely to be affected by the work to which the notice relates; (b) any harbour authority, navigation authority, conservancy authority, or local fisheries committee whose area includes the area where the work to which the notice relates is to be carried out or is otherwise likely to be affected by that work; (c) the Countryside Council for Wales; (d) if the work to which the notice relates is likely to affect any part of England or of the sea adjacent to England, English Nature, the Historic Buildings and Monuments Commission for England and the Countryside Agency; and (e) any other person who has an interest in any land on which the work to which the notice relates is to be carried out, or which is likely to be affected by the work, unless the identity of that person is not known to, and cannot reasonably be ascertained by, the coast protection authority: Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 4. For these purposes, 'local authority' means, in relation to Wales, a county or county

borough council, or, in relation to England, a county, district or borough council: reg 2. English Nature has been abolished and its functions transferred to Natural England: see the Natural Environment and Rural Communities Act 2006 s 1. As to Natural England, the Countryside Council for Wales and the Joint Nature Conservation Committee see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

As to the meaning of 'England' see PARA 19 note 8. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the Historic Buildings and Monuments Commission for England see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 803 et seq. As to the meanings of 'sea', 'navigation authority', 'harbour authority', 'conservancy authority' and 'local fisheries committee' see PARA 505 note 9. As to the meaning of 'land' see PARA 502 note 3.

15 See the Coast Protection Act 1949 s 5(2).

16 In relation to England, the notice must be in writing and must contain a statement of the grounds of objection; and for these purposes 'writing' includes an electronic communication within the meaning of the Electronic Communications Act 2000 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 947): Coast Protection (Notices) (England) Regulations 2002, SI 2002/1278, reg 4(1), (2). Such a notice of objection may be served by delivering it to the Secretary of State at the Department for Environment, Food and Rural Affairs, Flood Management, Ergon House, 17 Smith Square, London SW1P 3JR and to the Chief Executive of the coast protection authority at its principal office or, in either case, by sending it in a pre-paid letter to the addresses so specified: reg 4(3). Similarly, in relation to Wales the notice must be in writing (which includes by electronic communication: see note 10) and must state the grounds of the objection: Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 5(1), (2). The copy of the notice of objection required to be served on the Welsh Ministers must be addressed to the Environmental Protection Division, Welsh Assembly Government, Cathays Park, Cardiff CF10 3NQ; and the copy of the notice of objection required to be served on the coast protection authority must be addressed to the Chief Executive of that authority at its principal office: reg 5(3), (4); Government of Wales Act 2006 Sch 11 para 32. Any copy of such a notice of objection may be served by means of electronic communication: Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 6(1), (2)(a).

17 In relation to England, a notice of objection must be served within 28 days of publication of the notice of the proposal in question: Coast Protection (Notices) (England) Regulations 2002, SI 2002/1278, reg 4(1). In relation to Wales, the period for service is within such period as is specified in the notice published under the Coast Protection Act 1949 s 5(1) (see the text to notes 1-9), which period must not be less than 28 days after the publication of that notice: Coast Protection (Notices) (Wales) Regulations 2003, SI 2003/1847, reg 5(1).

18 Coast Protection Act 1949 s 5(3).

19 As to the meaning of 'protection' see PARA 505 note 9.

20 As to the meaning of 'functions' see PARA 510 note 4.

21 Where the objection is made by the Tweed Commissioners, the powers of the Secretary of State under the Coast Protection Act 1949 s 5(4) are exercisable jointly with the Secretary of State for Scotland; and where the objection is made by any other harbour authority, or by a conservancy, navigation or highway authority, or by the successor to the British Railways Board or by the British Waterways Board those powers or the powers of the Welsh Ministers are exercisable jointly with the Secretary of State for Transport: see s 5(4)(b), (c) (amended by virtue of the Transport Act 1962 s 32(1), Sch 2 Pt I). As to the meaning of 'Tweed Commissioners' see PARA 510 note 7. As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq. As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to the British Waterways Board see PARA 725 et seq. As to the Secretary of State for Transport see PARA 506 note 3.

22 As to local inquiries see PARA 506.

23 Coast Protection Act 1949 s 5(4).

24 See note 21.

25 Coast Protection Act 1949 s 5(4).

26 See note 21.

27 Coast Protection Act 1949 s 5(5).

28 As to the constitution of authorities see PARA 509.

29 Coast Protection Act 1949 s 5(6) (amended by the Water Act 1989 Sch 25 para 11(2); and SI 1996/593).





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#### **524. Preparation of works scheme.**

Where a coast protection authority<sup>1</sup> proposes that coast protection work<sup>2</sup> (not being work of maintenance or repair<sup>3</sup>) should be carried out on any land<sup>4</sup>, and it appears to the authority either:

- 1172 (1) that the work cannot be carried out except in the exercise of compulsory powers<sup>5</sup>; or
- 1173 (2) that persons<sup>6</sup> interested in land benefited by the carrying out of the work ought to pay coast protection charges<sup>7</sup> to the authority<sup>8</sup>,

it may prepare a scheme (known as a 'works scheme'<sup>9</sup>) for the carrying out of the work<sup>10</sup>.

A works scheme must:

- 1174 (a) indicate the nature of any work to be carried out by the authority on land vested in it or which it proposes to acquire for the purposes of the scheme<sup>11</sup>;
- 1175 (b) specify the work, if any, to be carried out on land not so vested or proposed to be acquired<sup>12</sup>; and
- 1176 (c) specify the estimated cost of all work comprised in the scheme<sup>13</sup>.

A works scheme may also indicate land ('contributory land'<sup>14</sup>) as land in respect of which coast protection charges are to be payable under the scheme on the ground that it will be benefited by the carrying out of the work provided for by the scheme<sup>15</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'coast protection work' see PARA 505 note 9.

3 As to works of maintenance or repair see PARA 528.

4 As to the meaning of 'land' see PARA 502 note 3.

5 Coast Protection Act 1949 s 6(1)(a). As to powers to carry out work under a scheme see PARA 527. The compulsory powers referred to in s 6(1)(a) are not the powers of entry conferred by s 25 (see PARA 514), but are the powers of compulsory acquisition referred to in s 14(1) (see PARA 519): *Webb v Minister of Housing and Local Government* [1965] 2 All ER 193, [1965] 1 WLR 755, CA.

6 As to the meaning of 'person' see PARA 13 note 29.

7 'Coast protection charge' means a charge payable in accordance with the Coast Protection Act 1949 ss 7, 10, 32(3), 33 (see PARAS 540-545): see ss 6(1)(b), 49(1).

8 Coast Protection Act 1949 s 6(1)(b).

9 See the Coast Protection Act 1949 ss 6(1), 49(1). As to the utility of works schemes in practice see PARA 522.

10 Coast Protection Act 1949 s 6(1). Coast protection work may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

11 Coast Protection Act 1949 s 6(2)(a).

12 Coast Protection Act 1949 s 6(2)(b).

13 Coast Protection Act 1949 s 6(2)(c).

14 As to contributory land see further PARA 540.

15 Coast Protection Act 1949 s 7(1). Works schemes should not be made for recovering compulsory contributions from householders or other private interests except where necessary to obtain compulsory purchase powers to carry out operations on land not owned by the coast protection authority, and in these cases no compulsory charges should be levied: see Ministry of Housing and Local Government Circular 41/62.

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## **525. Confirmation of works scheme.**

A works scheme<sup>1</sup> does not have effect unless confirmed by the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup>.

The coast protection authority<sup>4</sup> by which a works scheme is prepared must publish: (1) in one or more local newspapers circulating in its area; and (2) in such other manner, if any, as may be prescribed by regulations<sup>5</sup> made by the Secretary of State or the Welsh Ministers or as the Secretary of State or the Welsh Ministers may direct in any particular case, a notice stating that the scheme has been prepared, naming a place where a copy may be seen at all reasonable hours, and containing a sufficient indication that notice of objection may be served on the Secretary of State or, as the case may be, the Welsh Ministers and on the authority within the prescribed period<sup>6</sup>, being not less than 28 days<sup>7</sup>. The authority must also serve<sup>8</sup> copies of the scheme on the owner<sup>9</sup> and occupier of any land<sup>10</sup> (other than land vested in and occupied by the authority) on which the work provided for by the scheme is to be carried out, on the Environment Agency<sup>11</sup> and on any internal drainage board<sup>12</sup> in whose district any of that work is to be carried out, and on such other authorities or persons<sup>13</sup> (if any) as may be prescribed by regulations<sup>14</sup> made by the Secretary of State or the Welsh Ministers or as the Secretary of State or the Welsh Ministers may direct in any particular case<sup>15</sup>. If the scheme provides for the levying of coast protection charges<sup>16</sup>, the persons on whom a copy of the scheme must be served include either each of the persons specified in the scheme by whom the charges are to be paid<sup>17</sup> or<sup>18</sup> all owners of contributory land<sup>19</sup>.

Where a notice has been published by the coast protection authority under heads (1) and (2) above, any person may serve on the Secretary of State or, as appropriate, the Welsh Ministers and on the authority, in the prescribed manner and within the prescribed period (which must not be less than 28 days), notice of objection to the scheme<sup>20</sup>. Where such a notice of objection has been served and not withdrawn, and the ground of objection is:

- 1177 (a) that the work provided for by the scheme, or any part of it, is unnecessary<sup>21</sup>; or
- 1178 (b) that the carrying out of that work in the manner provided for by the scheme would cause hardship to the objector<sup>22</sup>; or
- 1179 (c) that the land indicated by the scheme as contributory land includes land which ought not to be so indicated, or does not include land which ought to be so indicated<sup>23</sup>; or
- 1180 (d) in the case of a scheme which specifies the persons by whom coast protection charges are to be paid<sup>24</sup>, that any other provision of the scheme as to those charges is inequitable or unduly onerous<sup>25</sup>; or
- 1181 (e) that the work provided for by the scheme will be detrimental to the protection<sup>26</sup> of any land specified in the notice of objection, or will interfere with the objector exercising his functions<sup>27</sup> under any enactment<sup>28</sup>,

the Secretary of State or, as the case may be, the Welsh Ministers<sup>29</sup> must either cause a local inquiry<sup>30</sup> to be held or give to the objector and to all other persons appearing to be affected by the scheme an opportunity of being heard by a person appointed by the Secretary of State or the Welsh Ministers for the purpose<sup>31</sup>. After considering the report of the person appointed to

hold the inquiry or hear objections, the Secretary of State or, as the case may be, the Welsh Ministers must determine the objection<sup>32</sup>.

As soon as may be after the time for serving notices of objection has expired, the Secretary of State or, as appropriate, the Welsh Ministers must make an order either confirming the scheme as prepared by the authority or with modifications<sup>33</sup>, or quashing the scheme, as they think fit having regard to the determination of any objections<sup>34</sup>.

When operative, a works scheme indicating land as contributory land is a local land charge as respects that land<sup>35</sup>.

1 As to the meaning of 'works scheme' see PARA 524.

2 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

3 Coast Protection Act 1949 s 6(3). The purported confirmation of an invalid scheme does not validate it: *Webb v Minister of Housing and Local Government* [1965] 2 All ER 193, [1965] 1 WLR 755, CA. The functions under the Coast Protection Act 1949 s 8 of the Secretary of State (as 'the minister': see PARA 504 note 1), but not the functions under s 8(4) (see note 29) of any other Minister of the Crown, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4 As to the meaning of 'coast protection authority' see PARA 508.

5 As to the making of regulations see PARA 505. At the date at which this volume states the law no such regulations had been made.

6 Ie the period prescribed by regulations made by the Secretary of State or, as the case may be, the Welsh Ministers: see the Coast Protection Act 1949 s 8(3). At the date at which this volume states the law no such regulations had been made.

7 See the Coast Protection Act 1949 s 8(1), (3).

8 As to the service of documents see PARA 22.

9 As to the meaning of 'owner' see PARA 518 note 7.

10 As to the meaning of 'land' see PARA 502 note 3.

11 As to the Environment Agency see PARA 17.

12 As to internal drainage boards see PARA 569 et seq.

13 As to the meaning of 'person' see PARA 13 note 29.

14 At the date at which this volume states the law no such regulations had been made.

15 Coast Protection Act 1949 s 8(1) (amended by the Water Act 1989 s 190(1), Sch 25 para 11(3); SI 1996/593).

16 As to the meaning of 'coast protection charge' see PARA 524 note 7.

17 Ie where those persons are specified in the scheme as mentioned in the Coast Protection Act 1949 s 7(4) (a) (see PARA 541): see s 8(2)(a).

18 Ie where the scheme contains such a statement as is mentioned in the Coast Protection Act 1949 s 7(4) (b): see PARA 541.

19 Coast Protection Act 1949 s 8(2)(b). As to the meaning of 'contributory land' see PARA 524.

20 Coast Protection Act 1949 s 8(3). At the date at which this title states the law, no regulations had been made prescribing the manner or period for these purposes.

21 Coast Protection Act 1949 s 8(4)(a).

22 Coast Protection Act 1949 s 8(4)(b).

23 Coast Protection Act 1949 s 8(4)(c).

24 le the persons as specified in the scheme as mentioned in the Coast Protection Act 1949 s 7(4)(a): see PARA 541.

25 Coast Protection Act 1949 s 8(4)(d).

26 As to the meaning of 'protection' see PARA 505 note 9.

27 As to the meaning of 'functions' see PARA 510 note 4.

28 Coast Protection Act 1949 s 8(4)(e). As to the meaning of 'enactment' see PARA 14 note 31.

29 Where the objection is made by the Tweed Commissioners, the Secretary of State's powers under the Coast Protection Act 1949 s 8(4) are to be exercised jointly with the Secretary of State for Scotland; and where the objection is made by any other harbour authority, or by a conservancy, navigation or highway authority, or by the successor to the British Railways Board or by the British Waterways Board, those powers or the Welsh Ministers' powers are to be exercised jointly with the Secretary of State for Transport: s 8(4) provisos (b), (c) (amended by virtue of the Transport Act 1962 s 32(1), Sch 2 Pt I). As to the meaning of 'Tweed Commissioners' see PARA 510 note 7. As to the meanings of 'harbour authority', 'conservancy authority' and 'navigation authority' see PARA 505 note 9. As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq. As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to the British Waterways Board see PARA 725 et seq. As to the Secretary of State for Transport see PARA 506 note 3.

30 As to local inquiries see PARA 506.

31 Coast Protection Act 1949 s 8(4).

32 Coast Protection Act 1949 s 8(4).

33 As to modifications see PARA 526.

34 Coast Protection Act 1949 s 8(5). Subject to the provisions of s 7(7) (see PARA 540), the provisions of Sch 1 Pt III (see PARAS 6, 7; and PARA 505) as to the validity of orders apply to the order (see s 8(7)), although the Secretary of State or the Welsh Ministers may, in a particular case, direct that such different provisions be substituted as, having regard to the nature of the order, are best suited for bringing it to the notice of persons affected (s 8(7) proviso).

35 Coast Protection Act 1949 s 8(8) (substituted by the Local Land Charges Act 1975 s 17(2), Sch 1). As to local land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 671 et seq.

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## **526. Modification of works scheme.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> must not modify a works scheme<sup>3</sup> by indicating as contributory land<sup>4</sup> any land not so indicated in the scheme as prepared by the coast protection authority<sup>5</sup>, or by specifying as a person<sup>6</sup> upon whom a coast protection charge<sup>7</sup> may be levied any person not so specified in the scheme as so prepared, or by increasing the amount of any charge specified in the scheme as so prepared<sup>8</sup>. Where, however, it appears to the Secretary of State or, as the case may be, the Welsh Ministers that a works scheme should be so modified, the Secretary of State or Welsh Ministers must direct the authority by which the scheme was prepared to serve notice<sup>9</sup> of the proposed modification on the owners<sup>10</sup> of the land proposed to be indicated as contributory land, or the persons proposed to be specified as persons upon whom charges may be levied or whose charges are proposed to be increased; and any person upon whom such notice is served may object to the proposed modification<sup>11</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 The functions of the Secretary of State under the Coast Protection Act 1949 s 8(5), (6), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the meaning of 'works scheme' see PARA 524. As to the power to modify such schemes see PARA 525.

4 As to the meaning of 'contributory land' see PARA 524. As to the meaning of 'land' see PARA 502 note 3.

5 As to the meaning of 'coast protection authority' see PARA 508. As to the preparation of schemes see PARA 524.

6 As to the meaning of 'person' see PARA 13 note 29.

7 As to the meaning of 'coast protection charge' see PARA 524 note 7.

8 Coast Protection Act 1949 s 8(5) proviso.

9 As to the service of documents see PARA 22.

10 As to the meaning of 'owner' see PARA 518 note 7.

11 Coast Protection Act 1949 s 8(6). The provisions of s 8(3), (4) as to the service of notices of objection and the determination of objections (see PARA 525) apply accordingly so far as applicable, with the substitution, for references to the 'scheme' of references to the 'proposed modification': s 8(6).

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### **527. Carrying out work provided for by works scheme.**

Where a works scheme<sup>1</sup> prepared by a coast protection authority<sup>2</sup> is confirmed by the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>3</sup>, the authority has power to take all necessary steps for carrying out the work provided for by the scheme<sup>4</sup>. Where, however, a works scheme specifies work to be carried out on land<sup>5</sup> neither vested in the authority nor proposed to be acquired by it<sup>6</sup> for the purposes of the scheme, then, at any time not later than the expiration of six weeks after the confirmation of the scheme, the owner<sup>7</sup> of the land may serve<sup>8</sup> a notice on the authority stating that he proposes to carry out the work; and where such a notice is served and not withdrawn, the authority must not carry out the work unless the owner fails to carry it out in accordance with the scheme<sup>9</sup>. If he does so fail, the authority may give him notice that unless the work is carried out within a specified period the authority will itself carry out the work; and where this notice has been given and the work is not so carried out within the specified period, the authority may take all necessary steps for carrying out the work in accordance with the scheme<sup>10</sup>.

1 As to the meaning of 'works scheme', and as to the preparation of such schemes, see PARA 524.

2 As to the meaning of 'coast protection authority' see PARA 508.

3 As to the confirmation of schemes see PARAS 525-526. As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1; and as to the transfer to the Welsh Ministers of the powers of the Secretary of State in relation to the confirmation of schemes see PARAS 525-526. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4 Coast Protection Act 1949 s 9(1). As to compensation in respect of such work see PARAS 530-532.

5 As to the meaning of 'land' see PARA 502 note 3.

6 As to the acquisition of land see PARA 519.

7 As to the meaning of 'owner' see PARA 518 note 7.

8 As to the service of documents see PARA 22.

9 Coast Protection Act 1949 s 9(2).

10 Coast Protection Act 1949 s 9(3). Section 5 (objections to, and approval of, proposals to carry out coast protection work: see PARA 523) does not apply to any proposal of a coast protection authority to carry out work provided for by a works scheme: s 9(4).



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## **(ii) Maintenance and Repair**

### **528. Work of maintenance and repair.**

Where it appears to a coast protection authority<sup>1</sup> that, for the protection<sup>2</sup> of land<sup>3</sup> in its area, any works<sup>4</sup> are in need of maintenance or repair, it may serve<sup>5</sup> a notice on the owner<sup>6</sup> and occupier of the land on which the works are situated specifying the work of maintenance or repair which the authority considers to be necessary, and a period after the expiration of which the authority will carry out the work if it has not been previously completed<sup>7</sup>. At the expiration of that period, if the specified work has not been completed, the authority may take all necessary steps to carry out the work<sup>8</sup>.

If it appears to a coast protection authority to be urgently necessary for the protection of land in its area that any works should be repaired immediately, it may take all necessary steps for repairing them without having served any notice or notwithstanding that the time for completing the work specified in any notice has not expired<sup>9</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'protection' see PARA 505 note 9.

3 As to the meaning of 'land' see PARA 502 note 3.

4 Nothing in the Coast Protection Act 1949 s 12 authorises a coast protection authority to carry out any work of maintenance or repair on works which the successor to the British Railways Board or which the British Waterways Board has for the time being power to maintain: s 12(4) (amended by virtue of the Transport Act 1962 s 32(1), Sch 2 Pt I). As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44. As to the British Waterways Board see PARA 725 et seq.

5 As to the service of documents see PARA 22.

6 As to the meaning of 'owner' see PARA 518 note 7. As to the content of such a notice and objection thereto see the Coast Protection Act 1949 s 13(2)-(8); and PARA 529.

7 Coast Protection Act 1949 s 12(1). If the owner is unable to carry out the work by reason of a covenant or other restriction he may apply for an order authorising him to carry out the work: see s 28; and PARA 550.

8 Coast Protection Act 1949 s 12(2). As to the recovery of the cost of maintenance works see PARA 528. As to compensation see PARAS 530-532.

9 Coast Protection Act 1949 s 12(3).

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### **529. Recovering cost of maintenance or repair of works.**

Where a coast protection authority<sup>1</sup> has carried out<sup>2</sup> any work of maintenance or repair on works not being works constructed, altered or improved under a works scheme<sup>3</sup> and not being works in respect of which a scheme for maintenance and repair<sup>4</sup> has come into operation, on the completion of the work the authority may recover the reasonable cost of carrying it out from the owner<sup>5</sup> or occupier of the land<sup>6</sup> on which the works are situated<sup>7</sup>. However, this right of recovery is not exercisable unless a notice in respect of the work in question has been served<sup>8</sup> containing the required information<sup>9</sup>.

At any time within 21 days after service on him of such a notice, the owner or occupier may complain in writing<sup>10</sup> to a magistrates' court<sup>11</sup> on any one or more of the following grounds:

- 1182 (1) that having regard to all the circumstances of the case it is equitable that the right of recovery so conferred should be exercisable, as respects the whole or some part of the cost of carrying out the work, against whichever of the owner and the occupier is not the complainant<sup>12</sup>;
- 1183 (2) that having regard to all the circumstances of the case it is equitable that the coast protection authority should bear the whole or some part of the cost of carrying out the work<sup>13</sup>;
- 1184 (3) that any of the work specified in the notice is not work of maintenance or repair<sup>14</sup>; or
- 1185 (4) that having regard to all the circumstances of the case, and in particular to the amount of the cost or the probability that there will be a recurrent need for maintenance or repair, the cost ought to be provided for by a scheme under the provisions set out below<sup>15</sup>.

A summons granted on such a complaint must be served on the coast protection authority and, if the complaint is made on the ground specified in head (1) above, on whichever of the owner and the occupier is not the complainant<sup>16</sup>. On such a complaint the court, if it thinks fit, may make such one or more of the following orders as appears to it to be appropriate, having regard to the grounds of complaint:

- 1186 (a) an order directing that the right of recovery of the cost is to be exercisable, as respects the whole or a specified part of the cost of carrying out the work, against whichever of the owner and the occupier is not the complainant<sup>17</sup>;
- 1187 (b) an order debarring the authority from recovering the cost of carrying out the work, or so much of that cost as may be specified in the order<sup>18</sup>;
- 1188 (c) an order declaring that any of the work specified in the notice is not work of maintenance or repair<sup>19</sup>; or
- 1189 (d) an order debarring the authority from recovering the cost but empowering it to make a scheme for maintenance and repair<sup>20</sup>.

Where the authority is empowered under head (d) above to make a scheme, it may do so, and the statutory provisions relating to preparation and confirmation of a works scheme<sup>21</sup> and to

coast protection charges<sup>22</sup> apply to any such scheme as they apply to a works scheme, but subject to certain modifications<sup>23</sup>.

- 1 As to the meaning of 'coast protection authority' see PARA 508.
- 2 Ie under the Coast Protection Act 1949 s 12: see PARA 528.
- 3 As to the meaning of 'works scheme' see PARA 524.
- 4 Ie under the Coast Protection Act 1949 s 13: see the text to notes 21-23.
- 5 As to the meaning of 'owner' see PARA 518 note 7.
- 6 As to the meaning of 'land' see PARA 502 note 3.
- 7 Coast Protection Act 1949 s 13(1). As to the position in relation to land belonging to ecclesiastical corporations see s 33; and PARA 545.
- 8 Ie under the Coast Protection Act 1949 s 12(1): see PARA 528.
- 9 See the Coast Protection Act 1949 s 13(2). The required information is a statement that the works to be maintained or repaired are works to which s 13 applies, a statement whether the authority propose to exercise its right of recovery against the owner or against the occupier, and a sufficient indication of the effect of s 13: see s 13(2).
- 10 As to the meaning of 'writing' see PARA 22 note 1.
- 11 The Magistrates' Courts Act 1980 applies to the proceedings on the complaint; and any party to them who is aggrieved by the court's decision may appeal to the Crown Court: Coast Protection Act 1949 s 13(7) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt I); Interpretation Act 1978 s 17(2)(a). As to procedure before the magistrates' court and on such appeals see **MAGISTRATES**.
- 12 Coast Protection Act 1949 s 13(3)(a).
- 13 Coast Protection Act 1949 s 13(3)(b).
- 14 Coast Protection Act 1949 s 13(3)(c). Subject to s 13(7) (see note 11), the court's determination that any work is not work of repair or maintenance is conclusive, as respects any right of recovery under s 13, of the matter of the complaint: s 13(8). See further *Dunbar v Edinburgh Corpn* 1961 SLT 45.
- 15 Coast Protection Act 1949 s 13(3)(d).
- 16 Coast Protection Act 1949 s 13(4).
- 17 Coast Protection Act 1949 s 13(5)(a).
- 18 Coast Protection Act 1949 s 13(5)(b).
- 19 Coast Protection Act 1949 s 13(5)(c). See also *Dunbar v Edinburgh Corpn* 1961 SLT 45.
- 20 Coast Protection Act 1949 s 13(5)(d).
- 21 Ie the Coast Protection Act 1949 ss 6-8: see PARAS 524-526.
- 22 Ie the Coast Protection Act 1949 ss 7, 10, 11: see PARAS 540-544.
- 23 Coast Protection Act 1949 s 13(6). The modifications are as follows: (1) s 6(1), (2) does not apply, but the scheme must specify the work of maintenance or repair for which provision is made (s 13(6)(a)); (2) in s 7(3): (a) references to that work are to be substituted for references to the work or works provided for by the scheme (s 13(6)(b)); and (b) the reference to the maintenance of the works provided for by the scheme is to be construed as a reference to the maintenance of the works for whose maintenance or repair provision is made by the scheme (s 13(6)(c)); and (3) the grounds on which objection may be made to the scheme are that any of the work is unnecessary or that any provision of the scheme as to charges is inequitable or unduly onerous, and no other grounds, and the reference in s 8(1) to s 8(3) is to be construed accordingly (s 13(6)(d)).

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### (iii) Compensation

#### 530. Claims for compensation.

Where on a claim being made<sup>1</sup> it is shown that the value of an interest<sup>2</sup> of any person<sup>3</sup> in land has been depreciated, or that any person has suffered damage by being disturbed in his enjoyment of land, in consequence of the carrying out of coast protection work<sup>4</sup> by a coast protection authority in the exercise of its coast protection powers<sup>5</sup>, the coast protection authority must pay to that person compensation<sup>6</sup> equal to the amount of the depreciation or damage<sup>7</sup>. However, a person is not entitled to such compensation unless the act or omission causing the depreciation or disturbance would have been actionable at his suit if it had been done or omitted otherwise than in the exercise of statutory powers<sup>8</sup>.

Any dispute arising under such a claim must be determined by arbitration<sup>9</sup>.

1 A claim for compensation must be made to the coast protection authority within 12 months of the completion of the work giving rise to the claim: see the Coast Protection Act 1949 s 19(2). As to the meaning of 'coast protection authority' see PARA 508. As to the meaning of 'month' see PARA 23 note 10.

2 'Interest' includes any estate in or right over land: Coast Protection Act 1949 s 19(5). As to the meaning of 'land' see PARA 502 note 3. Interest includes a tenancy agreement for three years for a beach kiosk: *Lakeman v Bournemouth Corp* (1956) 8 P & CR 265, Lands Tribunal. As to compensation where the interest is subject to a mortgage see PARA 531.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to the meaning of 'coast protection work' see PARA 505 note 9.

5 Coast Protection Act 1949 s 19(1)(a). The powers concerned are those conferred under the Coast Protection Act 1949 Pt I (ss 1-33).

6 This does not refer to compensation payable on the compulsory acquisition of land: *Cooper and Cooper v Smallburgh RDC* (1958) 9 P & CR 396, Lands Tribunal.

7 Coast Protection Act 1949 s 19(1). See *St Margaret's Bay Hotel Ltd v Dover RDC* (1960) 12 P & CR 239, Lands Tribunal (value of land acquired for coast protection work); and *Biard v Deal Corp* (1961) 12 P & CR 398, Lands Tribunal (damages for disturbance). As to the method of assessing compensation see *Re Coast Protection Act 1949* (1955) 106 L Jo 108, Lands Tribunal.

8 Coast Protection Act 1949 s 19(1) proviso. A claimant entitled to possession of the land is not prevented by s 19(1) proviso from obtaining compensation: *Lakeman v Bournemouth Corp* (1956) 8 P & CR 265 at 270-271, Lands Tribunal.

9 Coast Protection Act 1949 s 19(3). As to arbitration see PARA 532.

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### **531. Compensation where interest is subject to mortgage.**

Where any interest<sup>1</sup> in land<sup>2</sup> is subject to a mortgage<sup>3</sup>:

1190 (1) any compensation<sup>4</sup> which is payable in respect of depreciation of the value of that interest must be assessed as if the interest were not subject to the mortgage<sup>5</sup>;

1191 (2) a claim for compensation may be made by any mortgagee<sup>6</sup> of the interest, but without prejudice to the making of a claim by the person<sup>7</sup> entitled to the interest<sup>8</sup>;

1192 (3) a mortgagee is not entitled to claim compensation in respect of his interest as such<sup>9</sup>; and

1193 (4) the compensation payable in respect of the interest subject to the mortgage must be paid by the coast protection authority<sup>10</sup> to the mortgagee or, where there is more than one mortgagee, to the first mortgagee, and must in either case be applied by him as if it were proceeds of sale<sup>11</sup>.

1 As to the meaning of 'interest' see PARA 530 note 2.

2 As to the meaning of 'land' see PARA 502 note 3.

3 As to the meaning of 'mortgage' see PARA 518 note 6.

4 ie under the Coast Protection Act 1949 s 19: see PARAS 530, 548.

5 Coast Protection Act 1949 s 19(4)(a).

6 As to the meaning of 'mortgagee' see PARA 518 note 6.

7 As to the meaning of 'person' see PARA 13 note 29.

8 Coast Protection Act 1949 s 19(4)(b).

9 Coast Protection Act 1949 s 19(4)(c).

10 As to the meaning of 'coast protection authority' see PARA 508.

11 Coast Protection Act 1949 s 19(4)(d). As to the application by a mortgagee of the proceeds of sale see **MORTGAGE** vol 77 (2010) PARA 471 et seq.

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### **532. Arbitration.**

In arbitrations as to any question which is expressly required<sup>1</sup> to be determined by arbitration, the reference is to the Lands Tribunal<sup>2</sup>. The rules for valuation on a compulsory acquisition<sup>3</sup> are applied for the purposes of any such arbitration<sup>4</sup>.

1     le under the Coast Protection Act 1949 Pt I (ss 1-33). As to such requirements see s 7(7) (PARA 540); s 14(2) (PARA 519); s 19(3) (PARA 530).

2     Coast Protection Act 1949 s 24(1). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

3     le the Land Compensation Act 1961 s 5 rr (2)-(4): see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 754, 760, 789.

4     Coast Protection Act 1949 s 24(2); Interpretation Act 1978 s 17(2)(a). As to the costs of arbitration see the Lands Tribunal Act 1949 s 3 (**COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 205-206) and the Land Compensation Act 1961 s 4 (**COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 716-717, 746), which are applied for these purposes: see the Coast Protection Act 1949 s 24(3); and the Interpretation Act 1978 s 17(2) (a).

### **UPDATE**

### **532 Arbitration**

TEXT AND NOTE 2--Reference to the Lands Tribunal is now to the Upper Tribunal: Coast Protection Act 1949 s 24(1) (amended by SI 2009/1307).

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#### **(iv) Coastal Works Detrimental to Navigation**

##### **533. Restrictions on coastal works detrimental to navigation.**

Except in those cases where consent is not required<sup>1</sup>, no person<sup>2</sup> may, without the written consent<sup>3</sup> of the Secretary of State for Transport<sup>4</sup>, carry out any of the following operations:

- 1194 (1) construct, alter or improve any works on, under or over any part of the seashore<sup>5</sup> lying below the level of mean high water springs<sup>6</sup>;
- 1195 (2) deposit any object or any materials<sup>7</sup> on any such part of the seashore<sup>8</sup>; or
- 1196 (3) remove any object or any materials from any part of the seashore lying below the level of mean low water springs<sup>9</sup>,

if the operation (whether when being carried out or subsequently) causes or is likely to result in obstruction or danger to navigation<sup>10</sup>.

Such restrictions are not, however, applicable in relation to authorised work on the construction of the Channel Tunnel<sup>11</sup>; and in addition no person may carry out any works within a certain distance<sup>12</sup> of the tunnel system unless consent has been given by the persons responsible for the construction and/or operation of the tunnel<sup>13</sup>. The Secretary of State may make regulations exempting certain operations from the restriction imposed by the above provisions<sup>14</sup> where any harbour authority has power to license or otherwise regulate such operations<sup>15</sup>.

1    Ie where the provisions of the Coast Protection Act 1949 s 35 apply: see PARA 535.

2    As to the meaning of 'person' see PARA 13 note 29.

3    As to such consent see PARA 534. As to the meaning of 'written' see PARA 22 note 1. As to the enforcement of these provisions see PARA 537.

4    As to the Secretary of State for Transport see PARA 506 note 3.

5    As to the meaning of 'seashore' see PARA 505 note 9.

6    Coast Protection Act 1949 s 34(1)(a) (amended by the Merchant Shipping Act 1988 s 36(1), (2)(a)).

7    As to the meaning of 'materials' see PARA 513 note 2.

8    Coast Protection Act 1949 s 34(1)(b).

9    Coast Protection Act 1949 s 34(1)(c) (amended by the Merchant Shipping Act 1988 s 36(1), (2)(c)).

10   Coast Protection Act 1949 s 34(1) (amended by the Merchant Shipping Act 1988 s 36(1), (3)). Any reference in the Coast Protection Act 1949 s 34(1) or s 34(3) (see PARA 534) to an operation being likely to result in obstruction or danger to navigation is in the case of an operation falling within s 34(1)(a) (see head (1) in the text) to be construed as including a reference to its being likely to result in obstruction or danger to navigation by reason of any use intended to be made of the works in question when constructed, altered or improved: s 34(3A) (added by the Merchant Shipping Act 1988 s 36(1), (3)). 'Is caused or is likely to result' is to be construed no more widely than if it read 'is caused or is likely to be caused': *Harwich Harbour Conservancy Board v Secretary of State for the Environment, East Suffolk County Council and Stour River Estate* [1974] 1 Lloyd's Rep 140 at 147 per MacKenna J. Nothing in the Highways Act 1980 authorises the carrying out of any operations in contravention of this provision: see s 336; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004

Reissue) PARA 37. The Coast Protection Act 1949 Pt II (ss 34-36A), except s 34(1)(b) (see head (2) in the text), applies to any part of the sea bed in a designated area as it applies to the seashore: see the Continental Shelf Act 1964 s 4(1); and PARA 539. As to further restrictions on operations affecting the seashore for the safety of navigation see the Food and Environment Protection Act 1985 Pt II (ss 5-15); and **SHIPPING AND NAVIGATION** vol 43(2) (Reissue) PARA 1310 et seq.

11 Channel Tunnel Act 1987 s 44(3).

12 le 150 metres of the centre line of the tunnel system: Channel Tunnel Act 1987 s 44(4).

13 Channel Tunnel Act 1987 s 44(4). Consent is also not required in relation to certain works authorised under the Thames Barrier and Flood Prevention Act 1972 s 56 (sea defence works): see **LONDON GOVERNMENT**.

14 le the restriction imposed by the Coast Protection Act 1949 s 34(1)(a)-(c): see heads (1)-(3) in the text.

15 See the Merchant Shipping Act 1988 s 37(1); and PARA 536.

## **UPDATE**

### **533-539 Coastal Works Detrimental to Navigation**

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.



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### **534. Consent to coastal works.**

As a condition of considering an application for consent to coastal works detrimental to navigation<sup>1</sup>, the Secretary of State for Transport<sup>2</sup> may require to be furnished with such plans and particulars of the proposed operation as he considers necessary<sup>3</sup>. On receipt of an application he may cause notice of it, and of the time within which and the manner in which objections to it may be made, to be published in such manner as he considers appropriate for informing persons<sup>4</sup> affected by it; and before granting consent may, if he thinks fit, direct a local inquiry<sup>5</sup> to be held<sup>6</sup>.

If the Secretary of State is of opinion that the operation will cause or is likely to result in obstruction or danger to navigation<sup>7</sup> he must either refuse consent or give consent subject to such conditions as he thinks fit, having regard to the nature and extent of the obstruction or danger which it appears to him would otherwise be caused or be likely to result<sup>8</sup>. Any such condition to which a consent is made subject either remains in force for a specified time or remains in force without limit of time<sup>9</sup>, and binds (in addition to the person to whom the consent is given) any other person who for the time being owns, occupies or enjoys the use of the works in question<sup>10</sup>. Where the condition relates to the provision of any lights, signals or other aids to navigation<sup>11</sup>, or to the stationing of guard ships in the vicinity of the works in question or to the taking of any other measures for the purpose of, or in connection with, controlling the movements of ships in the vicinity of those works<sup>12</sup>, then the condition may be varied by the Secretary of State in the interests of the safety of navigation<sup>13</sup>. The Secretary of State may also revoke any such conditions if he thinks fit<sup>14</sup>.

Consent may be given so as to continue in force, unless renewed, only if the operation is begun or completed within such period as may be specified in the consent; and any renewal of such a consent may be similarly limited<sup>15</sup>.

1    Ie an application for consent under the Coast Protection Act 1949 s 34(1): see PARA 533.

2    As to the Secretary of State for Transport see PARA 506 note 3.

3    Coast Protection Act 1949 s 34(2). As to works which do not require consent see PARA 535.

4    As to the meaning of 'person' see PARA 13 note 29.

5    As to local inquiries see PARA 506.

6    Coast Protection Act 1949 s 34(2).

7    As to the meaning of 'will cause or is likely to result in obstruction or danger to navigation' see PARA 533 note 10.

8    Coast Protection Act 1949 s 34(3). It is an offence to fail to comply with any such condition: see PARA 537.

9    Coast Protection Act 1949 s 34(4A)(a) (s 34(4A) added by the Merchant Shipping Act 1988 s 36(1), (4)).

10   Coast Protection Act 1949 s 34(4A)(b) (as added: see note 9).

11   Coast Protection Act 1949 s 34(4A)(c)(i) (as added: see note 9).

12   Coast Protection Act 1949 s 34(4A)(c)(ii) (as added: see note 9).

13 Coast Protection Act 1949 s 34(4A)(c) (as added: see note 9). Such a variation may be made whether or not the operation has been completed, and the condition may be varied in such a manner as the Secretary of State thinks fit for the purpose of enhancing the effectiveness of any such aids or measures: s 34(4A)(c) (as so added).

14 Coast Protection Act 1949 s 34(4A)(d) (as added: see note 9).

15 Coast Protection Act 1949 s 34(4).

## **UPDATE**

### **533-539 Coastal Works Detrimental to Navigation**

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.

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### **535. Coastal works not requiring consent.**

The following operations are excepted from the requirement for consent<sup>1</sup>:

- 1197 (1) anything done on, under or over a part of the seashore<sup>2</sup> lying within any area closed by a lock or other artificial means against the regular action of the tide<sup>3</sup>;
- 1198 (2) the carrying out of any coast protection work<sup>4</sup> approved by the Secretary of State<sup>5</sup>;
- 1199 (3) the carrying out of any dredging operations<sup>6</sup> authorised by any local Act<sup>7</sup> in accordance with its provisions<sup>8</sup>;
- 1200 (4) the construction, alteration or improvement of any works more than 15.24 metres below the surface<sup>9</sup> in connection with the getting of minerals<sup>10</sup>;
- 1201 (5) any work to which the consent is required by virtue of any local Act, or by virtue of such an Act and any notice given and published<sup>11</sup> under the Harbours Transfer Act 1862<sup>12</sup>;
- 1202 (6) any work which a conservancy, harbour or navigation authority<sup>13</sup> is empowered to carry out for removing vessels sunk or stranded or of anything causing or likely to cause obstruction or danger to navigation<sup>14</sup>;
- 1203 (7) any work carried out by, or in accordance with a licence or permission granted by, such an authority as is mentioned in head (6) above in pursuance of any Act, where the Act requires that, if the approval of the Secretary of State for Transport<sup>15</sup> is not previously obtained to the work, other conditions must be complied with<sup>16</sup>, and such approval has been so obtained or those conditions are complied with<sup>17</sup>;
- 1204 (8) any operations comprised in offshore generating activities<sup>18</sup> carried out in accordance with a consent under the Electricity Act 1989<sup>19</sup> granted after<sup>20</sup> 1 October 2005<sup>21</sup>;
- 1205 (9) operations authorised by an order<sup>22</sup> under the Transport and Works Act 1992<sup>23</sup>;
- 1206 (10) operations authorised by an order<sup>24</sup> under the Harbours Act 1964<sup>25</sup>.

1    le consent under the Coast Protection Act 1949 s 34(1): see PARA 533.

2    As to the meaning of 'seashore' see PARA 505 note 9.

3    Coast Protection Act 1949 s 35(1)(a).

4    As to the meaning of 'coast protection work' see PARA 505 note 9.

5    Coast Protection Act 1949 s 35(1)(b). Any coast protection work is deemed to have been so approved: (1) if an objection to the proposal to carry it out was determined under the provisions of the Coast Protection Act 1949 Pt I (ss 1-33) (see s 5; and PARA 523), and the work does not contravene any directions given or modifications or conditions imposed by the Secretary of State or the Welsh Ministers under those provisions, or if the work is carried out in accordance with a works scheme (see PARAS 524-526) (s 35(2)(a)); (2) if the Secretary of State or the Welsh Ministers has made or agreed to make a grant under Pt I (see ss 20, 21; and PARAS 551-555) towards expenditure incurred, or to be incurred, on the work or has consented to the borrowing of money by a coast protection authority for the purpose of defraying or contributing to that expenditure (s 35(2)(b)). As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the transfer of functions to the Welsh Ministers under the provisions

mentioned above see the notes to the paragraphs referred to above. As to the meaning of 'coast protection authority' see PARA 508.

6 Such operations include the deposit of dredged materials: Coast Protection Act 1949 s 35(1)(c). As to the meaning of 'materials' see PARA 513 note 2.

7 As to the meaning of 'local Act' see PARA 504 note 3.

8 Coast Protection Act 1949 s 35(1)(c).

9 'Surface', in relation to land covered by water, means the surface of the land: Coast Protection Act 1949 s 49(1). As to the meaning of 'land' see PARA 502 note 3.

10 Coast Protection Act 1949 s 35(1)(d); Units of Measurement Regulations 1995, SI 1995/1804, reg 3. As to the meaning of 'minerals' see PARA 513 note 2.

11 Ie under the Harbours Transfer Act 1862 s 9 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 603), which enabled the Admiralty by notice to require that any harbour, port, bay, estuary or navigable river in, on or adjoining which there was a naval dockyard or station should be excepted from the operation of s 8 by which powers for the protection of navigation under local Acts were transferred from the Admiralty to the Board of Trade.

12 Coast Protection Act 1949 s 35(1)(e).

13 As to the meanings of 'conservancy authority', 'harbour authority' and 'navigation authority' see PARA 505 note 9.

14 Coast Protection Act 1949 s 35(1)(f).

15 As to the Secretary of State for Transport see PARA 506 note 3.

16 Coast Protection Act 1949 s 35(1)(g)(i).

17 Coast Protection Act 1949 s 35(1)(g)(ii).

18 'Offshore generating activities' has the same meaning as in the Electricity Act 1989 s 36B (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1251): Coast Protection Act 1949 s 35(5) (added by the Energy Act 2004 s 99(5)).

19 Ie under the Electricity Act 1989 s 36: see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1249.

20 Ie the date of commencement of the Energy Act 2004 s 99.

21 Coast Protection Act 1949 s 35(1)(ga) (added by the Energy Act 2004 s 99(4); and in force except in so far as it relates to the obligation upon the Secretary of State, arising under the Electricity Act 1989, s 36B(3), (4), to have regard to how powers under the Energy Act 2004, ss 95, 96, 100, Pt 2 Ch 3 have been or will be exercised; in force for remaining purposes as from a day to be appointed. At the date at which this volume states the law no such day had been appointed).

22 Ie an order under the Transport and Works Act 1992 s 1 or 3: see PARA 801; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

23 Coast Protection Act 1949 s 35(1)(h) (added by the Transport and Works Act 1992 s 19).

24 Ie an order under the Harbours Act 1964 s 14 or 16: see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARAS 628-630, 644-646.

25 Coast Protection Act 1949 s 35(1)(i) (added by the Transport and Works Act 1992 s 63(3)).

## UPDATE

### 533-539 Coastal Works Detrimental to Navigation

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.

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### **536. Licensing of tidal works by harbour authorities.**

Where it appears to the Secretary of State<sup>1</sup> that any harbour authority<sup>2</sup> has, by virtue of any statutory provision<sup>3</sup>, power to license or otherwise regulate operations consisting of coastal works detrimental to navigation<sup>4</sup> (the 'relevant power'), and he considers it appropriate to do so, he may make regulations<sup>5</sup> providing for the statutory restrictions<sup>6</sup> not to apply to operations of that description in relation to which the relevant power is exercisable and which are carried out within a specified area, or specified areas, falling within the jurisdiction of that harbour authority (the 'prescribed operations')<sup>7</sup>. Where:

- 1207 (1) any such regulations are in force in relation to a harbour authority<sup>8</sup>; and
- 1208 (2) the authority has determined an application made to it for the grant, in the exercise of the relevant power, of a licence to carry out a prescribed operation<sup>9</sup>; and
- 1209 (3) no appeal has been brought, whether under the regulations or otherwise, in respect of the authority's determination of the application<sup>10</sup>; but
- 1210 (4) the Secretary of State considers that it would be appropriate in the interests of the safety of navigation for the application to be redetermined by him<sup>11</sup>,

he may, within the period of 60 days beginning with the date of the authority's determination, serve a notice on the authority requiring it to furnish him with written<sup>12</sup> particulars of its determination, and with any documents in its possession relating to the application, in order that he may redetermine the application<sup>13</sup>. Where he serves such a notice, he must serve a copy of it on the applicant and must advertise, in such manner as he thinks fit, the fact that the application is to be redetermined by him<sup>14</sup>; and the operation of any licence granted by the authority in pursuance of the application is suspended until such time, if any, as the authority's decision to grant it is affirmed by the Secretary of State<sup>15</sup>.

When redetermining any application, the Secretary of State must have regard to any representations made to him by persons appearing to him to be likely to be affected by the operation to which the application relates, provided that they were made to him within the period of 30 days beginning with the date, or the latest date, of the publication of any advertisement published<sup>16</sup> by him<sup>17</sup>. Where the Secretary of State redetermines an application, he may, according to the circumstances of the case:

- 1211 (a) direct the harbour authority<sup>18</sup> to grant either a licence free from conditions, or a licence subject to such conditions as are specified in the direction<sup>19</sup>;
- 1212 (b) direct that authority to cancel any licence granted by it in pursuance of the application<sup>20</sup>; or
- 1213 (c) affirm the harbour authority's determination of the application<sup>21</sup>.

On each occasion when a harbour authority grants a licence in the exercise of the relevant power, whether or not directed to do so under the above provisions, it must, before the operation to which the licence relates has been begun, furnish the Hydrographer of the Navy with written particulars of the operation and with a plan showing where it is to be carried out<sup>22</sup>; and once the operation has been carried out, with a notification of that fact, and with such

plans and additional information relating to the completed operation as he may require for the purpose of determining whether, and if so what, changes should be made to any chart or other publication produced under his superintendence<sup>23</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the meaning of 'harbour authority' see PARA 505 note 9.

3 'Statutory provision' means any provision contained in or having effect under any enactment: Merchant Shipping Act 1988 s 57(2). As to the meaning of 'enactment' see PARA 14 note 31.

4 The operations of any description falling within any of the Coast Protection Act 1949 s 34(1)(a)-(c): see PARA 533.

5 The Secretary of State's power to make any such regulations with respect to any harbour authority is exercisable by him either on the application of the harbour authority, or of his own motion after consulting the authority (Merchant Shipping Act 1988 s 37(8)); and is exercisable by statutory instrument subject to annulment by a resolution of either House of Parliament: s 53(1) (repealed with savings by the Merchant Shipping Act 1995 s 314(1), Sch 12). Such regulations may make different provision for different classes or descriptions of ships and for different circumstances and make such transitional, incidental or supplementary provision as appears to the Secretary of State to be necessary or expedient: Merchant Shipping Act 1988 s 53(2) (as so repealed). Regulations so made by the Secretary of State with respect to any harbour authority may, in particular, make provision:

- 15 (1) in connection with the exercise by the authority of the relevant power in relation to the prescribed operations for any matter for which provision is made by the Coast Protection Act 1949 s 34(2)-(4A) (see PARA 534) and for any provision of the regulations so made, or made in pursuance of any of heads (2)-(7) below to have effect in addition to, or in substitution for, any other statutory provision which otherwise has effect in that connection (Merchant Shipping Act 1988 s 37(2)(a));
- 16 (2) requiring the authority to advertise in such manner as may be specified in the regulations any application made to it for the grant, in the exercise of the relevant power, of a licence to carry out a prescribed operation, and the grant of any such licence and any conditions subject to which it has been granted, and to give to the Secretary of State such notice of any of those matters as may be so specified (s 37(2)(b));
- 17 (3) enabling representations to be made with respect to any such application in such manner as may be specified in the regulations (s 37(2)(c));
- 18 (4) requiring the authority, when determining any such application, to have regard to any representations made in accordance with the regulations so far as touching on any consideration material to the authority's decision on the application (s 37(2)(d));
- 19 (5) enabling an appeal to the Secretary of State to be brought, by such persons, on such grounds and in such manner as may be specified in the regulations, against the grant or refusal of any such licence, or any conditions imposed on the grant of any such licence (s 37(2)(e));
- 20 (6) for the operation of any such licence to be suspended during the period during which such an appeal may be brought and, if such an appeal is brought by a person other than the applicant, until such time, if any, as the authority's decision on the application is affirmed by the Secretary of State (s 37(2)(f));
- 21 (7) authorising the Secretary of State on such an appeal to do any of the things mentioned in s 37(6)(a)-(c) (see heads (a)-(c) in the text) (s 37(2)(g));
- 22 (8) for any statutory provision having effect in relation to the authority to have effect subject to such modifications as appear to the Secretary of State to be necessary or expedient for the purpose of making provision for any matter for which provision may be made by virtue of any of heads (1)-(7) above, or in consequence of any provision of the regulations made in pursuance of any of those heads (s 37(2)(h)).

For these purposes, 'licence' includes a consent or permission; and references to the grant of a licence accordingly include references to the giving of a consent or permission: s 37(11). 'Modifications' includes additions, omissions and alterations: s 57(2). As to the meaning of 'person' see PARA 13 note 29.

- 6     le the restrictions contained in the Coast Protection Act 1949 s 34: see PARAS 533-534.
- 7     Merchant Shipping Act 1988 s 37(1). At the date at which this volume states the law no such regulations had been made.
- 8     Merchant Shipping Act 1988 s 37(3)(a).
- 9     Merchant Shipping Act 1988 s 37(3)(b).
- 10    Merchant Shipping Act 1988 s 37(3)(c).
- 11    Merchant Shipping Act 1988 s 37(3)(d).
- 12    As to the meaning of 'written' see PARA 22 note 1.
- 13    Merchant Shipping Act 1988 s 37(3).
- 14    Merchant Shipping Act 1988 s 37(4)(a).
- 15    Merchant Shipping Act 1988 s 37(4)(b).
- 16    le in pursuance of the Merchant Shipping Act 1988 s 37(4)(a): see the text to note 14.
- 17    Merchant Shipping Act 1988 s 37(5).
- 18    It is the duty of any harbour authority to whom the Secretary of State gives any direction under or by virtue of the Merchant Shipping Act 1988 s 37 to give effect to the direction: s 37(10).
- 19    Merchant Shipping Act 1988 s 37(6)(a). Any direction so given must be a direction requiring the authority in question to grant such a licence either in the form in which it was originally applied for by the applicant (s 37(7)(a)), or in that form but subject to such modifications as are specified in the direction, as the Secretary of State thinks fit (s 37(7)(b)). However, where the Secretary of State proposes to specify any modifications which appear to him to be capable of resulting in any substantial interference with navigation, he must take such steps as appear to him to be reasonably practicable for informing persons likely to be concerned (s 37(7)(i)), and must not so specify those modifications unless there has elapsed such period for consideration of, and comment upon, them as he thinks reasonable (s 37(7)(ii)).
- 20    Merchant Shipping Act 1988 s 37(6)(b). See also note 18.
- 21    Merchant Shipping Act 1988 s 37(6)(c).
- 22    Merchant Shipping Act 1988 s 37(9)(a).
- 23    Merchant Shipping Act 1988 s 37(9)(b).

## UPDATE

### 533-539 Coastal Works Detrimental to Navigation

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/8. COAST PROTECTION/(3) COAST PROTECTION WORK AND SCHEMES/(iv) Coastal Works Detrimental to Navigation/537. Enforcement of restrictions on coastal works.

### **537. Enforcement of restrictions on coastal works.**

Any person<sup>1</sup> who:

- 1214 (1) carries out any operation in contravention of the statutory restrictions<sup>2</sup> on coastal works detrimental to navigation<sup>3</sup>; or
- 1215 (2) fails to comply with any conditions subject to which any consent<sup>4</sup> of the Secretary of State for Transport<sup>5</sup> has been given<sup>6</sup>,

is guilty of an offence<sup>7</sup>. Where, however, a person is bound by any condition subject to which any consent by the Secretary of State for Transport has been given<sup>8</sup> but is not the person to whom that consent was given, then he is not taken to have failed to comply with the condition unless: (a) he has been served by the Secretary of State with a notice<sup>9</sup> requiring him to comply with the condition within such period (not being less than 30 days) as may be specified in the notice<sup>10</sup>; and (b) he has failed to comply with the condition within that period<sup>11</sup>.

Without prejudice to any proceedings for such an offence, where any person has constructed, altered or improved any works or deposited any object or materials<sup>12</sup> on the seashore<sup>13</sup> in contravention of the statutory restrictions, or has failed to comply with any conditions subject to which any consent has been given, the Secretary of State for Transport may serve a notice on him requiring him, within a specified period not being less than 30 days, to remove the works or to make specified alterations to them or to remove the object or materials, as the case may be<sup>14</sup>. However, if it appears to the Secretary of State urgently necessary to do so<sup>15</sup>, or if within the specified period the person upon whom the notice is served fails to comply with it<sup>16</sup>, the Secretary of State may himself remove or alter the works or remove the object or materials<sup>17</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 Ie in contravention of the provisions of the Coast Protection Act 1949 s 34(1): see PARA 533.

3 Coast Protection Act 1949 s 36(1)(a).

4 Ie under the Coast Protection Act 1949 s 34: see PARA 534.

5 As to the Secretary of State for Transport see PARA 506 note 3.

6 Coast Protection Act 1949 s 36(1)(b).

7 Coast Protection Act 1949 s 36(1). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see s 43 (amended by virtue of the Criminal Justice Act 1982 ss 35, 37, 38, 46). As to the standard scale see PARA 141 note 18. A harbour authority in England or Wales has power to enforce the provisions of s 34: s 36(5). As to the meaning of 'harbour authority' see PARA 505 note 9.

8 Ie under the Coast Protection Act 1949 s 34: see PARA 534.

9 As to the service of documents see PARA 22.

10 Coast Protection Act 1949 s 36(1A)(a) (s 36(1A) added by the Merchant Shipping Act 1988 s 36(1), (5)(a)).

11 Coast Protection Act 1949 s 36(1A)(b) (as added: see note 10).

12 As to the meaning of 'materials' see PARA 513 note 2.

13 As to the meaning of 'seashore' see PARA 505 note 9.

14 Coast Protection Act 1949 s 36(2).

15 See the Coast Protection Act 1949 s 36(2).

16 See the Coast Protection Act 1949 s 36(3).

17 See the Coast Protection Act 1949 s 36(2), (3). Where under s 36(2) or s 36(3) the Secretary of State himself so acts, he is entitled to recover his expenses of doing so, as certified by him, from the person on whom the notice was served under s 36(2) or, if no notice was served, from the person by whom the works were constructed, altered or improved or the object was, or materials were, deposited: s 36(4) (amended by the Merchant Shipping Act 1988 s 36(1), (5)(c)). As to the power of the Secretary of State to impose safety requirements in cases of emergency see PARA 538.

## **UPDATE**

### **533-539 Coastal Works Detrimental to Navigation**

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/8. COAST PROTECTION/(3) COAST PROTECTION WORK AND SCHEMES/(iv) Coastal Works Detrimental to Navigation/538. Imposition of safety requirements in cases of emergency.

### **538. Imposition of safety requirements in cases of emergency.**

Where at any time after the Secretary of State for Transport<sup>1</sup> has given consent for an operation to construct, alter or improve any works on, under or over any part of the seashore<sup>2</sup> lying below the level of mean high water springs<sup>3</sup> (the 'relevant consent'), it appears to him:

- 1216 (1) that any danger to navigation has arisen by reason of any substantial damage to any works to which that consent relates<sup>4</sup>, or any other substantial and unforeseen change in the state or position of any such works<sup>5</sup>; and
- 1217 (2) that it is urgently necessary to do so in the interests of the safety of navigation<sup>6</sup>,

he may, by notice served on the person<sup>7</sup> to whom the consent was given<sup>8</sup>, impose on that person such requirements as he thinks fit with respect to any of the relevant matters<sup>9</sup>. Those matters are: (a) the provision on, or in the vicinity of, the works in question of any lights, signals or other aids to navigation<sup>10</sup>; and (b) the stationing of guard ships in the vicinity of those works<sup>11</sup>.

Where the person on whom a notice is so served fails to comply with any requirements of the notice within the period of 24 hours beginning with the time when it is served on him or as soon after the end of that period as is reasonably practicable, the Secretary of State may make such arrangements as he thinks fit for the purpose of securing that those requirements are implemented<sup>12</sup>.

Once the requirements of the notice have been complied with by the person on whom it was served, or implemented in accordance with arrangements made by the Secretary of State, those requirements are treated for the statutory purposes<sup>13</sup> as conditions subject to which the relevant consent was given<sup>14</sup>.

1 As to the Secretary of State for Transport see PARA 506 note 3.

2 As to the meaning of 'seashore' see PARA 505 note 9.

3 I.e. an operation falling within the Coast Protection Act 1949 s 34(1)(a): see PARA 533. As to the giving of consent see PARA 534.

4 Coast Protection Act 1949 s 36A(1)(a)(i) (s 36A added by the Merchant Shipping Act 1988 s 36(1), (6)).

5 Coast Protection Act 1949 s 36A(1)(a)(ii) (as added: see note 4).

6 Coast Protection Act 1949 s 36A(1)(b) (as added: see note 4).

7 As to the meaning of 'person' see PARA 13 note 29.

8 Such a notice may be served by the Secretary of State whether or not the operation in question has been completed, or any condition was imposed by him on giving the relevant consent with respect to any of the matters referred to in the Coast Protection Act 1949 s 36A(2) (see heads (a)-(b) in the text): s 36A(8) (as added: see note 4). As to the service of documents see PARA 22.

9 Coast Protection Act 1949 s 36A(1) (as added: see note 4).

10 Coast Protection Act 1949 s 36A(2)(a) (as added: see note 4).

11 Coast Protection Act 1949 s 36A(2)(b) (as added: see note 4).

12 Coast Protection Act 1949 s 36A(3) (as added: see note 4). Where under s 36A(3) the Secretary of State makes any such arrangements, he is entitled to recover the cost, as certified by him, of making those arrangements from one or more of the following, ie: (1) the person to whom the relevant consent was given (s 36A(4)(a) (as so added)); and (2) any other person or persons who is or are, in accordance with s 34(4A)(b) (see PARA 534), bound by any condition subject to which that consent was given (s 36A(4)(b) (as so added)), as he thinks fit (s 36A(4) (as so added)).

13 Ie for the purposes of the Coast Protection Act 1949 Pt II (ss 34-36A).

14 Coast Protection Act 1949 s 36A(5) (as added: see note 4). However, s 34(4A)(a), (d) (duration of conditions and power to revoke conditions: see PARA 534) does not apply to any such requirements; but if it appears to the Secretary of State (whether on the application of any person or otherwise) that the circumstances giving rise to the urgent necessity for the imposition of the requirements no longer exist, he must revoke them by notice served on the person to whom the relevant consent was given: s 36A(6) (as so added). Where the Secretary of State has served a notice under s 36A(1) (see the text to notes 1-9) in respect of any particular circumstances, s 36A(5) does not preclude him from serving a further notice under s 36A(1) in respect of those circumstances: s 36A(7) (as so added).

## **UPDATE**

### **533-539 Coastal Works Detrimental to Navigation**

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/8. COAST PROTECTION/(3) COAST PROTECTION WORK AND SCHEMES/(iv) Coastal Works Detrimental to Navigation/539. Application of restrictions to the sea bed.

### **539. Application of restrictions to the sea bed.**

The statutory restrictions on works detrimental to navigation<sup>1</sup> (with the exception of the prohibition on the deposit of any object or materials<sup>2</sup>) are applied to any part of the sea bed which is in an area designated by Order in Council under the Continental Shelf Act 1964<sup>3</sup> as they apply to the seashore<sup>4</sup>. Any person<sup>5</sup> who is guilty of an offence in relation to those restrictions<sup>6</sup> as so applied is liable to an increased penalty<sup>7</sup>.

1    Ie the restrictions imposed by the Coast Protection Act 1949 Pt II (ss 34-36A): see PARA 533.

2    Ie the prohibition under the Coast Protection Act 1949 s 34(1)(b): see PARA 533. As to deposits in the sea, see, however, the Food and Environment Protection Act 1985 Pt II (ss 5-15); and **SHIPPING AND NAVIGATION** vol 43(2) (Reissue) PARA 1310 et seq.

3    Ie designated by Order in Council under the Continental Shelf Act 1964 s 1(7): see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1636.

4    Continental Shelf Act 1964 s 4(1). The Coast Protection Act 1949 s 46 (local inquiries: see PARA 506) extends to any matter arising under these provisions: Continental Shelf Act 1964 s 4(1).

5    As to the meaning of 'person' see PARA 13 note 29.

6    Ie an offence under the Coast Protection Act 1949 Pt II (ss 34-36A). As to such offences see s 36(1); and PARA 537.

7    Any person guilty of an offence under the Coast Protection Act 1949 Pt II as applied by the Continental Shelf Act 1964 s 4 is liable, on summary conviction to a fine not exceeding the prescribed sum, and on conviction on indictment to a fine of any amount: s 4(2) (amended by virtue of the Criminal Law Act 1977 s 32(1); the Magistrates' Courts Act 1980 s 32(2)). As to the meaning of 'prescribed sum' see PARA 169 note 20.

## **UPDATE**

### **533-539 Coastal Works Detrimental to Navigation**

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/8. COAST PROTECTION/(3) COAST PROTECTION WORK AND SCHEMES/(iv) Coastal Works Detrimental to Navigation/539A. Works detrimental to navigation.

### **539A. Works detrimental to navigation.**

The following provisions are not yet in force.

The Energy Act 2008 Pt 4A (ss 79A-79Q) (added by Marine and Coastal Access Act 2009 s 314) provides for a new navigational consenting regime and provides a variety of powers for the enforcement of that regime.

#### **1. Consent required for carrying out of certain operations**

A person must not, without the written consent of the Secretary of State, carry out in the regulated zone any operation to which the Energy Act 2008 s 79A applies (see s 79A(2) and (3)): Energy Act 2008 s 79A(1) (ss 79A-79Q added by Marine and Coastal Access Act 2009 s 314). 'Regulated zone' means the area that consists of (1) the area of sea within the seaward limits of the territorial sea, other than the Scottish inshore region, and (2) the area of sea within the limits of the UK sector of the continental shelf, and includes the bed and subsoil of the sea within those areas, the shore adjoining, and any land adjoining or adjacent to that shore, but does not include any land in Scotland: Energy Act 2008 s 79Q. 'Sea' includes any tidal waters; and any land covered with water at mean high water spring tide: s 79Q. 'Scottish inshore region' has the same meaning as in the Marine and Coastal Access Act 2009 (see Marine and Coastal Access Act 2009 s 322): Energy Act 2008 s 79Q. 'UK sector of the continental shelf' means the areas for the time being designated by an Order in Council under the Continental Shelf Act 1964 s 1(7): Energy Act 2008 s 79Q. Section 79A(1) does not apply to an operation if a marine licence under the Marine and Coastal Access Act 2009 Pt 4 (ss 65-115: see PARA 30D) is needed to carry out the operation: Energy Act 2008 s 79A(2). Subject to that, s 79A(1) applies to an operation if (a) it causes, or is likely to result in, obstruction or danger to navigation (whether while the operation is being carried out or subsequently), (b) it is of a description falling within s 79A(4), and (c) it may be carried out only with a permission falling within s 79A(5): s 79A(3). The descriptions of operations are (i) the construction, alteration, improvement, dismantlement or abandonment of any works; (ii) the deposit of any object or materials; (iii) the removal of any object or materials: s 79A(4). The permissions are (A) a licence under the Petroleum Act 1998 s 3 or the Petroleum (Production) Act 1934 s 2, (B) a licence under the Energy Act 2008 s 4 or 18 (gas storage and gas unloading, and carbon capture and storage licences), (C) a works authorisation under the Petroleum Act 1998 Pt 3 (ss 14-28) (construction etc of submarine pipelines), and see also Energy Act 2008 s 79A(6): s 79A(5). See further FUEL AND ENERGY.

The Secretary of State may, as a condition of considering an application for consent under the Energy Act 2008 s 79A, require to be furnished with such plans and particulars of the proposed operation as the Secretary of State may consider necessary: Energy Act 2008 s 79B(1). On receipt of any such application, the Secretary of State may cause to be published notice of the application, and the time within which, and the manner in which, objections to the application may be made: s 79B(2). Any such notice is to be published in such a manner as to be likely to come to the attention of those likely to be interested in, or affected by, the application: s 79B(3). The Secretary of State may cause an inquiry to be held in connection with the determination of an application for consent: s 79B(4).

If the Secretary of State is of the opinion that any operation in respect of which an application is made for consent under s 79A will cause, or is likely to result in, obstruction or danger to navigation, the Secretary of State must either refuse to give consent, or give consent subject to such conditions as the Secretary of State considers appropriate: see Energy Act 2008 s 79C. Provision is made with respect to consent conditions in the case of authorised exploration or exploitation operations: see Energy Act 2008 s 79D. As to 'authorised exploration or exploitation operations' see Energy Act 2008 s 79A(7), (8).

## **2. Directions by the Secretary of State**

If (1) the person to whom a consent under the Energy Act 2008 s 79A (see para 539A.1) is given fails to comply with any provision of the consent, or (2) a person who, by virtue of s 79D (see para 539A.1), is bound by a consent condition fails to comply with the condition, the Secretary of State may direct that person to take steps which the Secretary of State considers necessary or appropriate to comply with the provision or condition within a period specified in the direction: see Energy Act 2008 s 79E (ss 79A-79Q added by Marine and Coastal Access Act 2009 s 314).

## **3. Emergency safety requirements**

The Energy Act 2008 s 79F applies in any case where the Secretary of State has given consent ('the relevant consent') for an authorised exploration or exploitation operation, and at any time after the giving of that consent, the condition in s 79F(2) is met: s 79F(1) (ss 79A-79Q added by Marine and Coastal Access Act 2009 s 314). As to 'authorised exploration or exploitation operations' see Energy Act 2008 s 79A(7), (8). The condition is that it appears to the Secretary of State that any danger to navigation has arisen by reason of (1) any substantial damage to any works to which the relevant consent relates, or (2) any other substantial and unforeseen change in the state or position of any such works: s 79F(2). If it appears to the Secretary of State necessary to do so in the interests of the safety of navigation, the Secretary of State may serve a notice (an 'emergency safety notice') on the consent holder: s 79F(3). 'Consent holder' means the person to whom a consent under the Energy Act 2008 s 79A (see para 539A.1) is given: Energy Act 2008 s 79Q. By serving an emergency safety notice on the consent holder, the Secretary of State imposes on the consent holder such requirements as are prescribed in the notice with respect to any of the matters specified in s 79F(5): s 79F(4). Those matters are (a) the provision on, or in the vicinity of, the works in question of any lights, signals or other aids to navigation, and (b) the stationing of guard ships in the vicinity of those works: s 79F(5). An emergency safety notice may be served by the Secretary of State whether or not (i) the operation in question has been completed, or (ii) any condition was imposed by the Secretary of State, on giving the relevant consent, with respect to any of the matters referred to in s 79F(5): s 79F(6). Supplementary provision is made in relation to emergency safety notices: see Energy Act 2008 s 79G.

The Secretary of State may impose an 'immediate action notice' on a consent holder or other person bound by a condition on a consent if as a result of a failure to comply with a consent condition a danger to navigation has arisen: see Energy Act 2008 s 79H.

## **4. Enforcement**

It is an offence for a person to carry out an operation to which the Energy Act 2008 s 79A(1) (see para 539A.1) applies without the written consent of the Secretary of State under that provision, or to fail to comply with a condition of such a consent: Energy Act 2008 s 79I(1) (ss 79A-79Q added by Marine and Coastal Access Act 2009 s 314). A person guilty of an offence under the Energy Act 2008 s 79I is liable on summary conviction, to a fine not exceeding

£50,000, or on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both: s 79I(2).

It is an offence for a person to make a statement which the person knows to be false, or recklessly to make a statement which is false, in order to obtain the consent of the Secretary of State under s 79A(1): Energy Act 2008 s 79J(1). It is an offence for a person to fail to disclose information which the person knows, or ought to know, to be relevant to an application for the consent of the Secretary of State under s 79A(1): s 79J(2). A person guilty of an offence under s 79J is liable on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine: s 79J(3). As to the statutory maximum see PARA 169.

It is an offence for a person to fail to comply with a direction under the Energy Act 2008 s 79E (see PARA 539A.2), unless the person proves that due diligence was exercised in order to avoid the failure: Energy Act 2008 s 79K(1). A person guilty of an offence under s 79K is liable on summary conviction, to a fine not exceeding £50,000, or on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both: s 79K(2).

It is an offence for a person to fail to comply with an emergency safety notice (see PARA 539A.3), or an immediate action notice (see PARA 539A.3), within the time allowed (within the meaning of the Energy Act 2008 s 79G(1)): Energy Act 2008 s 79L(1). A person guilty of an offence under s 79L is liable on summary conviction, to a fine not exceeding £50,000, or on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both: s 79L(2).

Where the Secretary of State considers it necessary or expedient to restrain any actual or apprehended breach of s 79A(1), the Secretary of State may apply to the High Court for an injunction: see Energy Act 2008 s 79M.

The Secretary of State may appoint persons to act as inspectors to assist in carrying out the functions of the Secretary of State under the Energy Act 2008 Pt 4A (ss 79A-79Q): see Energy Act 2008 s 79N.

Proceedings for a relevant offence may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the United Kingdom: see Energy Act 2008 s 79O.

## **5. Power to extend the application of the Energy Act 2008 Pt 4A**

The Secretary of State may by order provide that specified provisions of the Energy Act 2008 Pt 4A (ss 79A-79Q) are to apply, subject to any specified modifications, in relation to the carrying out of specified operations, or operations of a specified description, in the Scottish inshore region: see Energy Act 2008 s 79P (ss 79A-79Q added by Marine and Coastal Access Act 2009 s 314).

### **UPDATE**

#### **533-539 Coastal Works Detrimental to Navigation**

Coast Protection Act 1949 Pt 2 repealed: Marine and Coastal Access Act 2009 Sch 8 para 1(2), Sch 22 Pt 2 (not yet in force).

For works detrimental to navigation see Energy Act 2008 Pt 4A (ss 79A-79Q) and PARA 539A.



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/8. COAST PROTECTION/ (4) COAST PROTECTION CHARGES/540. Calculation of charges under works scheme.

## **(4) COAST PROTECTION CHARGES**

### **540. Calculation of charges under works scheme.**

Coast protection charges<sup>1</sup> under a works scheme<sup>2</sup> are levied by reference to interests<sup>3</sup> in contributory land<sup>4</sup>. The charge payable by reference to any such interest must not exceed the amount by which the value of the interest immediately after the time at which the works provided for by the scheme have been completed, calculated on the assumption that those works will in future be maintained without expense to the person<sup>5</sup> entitled to the interest in question, is greater than the value of that interest would then be if the works had not been undertaken<sup>6</sup>. Where, however, any of the work provided for by the scheme is carried out at the expense of the person entitled to the interest, the charge must not exceed the amount that could have been levied, reduced by the reasonable cost of carrying out such work<sup>7</sup>.

Any dispute arising in connection with a works scheme as to whether a charge under the scheme exceeds the amount permitted must be determined by arbitration<sup>8</sup>. If on arbitration it is determined that the charge exceeds that amount, the charge must be reduced accordingly and the scheme and any notice served under it then have effect as if the amount of the charge expressed in it were the permitted amount as determined by the arbitration<sup>9</sup>.

1 As to the meaning of 'coast protection charge' see PARA 524 note 7.

2 As to the meaning of 'works scheme' see PARA 524.

3 'Interest' means the fee simple or an interest under a tenancy; and 'tenancy' includes a tenancy under an underlease and a tenancy under an agreement for a lease or an underlease, but not an option to take a tenancy and not a mortgage: Coast Protection Act 1949 s 7(8)(a). The value of an interest which is subject to a mortgage is to be calculated as if the interest were not so subject: s 7(8). As to the meaning of 'mortgage' see PARA 518 note 6.

4 Coast Protection Act 1949 s 7(2). As to the meaning of 'contributory land' see PARA 524. As to when coast protection charges become due see PARA 542.

5 As to the meaning of 'person' see PARA 13 note 29.

6 Coast Protection Act 1949 s 7(3). See *Re Coast Protection Act 1949* (1955) 106 L Jo 108, Lands Tribunal.

7 Coast Protection Act 1949 s 7(3) proviso.

8 Coast Protection Act 1949 s 7(7). As to arbitration see PARA 532.

9 Coast Protection Act 1949 s 7(7).

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#### **541. Charges levied under works scheme.**

A works scheme<sup>1</sup> which provides for the levying of coast protection charges<sup>2</sup> must either:

1218 (1) specify the persons<sup>3</sup> by whom such charges are to be paid, the amount of the charge to be paid by each person and the interest<sup>4</sup> in land<sup>5</sup> by reference to which the charge is levied upon him<sup>6</sup>; or

1219 (2) state that the coast protection authority<sup>7</sup> by which the scheme is prepared will, within such period after the completion of the work as may be specified in the scheme<sup>8</sup>, determine the interests in land by reference to which charges are to be levied and the amount of the charge leviable in respect of each interest<sup>9</sup>.

Where a works scheme contains the statement mentioned in head (2) above, the authority may, at any time within the period specified in the scheme, determine the charges to be levied under it, and must serve<sup>10</sup> on each person on whom a charge is leviable under the scheme a notice containing full particulars of its determination as to all the charges to be so levied<sup>11</sup>. Any person aggrieved<sup>12</sup> by the determination may appeal to the Secretary of State<sup>13</sup> or, in relation to Wales, the Welsh Ministers<sup>14</sup> on the ground that the determination is inequitable or unduly onerous, and, after giving the appellant and the authority, and any other person appearing to the Secretary of State or, as appropriate, the Welsh Ministers to be concerned, an opportunity of being heard by a person appointed for the purpose, the Secretary of State or, as the case may be, the Welsh Ministers may either confirm, reduce or cancel the charge levied upon the appellant as they think fit<sup>15</sup>.

Except with the consent of the appropriate authority<sup>16</sup>, a coast protection charge in respect of any land is not payable by the Crown or that authority<sup>17</sup>.

1 As to the meaning of 'works scheme' see PARA 524.

2 As to the meaning of 'coast protection charge' see PARA 524 note 7.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to the meaning of 'interest' see PARA 540 note 3.

5 As to the meaning of 'land' see PARA 502 note 3.

6 Coast Protection Act 1949 s 7(4)(a).

7 As to the meaning of 'coast protection authority' see PARA 508.

8 The requirement that the authority act within the period so specified is mandatory; non-compliance will invalidate a determination: *Cullimore v Lyme Regis Corp'n* [1962] 1 QB 718, [1961] 3 All ER 1008.

9 Coast Protection Act 1949 s 7(4)(b). In a case falling within this head, the charge is payable by the person who, at the time of the determination of the interest by reference to which the charge is to be levied, is entitled to that interest: s 7(4).

10 As to the service of documents see PARA 22.

11 Coast Protection Act 1949 s 7(5).

- 12 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
- 13 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.
- 14 The functions of the Secretary of State under the Coast Protection Act 1949 s 7, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.
- 15 Coast Protection Act 1949 s 7(6).
- 16 As to the meaning of 'appropriate authority' see PARA 514 note 14.
- 17 Coast Protection Act 1949 s 32(3).

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#### **542. When coast protection charges become due.**

A coast protection charge<sup>1</sup> levied upon any person<sup>2</sup> under a works scheme<sup>3</sup> becomes due: (1) in the case of a charge the amount of which is specified in the scheme, on the completion of the work provided for by the scheme<sup>4</sup>; and (2) in any other case, on the service upon him of a notice<sup>5</sup> specifying the amount of the charge<sup>6</sup>. If, however, the charge is disputed and has to be determined either by arbitration<sup>7</sup> or by an appeal to the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>8</sup>, the charge does not become due until the dispute is finally determined<sup>9</sup>.

1 As to the meaning of 'coast protection charge' see PARA 524 note 7. As to the calculation of coast protection charges see PARA 540. As to the levying of charges see PARA 541.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'works scheme' see PARA 524.

4 Coast Protection Act 1949 s 10(1)(a).

5 As to the service of documents see PARA 22.

6 Coast Protection Act 1949 s 10(1)(b).

7 As to the determination of charges by arbitration see PARA 540. As to arbitration generally see PARA 532.

8 As to such appeals see PARA 541. As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1. As to the Welsh Ministers see PARA 16 note 5.

9 Coast Protection Act 1949 s 10(1). As to payment by instalments see PARA 543.

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### **543. Payment by instalments.**

A coast protection authority<sup>1</sup> to which a coast protection charge<sup>2</sup> is payable by any person<sup>3</sup> may, if he so requires, by order<sup>4</sup> declare that it is to be payable by instalments<sup>5</sup> over a period specified in the order not exceeding 30 years, with interest at such reasonable rate as the authority may determine<sup>6</sup>. An order may be made at any time with respect to the unpaid balance of any charge, but the period for repayment must not in any case extend beyond 30 years from the time when the charge first became due<sup>7</sup>. The making of an order does not prevent the charge from being discharged at any time by the payment to the authority of the unpaid balance of the charge, together with any accrued interest on it<sup>8</sup>.

Any instalment, or any part of it, may be recovered at any time after it has fallen due from the person for the time being entitled to the interest in land<sup>9</sup> by reference to which the charge was levied; and where that person is the owner<sup>10</sup>, the instalment, or any part of it, may be recovered from the occupier for the time being of the land, and in this event the occupier may deduct it from the rent of the land<sup>11</sup>. An occupier is not, however, required to pay at any one time any sum in excess of the amount which was due from him on account of rent at, or has become due from him on account of rent since, the date on which he received a demand from the authority together with a notice<sup>12</sup> requiring him not to pay rent to his landlord without deducting the sum so demanded<sup>13</sup>.

1 As to the meaning of 'coast protection authority' see PARA 508.

2 As to the meaning of 'coast protection charge' see PARA 524 note 7. As to when charges become payable see PARA 542.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to orders see PARA 505.

5 References to the payment or recovery of an instalment in respect of such a charge are to be construed as including references to the payment or recovery of any accrued interest in respect of the charge: Coast Protection Act 1949 s 10(9).

6 Coast Protection Act 1949 s 10(2) (amended by the Local Government, Planning and Land Act 1980 s 1(6), Sch 6 para 5).

7 Coast Protection Act 1949 s 10(4).

8 Coast Protection Act 1949 s 10(5).

9 As to the meaning of 'land' see PARA 502 note 3.

10 As to the meaning of 'owner' see PARA 518 note 7.

11 Coast Protection Act 1949 s 10(3).

12 As to the service of documents see PARA 22.

13 Coast Protection Act 1949 s 10(3).

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#### **544. Payment in particular cases.**

Where, at a time when a coast protection charge<sup>1</sup> or any instalment in respect of it<sup>2</sup> is due and remains unpaid, a person<sup>3</sup> is in receipt of the rents and profits of land<sup>4</sup> as agent for the person entitled to the interest in land by reference to which the charge is levied, the charge or instalment may be recovered from the agent<sup>5</sup>. Where, however, a coast protection authority<sup>6</sup> claims to recover any sum in respect of a coast protection charge from a person who proves that: (1) he acts, in the capacity by reason of which the claim is made, merely as agent or trustee for some other person<sup>7</sup>; and (2) he does not have, and since the date of the service on him of a demand for payment has not had, in his hands on behalf of that other person sufficient money to discharge the whole demand of the authority<sup>8</sup>, his liability is limited to the total amount of the money which he has, or has so had, in his hands<sup>9</sup>. However, an authority which is, or would be, debarred by this provision from recovering the whole of any such sum from an agent or trustee may recover the whole or any unpaid balance of it from the person on whose behalf the agent or trustee acts<sup>10</sup>.

Where the interest in land by reference to which a coast protection charge is levied is subject to a mortgage<sup>11</sup>, then, at the time while the mortgagee<sup>12</sup> is in possession, or in receipt of the rents or profits, the charge or any instalment in respect of it for the time being due and remaining unpaid is payable by the mortgagee, and not by the person entitled to the interest<sup>13</sup>. Any amount paid by a mortgagee in respect of a coast protection charge, or in respect of expenses incurred in carrying out work under a works scheme<sup>14</sup>, is to be treated as if it were secured by the mortgage, with the like priority and with interest at the same rate as the mortgage money<sup>15</sup>, except that, without prejudice to the recovery of interest, the amount is not recoverable from the mortgagor personally<sup>16</sup>.

Certain statutory provisions are applied for the raising of money in particular cases for the payment of coast protection charges, and of expenses incurred in carrying out work under a works scheme<sup>17</sup>.

1 As to the meaning of 'coast protection charge' see PARA 524 note 7.

2 As to payment by instalments see PARA 543. As to references to the payment or recovery of an instalment see PARA 543 note 5.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to the meaning of 'land' see PARA 502 note 3.

5 Coast Protection Act 1949 s 10(7). As to the levying of coast protection charges see PARAS 540, 541. As to the payment of charges see PARAS 542, 543.

6 As to the meaning of 'coast protection authority' see PARA 508.

7 Coast Protection Act 1949 s 10(8)(a).

8 Coast Protection Act 1949 s 10(8)(b).

9 Coast Protection Act 1949 s 10(8).

10 Coast Protection Act 1949 s 10(8).

11 As to the meaning of 'mortgage' see PARA 518 note 6.

12 As to the meaning of 'mortgagee' see PARA 518 note 6.

13 Coast Protection Act 1949 s 10(6).

14 As to the meaning of 'works scheme' see PARA 524.

15 Coast Protection Act 1949 s 11(1).

16 Coast Protection Act 1949 s 11(1) proviso.

17 See the Coast Protection Act 1949 s 11(2). Thus eg the payment of any such charges and expenses is included among the purposes authorised: (1) for the application of capital money by (a) the Settled Land Act 1925 s 73; and (b) the Universities and College Estates Act 1925 s 26; and (2) by (a) the Settled Land Act 1925 s 71; and (b) the Universities and College Estates Act 1925 s 30, as purposes for which money may be raised by mortgage: Coast Protection Act 1949 s 11(2)(a) (amended by the Universities and College Estates Act 1964 s 4(1), Sch 3 Pt II; and by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and see **SETTLEMENTS** vol 42 (Reissue) PARA 808. Further, with Treasury approval in relation to England, or with the approval of the Welsh Ministers, charges or expenses payable by the Crown Estate Commissioners in respect of land under their management may be charged as a principal sum to the account of the Crown's land revenues, although the Treasury or the Welsh Ministers may direct that any sum so charged be repaid out of the income of those revenues within a specified time and by specified instalments: Coast Protection Act 1949 s 11(2)(b). As to payments out of the revenues of the Duchy of Lancaster and the Duchy of Cornwall see s 11(2)(c), (d). The functions of the Treasury under the Coast Protection Act 1949 s 11, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Treasury' see PARA 108 note 6.

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#### **545. Land belonging to ecclesiastical corporations.**

Where any coast protection charge<sup>1</sup>, or instalment of such a charge<sup>2</sup>, or any cost of carrying out certain work of maintenance or repair<sup>3</sup>, is payable or recoverable in respect of land<sup>4</sup> belonging to an ecclesiastical corporation<sup>5</sup>, the Church Commissioners<sup>6</sup> may apply any money or securities held by them for the corporation in discharging the whole or any part of the sums payable or recoverable<sup>7</sup>.

1 As to the meaning of 'coast protection charge' see PARA 524 note 7.

2 As to payments by instalments see PARA 543.

3 ie any cost recoverable under the Coast Protection Act 1949 s 13(1); see PARA 529.

4 As to the meaning of 'land' see PARA 502 note 3.

5 'Ecclesiastical corporation' is defined for these purposes by reference to the Episcopal and Capitular Estates Act 1851 (see s 11 (repealed), and **ECCLESIASTICAL LAW**); and includes the incumbent of a benefice as well as the persons mentioned in that statutory definition (eg an archbishop, bishop, dean and chapter, dean, archdeacon, canon, prebendary): see the Coast Protection Act 1949 s 33(2).

6 As to the Church Commissioners see **ECCLESIASTICAL LAW** vol 14 PARA 363 et seq.

7 Coast Protection Act 1949 s 33(1)(a).



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## **(5) COAST PROTECTION WORK BY OTHERS**

### **546. Subsisting obligations to carry out coast protection work.**

No person<sup>1</sup> is liable, by reason only that he is subject to an obligation to carry out coast protection work<sup>2</sup> to which he would be subject by reason of tenure, custom, prescription or otherwise<sup>3</sup> if the Coast Protection Act 1949 had not been passed<sup>4</sup>, to maintain or repair either: (1) any works constructed, altered or improved under a works scheme<sup>5</sup>; or (2) any works for whose maintenance or repair provision is made by a scheme which a coast protection authority<sup>6</sup> is empowered to make<sup>7</sup> for recovering the cost of maintenance of works<sup>8</sup>. Subject to this qualification, however, nothing in the provisions of the Coast Protection Act 1949 relating to coast protection<sup>9</sup> operates to release any person from any such subsisting obligation<sup>10</sup>.

If a person who, by reason of any such obligation, is liable to carry out any coast protection work fails to carry it out, any coast protection authority in whose area the work ought to be carried out, or to which it appears that the work is necessary or expedient for the protection<sup>11</sup> of any land<sup>12</sup> in its area, may serve<sup>13</sup> a notice on him requiring him to carry it out within a period specified in the notice<sup>14</sup>. If he fails to comply with the notice within the specified period, the authority may carry out the work and may recover from him any expenses reasonably incurred in carrying it out<sup>15</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'coast protection work' see PARA 505 note 9.

3 As to the common law rights and obligations to maintain sea walls and protect land against encroachment by the sea see PARA 499 et seq.

4 See the Coast Protection Act 1949 s 15(2).

5 As to the meaning of 'works scheme' see PARA 524.

6 As to the meaning of 'coast protection authority' see PARA 508.

7 Ie under the Coast Protection Act 1949 s 13: see PARA 529.

8 Coast Protection Act 1949 s 15(1).

9 Ie nothing in the Coast Protection Act 1949 Pt I (ss 1-33).

10 Coast Protection Act 1949 s 15(3). Coast protection works may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

11 As to the meaning of 'protection' see PARA 505 note 9.

12 As to the meaning of 'land' see PARA 14 note 21.

13 As to the service of documents see PARA 22.

14 Coast Protection Act 1949 s 15(4).

15 Coast Protection Act 1949 s 15(4). In such circumstances compensation for disturbance may become payable: see PARA 530.



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#### **547. Failure of sea defence commissioners to carry out works.**

Where it is represented to the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> by a coast protection authority<sup>3</sup> that any sea defence commissioners<sup>4</sup> have failed to carry out any coast protection work<sup>5</sup> which the commissioners are authorised or required by their local Act<sup>6</sup> to carry out, and which is necessary or expedient for the protection<sup>7</sup> of land<sup>8</sup> in the authority's area, the Secretary of State or, as the case may be, the Welsh Ministers may make an order<sup>9</sup> authorising the authority to carry out the work and to recover from the commissioners any expenses reasonably incurred in carrying out the work, or such part of those expenses as the Secretary of State or the Welsh Ministers thinks fit<sup>10</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 The functions of the Secretary of State under the Coast Protection Act 1949 s 15, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the meaning of 'coast protection authority' see PARA 508.

4 As to the meaning of 'sea defence commissioners' see PARA 505 note 9.

5 As to the meaning of 'coast protection work' see PARA 505 note 9.

6 As to the meaning of 'local Act' see PARA 504 note 3.

7 As to the meaning of 'protection' see PARA 505 note 9.

8 As to the meaning of 'land' see PARA 502 note 3.

9 Before making such order, the Secretary of State or the Welsh Ministers must give the commissioners an opportunity of making representations with respect to the matter: see the Coast Protection Act 1949 s 15(5). As to orders see PARA 505. Such orders being local in nature are not recorded in this work.

10 See the Coast Protection Act 1949 s 15(5). Compensation for disturbance as a result of such works may become payable under s 19: see PARA 530. Coast protection works may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

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#### **548. Consent to carry out work.**

Subject to certain exceptions<sup>1</sup>, any person<sup>2</sup> who carries out coast protection work<sup>3</sup>, other than work of maintenance or repair<sup>4</sup>, without the written<sup>5</sup> consent of the coast protection authority<sup>6</sup> in whose area the work is to be carried out, or in contravention of any conditions subject to which that consent is granted, is guilty of an offence<sup>7</sup>. A coast protection authority may institute proceedings for such an offence<sup>8</sup>.

Where application is made to a coast protection authority for its consent, then before determining the application it must give notice of it to any coast protection authority whose area adjoins its area, and to the Environment Agency<sup>9</sup> and to any internal drainage board<sup>10</sup> whose district comprises the whole or any part of its area; and the authority must consider any representations made by any such body<sup>11</sup>.

Without prejudice to any proceedings which may be taken for such an offence, where any person has constructed, altered or improved any works in contravention of these requirements, or of any condition subject to which consent was granted, the coast protection authority in whose area the work was carried out may serve<sup>12</sup> a notice on him requiring him, within a specified period of not less than 30 days, to remove the works or to make specified alterations in them<sup>13</sup>. If within that period the person fails to comply with the notice, the coast protection authority may itself remove or alter the works, as specified in the notice, and if it does so it is entitled to recover the expense of doing so from the person on whom the notice was served<sup>14</sup>.

1    le subject to the provisions of the Coast Protection Act 1949 s 17: see PARA 549.

2    As to the meaning of 'person' see PARA 13 note 29.

3    As to the meaning of 'coast protection work' see PARA 505 note 9.

4    As to work of maintenance or repair see PARA 528.

5    As to the meaning of 'written' see PARA 22 note 1.

6    As to the meaning of 'coast protection authority' see PARA 508. Various other consents may also be required: see *R (on the application of Boggis) v Natural England* [2008] EWHC 2954 (Admin), (2009) Times, 25 February, [2009] All ER (D) 26 (Jan).

7    Coast Protection Act 1949 s 16(1). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see s 43 (amended by virtue of the Criminal Justice Act 1982 ss 35, 37, 38, 46).

8    See the Coast Protection Act 1949 s 16(5).

9    As to the Environment Agency see PARA 17.

10   As to internal drainage boards see PARA 569 et seq.

11   Coast Protection Act 1949 s 16(4) (amended by the Water Act 1989 s 190(1), Sch 25 para 11(4); SI 1996/593). Compensation equal to the amount of the depreciation is payable by a coast protection authority on a claim for compensation where it is shown that the value of an interest of any person in land has been depreciated in consequence of the refusal of consent or of the granting of consent subject to conditions: see the Coast Protection Act 1949 s 19(1)(b). As to claims for compensation see s 19(2)-(5); and PARA 530. As to the meaning of 'interest' see PARA 530 note 2. Coast protection works may require an environmental impact assessment (see PARA 10) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

12 As to the service of documents see PARA 22.

13 Coast Protection Act 1949 s 16(2).

14 Coast Protection Act 1949 s 16(3).

## **UPDATE**

### **548 Consent to carry out work**

NOTE 6--*Boggis*, cited, reversed in part: *Boggis v Natural England* [2009] EWCA Civ 1061, [2009] All ER (D) 229 (Oct).

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#### **549. Relaxation of consent requirements.**

The consent normally required before carrying out coast protection work<sup>1</sup> is not necessary in the case of work carried out:

- 1220 (1) by a coast protection authority<sup>2</sup>;
- 1221 (2) by any body or person<sup>3</sup> upon whom any powers or duties relating to the protection<sup>4</sup> of land<sup>5</sup> have been conferred or imposed by or under any enactment<sup>6</sup> other than the Coast Protection Act 1949<sup>7</sup>;
- 1222 (3) by an authority for the protection of a highway<sup>8</sup>;
- 1223 (4) by the successor to the British Railways Board for the protection of a railway<sup>9</sup>; or
- 1224 (5) by a harbour authority<sup>10</sup>.

Work which does not require consent under any of heads (2) to (5) above may not, however, be carried out except in accordance with a prescribed procedure<sup>11</sup>; and any body or person who contravenes the procedure is guilty of an offence<sup>12</sup>, unless the work appears to it or him to be urgently necessary for the protection of land<sup>13</sup>.

1 The consent under the Coast Protection Act 1949 s 16(1): see PARA 548. As to the meaning of 'coast protection work' see PARA 505 note 9.

2 Coast Protection Act 1949 s 17(1)(a). As to the meaning of 'coast protection authority' see PARA 508.

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to the meaning of 'protection' see PARA 505 note 9.

5 As to the meaning of 'land' see PARA 502 note 3.

6 As to the meaning of 'enactment' see PARA 14 note 31.

7 Coast Protection Act 1949 s 17(1)(b).

8 Coast Protection Act 1949 s 17(1)(c) (amended by the Local Government Act 1972 s 272(1), Sch 30). As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

9 See the Coast Protection Act 1949 s 17(1)(d) (amended by the Transport Act 1962 s 32(1), Sch 2 Pt I). As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44.

10 Coast Protection Act 1949 s 17(1)(e). As to the meaning of 'harbour authority' see PARA 505 note 9.

11 Coast Protection Act 1949 s 17(2). The body or person intending to carry out the work (the 'undertakers') must give not less than 28 days' notice of its or his intention to the coast protection authority for the area in which the work is to be carried out and for any adjoining area, and to the Environment Agency or any internal drainage board whose area comprises the whole or any part of that area: s 17(3) (amended by the Water Act 1989 s 190(1), Sch 25 para 11(5); and by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 2, Sch 1). The undertakers must not carry out the work before the notice expires (Coast Protection Act 1949 s 17(3)(a)); and if before the notice expires any authority or board to which notice has been given serves notice of objection on the Secretary of State or, in relation to Wales, the Welsh Ministers, the undertakers may not carry out the work except in accordance with a direction by the Secretary of State or the Welsh Ministers (s 17(3)(b)). As to the Environment Agency see PARA 17. As to internal drainage boards see PARA 569 et seq. As to the service of documents see PARA 22. As to the Secretary of State in relation to the Coast

Protection Act 1949 see PARA 504 note 1. The functions under the Coast Protection Act 1949 s 17 conferred on the Secretary of State (as 'the minister' (see PARA 504 note 1) or as the successor to the Minister of Agriculture, Fisheries and Food) but not those conferred on any other Minister of the Crown, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. The relevant functions of the Minister of Agriculture, Fisheries and Food, were transferred to the Secretary of State: see the Transfer of Functions (Fishery Harbours) Order 2001, SI 2001/3503, art 2(2)(a).

Where notice of objection has been served and has not been withdrawn, the Secretary of State or, as the case may be, the Welsh Ministers and any other minister concerned, after affording to the undertakers and to the objectors and, if the objectors are not the coast protection authority in whose area the work is to be carried out, to that authority, an opportunity of being heard by a person appointed for the purpose, must determine the objection: Coast Protection Act 1949 s 17(4). Where an objection has been so determined, the appropriate minister must either direct that the undertakers be at liberty to carry out the work, whether as specified in the notice given by them or subject to such modifications or conditions as he may think fit, having regard to the determination of the objection, or direct them not to carry it out: s 17(5). 'Appropriate minister', in relation to a notice of objection, means: (1) if the undertakers are a body or person mentioned in head (2) in the text, any minister (or, as appropriate if that minister is the Secretary of State, the Welsh Ministers) concerned with the exercise by that body or person of its or his functions under the relevant enactment (any question arising under this head being determined, in relation to England, by the Treasury); (2) if the undertakers are a harbour authority for a harbour which is a fishery harbour for the purposes of the Sea Fish Industry Act 1951 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 612), the Secretary of State or the Welsh Ministers; (3) in any other case, the Secretary of State for Transport: see the Coast Protection Act 1949 s 17(8)(a)-(c) (amended by the Transport and Works Act 1992 s 65(2); SI 1955/554; and by virtue of SI 2001/3503). 'Minister concerned' means the appropriate minister or, if the notice of objection was served by the Environment Agency or any internal drainage board and the appropriate minister is not the Secretary of State (or, in relation to Wales, the Welsh Ministers), the appropriate minister and the Secretary of State (or, in relation to Wales, the Welsh Ministers): Coast Protection Act 1949 s 17(9) (amended by SI 1955/554; and by virtue of SI 2001/3503). As to the meaning of 'England' see PARA 19 note 8.

12 Coast Protection Act 1949 s 17(2). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: see s 43 (amended by virtue of the Criminal Justice Act 1982 ss 35, 37, 38, 46). A coast protection authority may institute proceedings for such an offence: Coast Protection Act 1949 s 17(6). As to the standard scale see PARA 141 note 18.

13 See the Coast Protection Act 1949 s 17(7). Where any work is so carried out, however, before or as soon as possible after commencing the work the undertakers must give notice of the nature of the work to the coast protection authority in whose area the work is carried out: s 17(7).

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### **550. Facilitation of coast protection work by the Secretary of State or the Welsh Ministers.**

Where a person<sup>1</sup>, not being a coast protection authority<sup>2</sup>, desires to carry out coast protection work<sup>3</sup> in accordance with a works scheme<sup>4</sup>, or with a maintenance or repair notice served<sup>5</sup> by a coast protection authority, but the work cannot be carried out by reason of:

- 1225 (1) any covenant or other restriction affecting the person's power to do so; or
- 1226 (2) the objection, absence or disability of any person whose land<sup>6</sup> it is reasonably necessary to enter for the purpose of carrying it out or across whose land it is reasonably necessary to exercise rights of passage<sup>7</sup> in order to obtain access to the land on which the work is to be carried out,

he may apply<sup>8</sup> to the Secretary of State<sup>9</sup> or, in relation to Wales, to the Welsh Ministers<sup>10</sup> for an order<sup>11</sup> authorising him to carry out the work or to exercise those rights<sup>12</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'coast protection authority' see PARA 508. As to facilitation of work by coast protection authorities see PARA 517.

3 As to the meaning of 'coast protection work' see PARA 505 note 9.

4 As to the meaning of 'works scheme' see PARA 524.

5 Ie under the Coast Protection Act 1949 s 12: see PARA 528.

6 As to the meaning of 'land' see PARA 14 note 21.

7 Ie to exercise the like rights as can be created in favour of a coast protection authority under the Coast Protection Act 1949 s 27: see PARA 520.

8 As to the procedure on the application see the Coast Protection Act 1949 s 28(3)-(5); and PARA 517.

9 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

10 The functions of the Secretary of State under the Coast Protection Act 1949 s 28, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

11 As to such order see the Coast Protection Act 1949 s 28(5); and PARA 517.

12 Coast Protection Act 1949 s 28(1).



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## **(6) FINANCE**

### **551. Assistance from national government.**

Subject to such conditions as the Treasury<sup>1</sup> may determine, the Secretary of State<sup>2</sup> may, in relation to England<sup>3</sup>, make grants towards any expenditure incurred: (1) under the Coast Protection Act 1949 by a coast protection authority<sup>4</sup>; or (2) by the council of a county<sup>5</sup> in carrying out coast protection work<sup>6</sup> under the enactments relating to highways<sup>7</sup>.

In relation to Wales, the Welsh Ministers<sup>8</sup> have a similar power to make grants to a coast protection authority or to the council of a county borough<sup>9</sup>.

1 As to the meaning of 'Treasury' see PARA 108 note 6.

2 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

3 As to the meaning of 'England' see PARA 19 note 8.

4 Coast Protection Act 1949 s 21(1)(a). As to the meaning of 'coast protection authority' see PARA 508.

5 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

6 As to the meaning of 'coast protection work' see PARA 505 note 9.

7 Coast Protection Act 1949 s 21(1)(b). As to the meaning of 'enactment' see PARA 14 note 31. As to the enactments relating to highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 28, 43 et seq.

8 The functions of the Secretary of State and the Treasury under the Coast Protection Act 1949 s 21, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

9 See the Coast Protection Act 1949 s 21(1)(a), (b) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(3)).

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## **552. Contributions by county councils in England to maritime district councils.**

Where the Secretary of State<sup>1</sup> undertakes to make, or makes, a grant<sup>2</sup> towards expenditure incurred under the Coast Protection Act 1949 by a maritime district<sup>3</sup> council in England<sup>4</sup>, the council of the county within which the maritime district is situated must pay to the maritime district council a contribution towards that expenditure of such amount and payable at such time as may be agreed between the two councils, or as the Secretary of State may determine in default of agreement<sup>5</sup>. The amount so determined must not, however, without the consent of the county council:

- 1227 (1) exceed the amount of the grant made by the Secretary of State<sup>6</sup>; or
- 1228 (2) be such that the amount of the contribution, together with the amount of any other contributions which, by virtue of any agreement or determination in default of agreement, the county council has paid or has become liable to pay (whether to the same or any other maritime district council) in the same financial year, exceeds the product of the rate of one penny in the pound levied over the whole county in respect of the financial year ending on 31 March 1990<sup>7</sup>, increased or decreased in proportion to the difference between the retail prices index for September of the financial year preceding that in which the contribution is payable and the retail prices index for September 1989<sup>8</sup>.

So much of any contribution as is agreed between the county council and the maritime district council to be attributable to the protection<sup>9</sup> of any highway for which the council was the highway authority when the relevant expenditure was incurred, or in default of agreement so much of it as is determined jointly by the Secretary of State and the Secretary of State for Transport to be so attributable, is to be disregarded for these purposes<sup>10</sup>.

1 As to the Secretary of State in relation to the Coast Protection Act 1949 see PARA 504 note 1.

2 Ie under the Coast Protection Act 1949 s 21: see PARA 551.

3 As to the meaning of 'maritime district' see PARA 508 note 7. As to local government areas and authorities in England see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

4 As to the meaning of 'England' see PARA 19 note 8.

5 Coast Protection Act 1949 s 20(1) (amended by the Local Government Act 1972 s 251(2), Sch 29 para 17(1)(a); Local Government (Wales) Act 1994 ss 22(5), 66(8), Sch 11 para 5(2), Sch 18).

6 See the Coast Protection Act 1949 s 20(2)(a).

7 Ie the last financial year in which the general rate was levied. With effect from 1 April 1990, domestic rates were replaced by the community charge, itself replaced with effect from 1 April 1993 by the council tax: see **RATING AND COUNCIL TAX**.

8 Coast Protection Act 1949 s 20(2)(b) (amended by the Local Government Act 1972 s 251(2), Sch 29 para 17(1); SI 1991/1730). In the case of a contribution determined by the Secretary of State to be of a capital nature, head (2) in the text applies as if the amount of the contribution were the amount so determined to be the annual amount which would have to be provided for the payment of principal and interest in respect of a loan made by the Public Works Loan Commissioners to the council and repayment by 20 equal annual instalments of principal and interest combined, being a loan of an amount equal to the actual amount of the contribution: Coast Protection Act 1949 s 20(2) proviso. In these circumstances, for the purposes of head (2) in

the text (but not for any other purpose) the council is deemed to have become so liable to pay, in each of the next 19 financial years, a contribution of the amount so determined as aforesaid: s 20(2) proviso. As to the Public Works Loan Commissioners see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1377.

9 As to the meaning of 'protection' see PARA 505 note 9.

10 Coast Protection Act 1949 s 20(3) (amended by the Local Government Act 1972 s 251, Sch 29, para (1)). As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

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### **553. Contributions by county councils in England to other persons.**

A county council in England<sup>1</sup> may pay such contributions as it thinks fit towards any expenses incurred by any person<sup>2</sup> other than a maritime district<sup>3</sup> council within the county in respect of coast protection work<sup>4</sup> carried out within the county or appearing to the council to be work for the protection<sup>5</sup> of any land<sup>6</sup> in the county<sup>7</sup>.

1 As to local government areas and authorities in England see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the meaning of 'England' see PARA 19 note 8.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the meaning of 'maritime district' see PARA 508 note 7.

4 As to the meaning of 'coast protection work' see PARA 505 note 9.

5 As to the meaning of 'protection' see PARA 505 note 9.

6 As to the meaning of 'land' see PARA 14 note 21.

7 Coast Protection Act 1949 s 20(4) (amended by the Local Government Act 1972 s 251(2), Sch 29 para 17(1); and by the Local Government (Wales) Act 1994 ss 22(5), 66(8), Sch 11 para 5(2), Sch 18).

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**554. Contributions by district councils in England and county or county borough councils in Wales.**

A district council in England, or the council of a county or county borough in Wales<sup>1</sup>, which is not a coast protection authority<sup>2</sup> or a constituent authority<sup>3</sup> of a coast protection board<sup>4</sup>, may if it thinks fit defray, or contribute towards, the cost of carrying out any coast protection work<sup>5</sup> which appears to the council to be necessary or expedient for the protection<sup>6</sup> of any land<sup>7</sup> in its area<sup>8</sup>.

1 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

2 As to the meaning of 'coast protection authority' see PARA 508.

3 As to the meaning of 'constituent authority' see PARA 511 note 2.

4 As to coast protection boards see PARA 508 et seq.

5 As to the meaning of 'coast protection work' see PARA 505 note 9.

6 As to the meaning of 'protection' see PARA 505 note 9.

7 As to the meaning of 'land' see PARA 502 note 3.

8 Coast Protection Act 1949 s 20(5) (amended by the Local Government Act 1972 s 251(2), Sch 29 para 17(1); and by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 5(2)).

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**555. Contributions by coast protection authorities in England and Wales.**

A coast protection authority<sup>1</sup> may defray, or contribute towards, the cost of carrying out any coast protection work<sup>2</sup>, whether within or outside its area, which appears to it to be necessary or expedient for the protection<sup>3</sup> of any land<sup>4</sup> in its area<sup>5</sup>.

- 1 As to the meaning of 'coast protection authority' see PARA 508.
- 2 As to the meaning of 'coast protection work' see PARA 505 note 9.
- 3 As to the meaning of 'protection' see PARA 505 note 9.
- 4 As to the meaning of 'land' see PARA 502 note 3.
- 5 Coast Protection Act 1949 s 20(6).

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## **9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER**

### **(1) INTRODUCTION**

#### **556. Scope of this part of the title.**

The legislative and administrative framework with regard to flood defence<sup>1</sup> reflects the distinction between flooding and coastal erosion, with flood defence and land drainage provision being made by the Land Drainage Act 1991, the Water Resources Act 1991 and the Environment Act 1995, and coast protection provision being made by the Coast Protection Act 1949. In practice, however, coast protection and coastal flood defence are clearly inter-related<sup>2</sup>. The discussion below deals with flood defence and land drainage<sup>3</sup>, as well as with the common law principles for establishing liability for flood damage<sup>4</sup>. Coast protection is dealt with separately in this title<sup>5</sup>.

The planning controls to which housing development on flood plains is subject are discussed elsewhere in this work<sup>6</sup>.

1 For a discussion of recent flooding incidents, the extent of the risk and the suggested reasons for the increased importance of flood defence see Howarth *Flood Defence Law* (2002) p 8 et seq.

2 See the discussion in Howarth *Flood Defence Law* (2002) p 204 et seq.

3 See PARA 559 et seq.

4 See PARA 662 et seq.

5 As to coast protection see PARA 499 et seq.

6 See **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 9.

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### **557. European Directive on the assessment and management of flood risks.**

The purpose of the European Directive on the assessment and management of flood risks<sup>1</sup> is to establish a framework for the assessment and management of flood risks<sup>2</sup>, aiming at the reduction of the adverse consequences for human health, the environment, cultural heritage and economic activity associated with floods in the Community<sup>3</sup>. For the purposes of the Directive member states must make use of the arrangements made under the Water Framework Directive<sup>4</sup>, although they may appoint different competent authorities from those identified under that Directive, and may identify certain coastal areas or individual river basins<sup>5</sup> and assign them to a unit of management different from those assigned under that Directive<sup>6</sup>.

Member states must, for each river basin district, or unit of management, or the portion of an international river basin district lying within their territory, undertake a preliminary flood risk assessment, which based on available or readily derivable information<sup>7</sup> must provide an assessment of potential risks<sup>8</sup>. The assessment must include at least the following:

- 1229 (1) maps of the river basin district<sup>9</sup> at the appropriate scale including the borders of the river basins, sub-basins and, where existing, coastal areas, showing topography and land use;
- 1230 (2) a description of the floods which have occurred in the past and which had significant adverse impacts on human health, the environment, cultural heritage and economic activity and for which the likelihood of similar future events is still relevant, including their flood extent and conveyance routes and an assessment of the adverse impacts they have entailed;
- 1231 (3) a description of the significant floods which have occurred in the past, where significant adverse consequences of similar future events might be envisaged;
- 1232 and, depending on the specific needs of member states, it must include:
- 1233 (4) an assessment of the potential adverse consequences of future floods for human health, the environment, cultural heritage and economic activity, taking into account as far as possible issues such as the topography, the position of watercourses and their general hydrological and geo-morphological characteristics, including floodplains as natural retention areas, the effectiveness of existing man-made flood defence infrastructures, the position of populated areas, areas of economic activity and long-term developments including impacts of climate change on the occurrence of floods<sup>10</sup>.

Member states must complete the preliminary flood risk assessment by 22 December 2011<sup>11</sup>. On the basis of a preliminary flood risk assessment, member states must, for each river basin district, or unit of management, or portion of an international river basin district lying within their territory, identify those areas for which they conclude that potential significant flood risks exist or might be considered likely to occur<sup>12</sup>. Member states must, at the level of the river basin district, or unit of management, prepare flood hazard maps<sup>13</sup> and flood risk maps<sup>14</sup>, at the most appropriate scale for the areas so identified<sup>15</sup>. Member states must ensure that the flood hazard maps and flood risk maps are completed by 22 December 2013<sup>16</sup>.



On the basis of the flood hazard maps and flood risk maps, member states must establish flood risk management plans<sup>17</sup> which must include measures for achieving the objectives established by the member states<sup>18</sup> for the management of flood risks<sup>19</sup>. Member states must ensure that flood risk management plans are completed and published by 22 December 2015<sup>20</sup>.

In accordance with applicable Community legislation, member states must make available to the public the preliminary flood risk assessment, the flood hazard maps, the flood risk maps and the flood risk management plans, and must encourage active involvement of interested parties in the production, review and updating of the flood risk management plans<sup>21</sup>.

The preliminary flood risk assessment<sup>22</sup> must be reviewed, and if necessary updated, by 22 December 2018 and every six years thereafter<sup>23</sup>; the flood hazard maps and the flood risk maps must be reviewed, and if necessary updated, by 22 December 2019 and every six years thereafter<sup>24</sup>; and the flood risk management plan(s) must be reviewed, and if necessary updated, by 22 December 2021 and every six years thereafter<sup>25</sup>. The likely impact of climate change on the occurrence of floods must be taken into account in such reviews<sup>26</sup>.

In accordance with applicable Community legislation, member states must make available to the public the preliminary flood risk assessment, the flood hazard maps, the flood risk maps and the flood risk management plans<sup>27</sup>; and must encourage active involvement of interested parties in the production, review and updating of flood risk management plans<sup>28</sup>. Member states must make available the preliminary flood risk assessment, the flood hazard maps, the flood risk maps and flood risk management plans, as well as their review and, where applicable, their updates to the Commission within three months after the dates by which they must be completed<sup>29</sup>.

Member states must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 26 November 2009<sup>30</sup>.

1    Ie European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) of 23 October 2007 on the assessment and management of flood risks.

2    'Flood risk' means the combination of the probability of a flood event and of the potential adverse consequences for human health, the environment, cultural heritage and economic activity associated with a flood event: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 2(2). 'Flood' means the temporary covering by water of land not normally covered by water; and includes floods from rivers, mountain torrents, Mediterranean ephemeral water courses, and floods from the sea in coastal areas, and may exclude floods from sewerage systems: art 2(1). As to the meaning of 'river' see PARA 7 note 13: definition applied by art 2.

3    European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 1.

4    Ie the arrangements under European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 3(1), (2), (3), (5) and (6): see PARA 7.

5    As to the meaning of 'river basin' see PARA 7 note 13: definition applied by European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 2.

6    See European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 3. Member states must take appropriate steps to coordinate the application of the Directive and that of European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) (see PARA 7) focusing on opportunities for improving efficiency, information exchange and for achieving common synergies and benefits having regard to the environmental objectives laid down in art 4 of that Directive: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 9. In particular: (1) the development of the first flood hazard maps and flood risk maps and their subsequent reviews as referred to in art 6 (see the text to notes 13-16) and art 14 (see the text to notes 23-26) must be carried out in such a way that the information they contain is consistent with relevant information presented according to European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01). They must be coordinated with, and may be integrated into, the reviews provided for in art 5(2) of that Directive; (2) the development of the first flood risk management plans and their subsequent reviews as referred to in European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 7 (see the text to notes 17-20) and art 14 must be carried out in coordination with, and may be integrated into, the reviews of the river basin management plans provided for in European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 13(7) of that Directive; (3) the active involvement of all interested

parties under European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 10 (see the text to note 21) must be coordinated, as appropriate, with the active involvement of interested parties under European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 14: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 9(1)-(3).

7 le such as records and studies on long term developments, in particular impacts of climate change on the occurrence of floods: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 4(1).

8 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 4(1), (2).

9 As to the meaning of 'river basin district' see PARA 7 note 20: definition applied by European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 2.

10 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 4(2)(a)-(d).

11 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 4(4). Without prejudice to art 14 (see the text to notes 23-26), member states may decide not to undertake the preliminary flood risk assessment referred to in art 4 for those river basins, sub-basins or coastal areas where they have either: (1) already undertaken a risk assessment to conclude, before 22 December 2010, that a potential significant flood risk exists or might be considered likely to occur leading to the identification of the area among those referred to in art 5(1) (see the text to note 12); or (2) decided, before 22 December 2010, to prepare flood hazard maps and flood risk maps and to establish flood risk management plans in accordance with the relevant provisions of the Directive: see art 13(1), (4).

12 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 5(1).

13 Flood hazard maps must cover the geographical areas which could be flooded according to the following scenarios: (1) floods with a low probability, or extreme event scenarios; (2) floods with a medium probability (likely return period [ $\geq$ ] 100 years); (3) floods with a high probability, where appropriate: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 6(3). For each such scenario the following elements must be shown: (a) the flood extent; (b) water depths or water level, as appropriate; (c) where appropriate, the flow velocity or the relevant water flow: art 6(4). Member states may decide that, for coastal areas where an adequate level of protection is in place, the preparation of flood hazard maps be limited to the scenario referred to in head (1) above: art 6(7). As to coast protection see PARA 499 et seq.

14 Flood risk maps must show the potential adverse consequences associated with flood scenarios referred to in the European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 6(3) (see note 13) and expressed in terms of the following: (1) the indicative number of inhabitants potentially affected; (2) type of economic activity of the area potentially affected; (3) installations as referred to in Council Directive 96/61 (OJ L257, 10.10.1996, p 26) Annex I concerning integrated pollution prevention and control which might cause accidental pollution in case of flooding and potentially affected protected areas identified in European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) Annex IV(1)(i), (iii) and (v); (4) other information which the member state considers useful such as the indication of areas where floods with a high content of transported sediments and debris floods can occur and information on other significant sources of pollution: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 6(5).

15 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 6(1).

16 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 6(8). Without prejudice to art 14 (see the text to notes 23-26), member states may decide to make use of flood hazard maps and flood risk maps finalised before 22 December 2010, if such maps provide a level of information equivalent to the requirements of art 6; and may decide to make use of flood risk management plans finalised before 22 December 2010, provided the content of these plans is equivalent to the requirements set out in art 7 (see the text to notes 17-20): see art 13(2)-(4).

17 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 7(1).

18 Member states must establish appropriate objectives for the management of flood risks, focusing on the reduction of potential adverse consequences of flooding for human health, the environment, cultural heritage and economic activity, and, if considered appropriate, on non-structural initiatives and/or on the reduction of the likelihood of flooding: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 7(2).

19 See European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 7(3). The plans must also include the components set out in the Annex Pt A: art 7(3). Flood risk management plans must take into account relevant aspects such as costs and benefits, flood extent and flood conveyance routes and areas which have the potential to retain flood water, such as natural floodplains, the environmental objectives of European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) art 4 (see PARA 7), soil and

water management, spatial planning, land use, nature conservation, navigation and port infrastructure; and must address all aspects of flood risk management focusing on prevention, protection, preparedness, including flood forecasts and early warning systems and taking into account the characteristics of the particular river basin or sub-basin. Flood risk management plans may also include the promotion of sustainable land use practices, improvement of water retention as well as the controlled flooding of certain areas in the case of a flood event: European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 7(3).

- 20 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 7(5).
- 21 See European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 10.
- 22 le or the assessment and decisions referred to in European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 13(1): see note 11.
- 23 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 14(1).
- 24 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 14(2).
- 25 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 14(3).
- 26 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 14(4).
- 27 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 10(1).
- 28 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 10(2).
- 29 See European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 15(1).
- 30 European Parliament and Council Directive 2007/60 (OJ L288, 06.11.2007, p 27) art 17(1).

## **UPDATE**

### **557 European Directive on the assessment and management of flood risks**

TEXT AND NOTES--See Flood Risk Regulations 2009, SI 2009/3042 (amended by SI 2010/1102).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(1) INTRODUCTION/558. The administrative framework.

### **558. The administrative framework.**

Policy relating to flood defence and land drainage is formulated, in relation to England<sup>1</sup>, by the Secretary of State for Environment, Food and Rural Affairs<sup>2</sup> and, subject to certain exceptions, in relation to Wales by the Welsh Ministers<sup>3</sup>.

The Environment Agency<sup>4</sup> has a general supervisory role<sup>5</sup> as well as specific functions in relation to main rivers<sup>6</sup>, flood warnings<sup>7</sup> and information<sup>8</sup>. The Agency has default powers to undertake flood defence measures where an internal drainage board has failed to do so<sup>9</sup> and may undertake such measures on behalf of local authorities<sup>10</sup>.

In internal drainage districts, internal drainage boards<sup>11</sup> have flood defence powers in respect of ordinary watercourses, that is, watercourses that are not main rivers<sup>12</sup>. Outside such districts, local authorities have such powers<sup>13</sup>.

Under the Land Drainage Act 1991, landowners may be authorised to carry out drainage works and to restore and improve ditches<sup>14</sup>. Private and local legislation may impose duties on landowners or other bodies in respect of flood defence and land drainage<sup>15</sup>. Additionally, such persons or bodies may be liable in nuisance or negligence for flood damage<sup>16</sup>.

Highway authorities have powers to drain highways, including the construction of culverts, and to fill in roadside ditches<sup>17</sup>.

1 As to the meaning of 'England' see PARA 19 note 8.

2 As to the Secretary of State see PARA 15. As to the latest strategy for the management of risk from all forms of flooding (river, coastal, groundwater, surface run-off and sewer) and coastal erosion, see *Making Space for Water* together with the programme of work thereunder. See also *Future Water* which sets out a framework for water management in England. These documents are available on the Department of Environment, Food and Rural Affairs website at [www.defra.gov.uk](http://www.defra.gov.uk).

3 As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. The transfer of the powers of the Secretary of State to the Welsh Ministers are noted in the footnotes to the relevant paragraph of the text. As to the latest policy relating to flood management in Wales see the *Environment Strategy for Wales* which is available on the Welsh Assembly Government website at [www.new.wales.gov.uk](http://www.new.wales.gov.uk).

4 As to the Environment Agency see PARA 17.

5 See the Environment Act 1995 s 6(4), (5); and PARA 573.

6 See PARA 574.

7 See PARA 596.

8 As to the duty to gather information see the Water Resources Act 1991 s 105(2); and PARA 573. Information about flooding is available on the Environment Agency's website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

9 See PARA 582.

10 See PARA 589.

11 As to internal drainage districts and internal drainage boards see PARA 569.

12 See PARA 569 et seq.

13 See PARA 589 et seq.

14 See PARAS 581-582.

15 As to local legislation see PARA 14. For an example of a case where such a duty was imposed by a local Act see *Countess of Rothes v Kirkcaldy and Dysart Waterworks Comrs* (1882) 7 App Cas 694, HL, where it was held that the relevant provisions of the Act were to be regarded as a contract between the parties.

16 See PARA 662 et seq.

17 See **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 285-286.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(i) Flood Defence Committees and Internal Drainage Boards/A. REGIONAL FLOOD DEFENCE COMMITTEES/559. Establishment of regional flood defence committees.

## **(2) FLOOD DEFENCE AND LAND DRAINAGE**

### **(i) Flood Defence Committees and Internal Drainage Boards**

#### ***A. REGIONAL FLOOD DEFENCE COMMITTEES***

##### **559. Establishment of regional flood defence committees.**

There must be regional flood defence committees<sup>1</sup> established for the purpose of carrying out the functions which fall to be carried out by such committees by virtue of the Environment Act 1995 and the Water Resources Act 1991<sup>2</sup>. The Environment Agency must maintain a principal office for the area of each such committee<sup>3</sup>.

<sup>1</sup> As to the duty of the Environment Agency to carry out flood defence functions through committees see the Water Resources Act 1991 s 106; and PARA 573. As to the Environment Agency see PARA 17.

<sup>2</sup> Environment Act 1995 s 14(1). Subject to Sch 4 (see PARA 560), there must be a regional flood defence committee for each of the areas for which there was an old committee immediately before 1 April 1996; but where under the Water Resources Act 1991 s 165(2) or (3) (see PARA 589) any function of the Agency falls to be carried out at a place beyond the seaward boundaries of the area of any regional flood defence committee, that place is assumed for these purposes and for the purposes of the Water Resources Act 1991 to be within the area of the regional flood defence committee to whose area the area of the sea where that place is situated is adjacent: Environment Act 1995 s 14(2); Environment Act 1995 (Commencement No 5) Order 1996, SI 1996/186, art 3. 'Old committee' means a regional flood committee for the purposes of the Water Resources Act 1991 s 9 (repealed): Environment Act 1995 s 14(4).

<sup>3</sup> Environment Act 1995 s 14(3).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(i) Flood Defence Committees and Internal Drainage Boards/A. REGIONAL FLOOD DEFENCE COMMITTEES/560. Boundaries etc of regional flood defence areas.

### **560. Boundaries etc of regional flood defence areas.**

The Secretary of State or, in certain cases, the Welsh Ministers or the Secretary of State and the Welsh Ministers acting jointly (the 'relevant minister')<sup>1</sup> may by order made by statutory instrument<sup>2</sup>:

- 1234 (1) alter the boundaries of the area of any regional flood defence committee<sup>3</sup>;
- 1235 (2) provide for the amalgamation of any two or more such areas<sup>4</sup>;
- 1236 (3) establish a new regional flood defence committee for such area as may be specified in the order (other than by providing for the amalgamation of the area of any two or more such committees)<sup>5</sup>; or
- 1237 (4) abolish a regional flood defence committee<sup>6</sup>.

Where such an order makes provision by reference to anything shown on a main river map<sup>7</sup>, that map is conclusive evidence for the purposes of the order of what is shown on the map<sup>8</sup>.

Before making any such order, the relevant minister must consult such persons<sup>9</sup> or representative bodies as he considers it appropriate to consult at that stage<sup>10</sup>. He must prepare a draft order<sup>11</sup>, and publish a notice<sup>12</sup> in the London Gazette and in such other manner as he considers appropriate for bringing the draft order to the attention of persons likely to be affected by it if it is made<sup>13</sup>; and must also cause copies of the notice and of the draft order to be served<sup>14</sup> on every person carrying out functions under any enactment<sup>15</sup> who appears to him to be concerned<sup>16</sup>.

The relevant minister must, before making the order, consider any representations or objections which are duly made with respect to the draft order and are not withdrawn, and may, if he thinks fit, cause a local inquiry to be held with respect to any such representations or objections<sup>17</sup>. Where notice of a draft order has been published and given in accordance with the above requirements and any representations or objections have been so considered, the relevant minister may make the order either in the terms of the draft or in those terms as modified in such manner as he thinks fit, or may decide not to make the order<sup>18</sup>. He may not, however, make a modification<sup>19</sup> of a draft order in so far as the modification is such as to include, in the area of any regional flood defence committee, any tidal waters which, if the order had been made in the form of the draft, would have been outside the area of every regional flood defence committee<sup>20</sup>.

Where the relevant minister makes such an order, he must serve notice of the making of the order on every person, if any, who is a person on whom notice of his intention to make it is required to have been served and who has duly made an objection to the making of the order that has not been withdrawn<sup>21</sup>. The order does not have effect before the end of a period of 28 days from the date of the last such notice served<sup>22</sup> and if, before the order so has effect, any person who has been served with such notice serves a notice of objection on the Secretary of State or the Welsh Ministers, or in the case of an order made jointly by them, on either of them, and the notice is not withdrawn, the order is subject to special parliamentary procedure unless made in relation to Wales<sup>23</sup>.

After making an order, the relevant minister must publish in the London Gazette, and in such manner as he considers appropriate for bringing the order to the attention of persons likely to be affected by it, a notice stating that the order has been made, and naming the places where a copy of it may be inspected at all reasonable times<sup>24</sup>. Subject to certain exceptions<sup>25</sup>, if any person desires to question the validity of any such order on the ground that it is not within the statutory powers above<sup>26</sup>, or that any statutory requirement above has not been complied with<sup>27</sup>, he may make an application for the purpose to the High Court within six weeks after the date of the first publication of the notice stating that it has been made<sup>28</sup>. On such an application, if the High Court is satisfied that the order is not within the statutory powers<sup>29</sup>, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the above requirements<sup>30</sup>, it may quash the order either generally or in so far as it affects the applicant<sup>31</sup>. The validity of such an order may not otherwise be questioned, either before or after it has been made, in any legal proceedings whatsoever<sup>32</sup>.

1 'Relevant minister' means: (1) in relation to any alteration of the boundaries of an area where the whole or any part of that area is in Wales, the ministers; (2) in relation to the amalgamation of any two or more areas where the whole or any part of one of those areas is in Wales, the ministers; (3) in relation to the establishment or abolition of a regional flood defence committee for an area the whole of which is in Wales, the Welsh Ministers; (4) in relation to the establishment or abolition of a regional flood defence committee for an area any part (but not the whole) of which is in Wales, the Secretary of State and the Welsh Ministers acting jointly; and (5) in any other case, the minister: see the Environment Act 1995 Sch 4 para 1(5) (amended by the Water Act 2003 s 68(4)); Government of Wales Act 2006 Sch 11 para 32. 'The minister' means the Minister of Agriculture, Fisheries and Food; and 'the ministers' means the Secretary of State and the minister: Environment Act 1995 s 56(1). On 27 March 2002, the Ministry of Agriculture, Fisheries and Food was dissolved and the functions of the Minister of Agriculture, Fisheries and Food were transferred to the Secretary of State, with any function which was exercisable by the Minister of Agriculture, Fisheries and Food and the Secretary of State acting jointly also being transferred to the Secretary of State: see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794, arts 1(2), 2(1)-(3).

The functions of the Secretary of State under the Environment Act 1995 Sch 4 (except those under head (4) above), so far as exercisable in relation to Wales, and the functions exercisable by the Minister of Agriculture, Fisheries and Food in pursuance of head (1) above in relation to the alteration of the boundaries of an area the whole of which is in Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the establishment of regional flood defence committees see PARA 559; and as to their membership etc see PARA 561 et seq. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

2 The power to make such an order includes power to make such supplemental, consequential and transitional provision as the relevant minister considers appropriate: Environment Act 1995 Sch 4 para 1(3). Such orders being local in nature are not recorded in this work.

3 Environment Act 1995 Sch 4 para 1(1)(a).

4 Environment Act 1995 Sch 4 para 1(1)(b). In the case of an order amalgamating the areas of any two or more regional flood defence committees or otherwise establishing a new regional flood defence committee, the provision made by virtue of Sch 4 para 1(3) (see note 2) may include provision determining the total number of members of the amalgamated or new committee and the total number of such members to be appointed by the constituent councils of that committee; and the provisions of s 16(7), (8) (see PARA 561) apply in relation to so much of such an order as they apply in relation to an order made under s 16(5): Sch 4 para 1(4) (amended by the Water Act 2003 s 68(1), (3)).

5 Environment Act 1995 Sch 4 para 1(1)(c) (Sch 4 para 1(1)(c), (d) added by the Water Act 2003 s 68(1), (2)).

6 Environment Act 1995 Sch 4 para 1(1)(d) (as added: see note 5).

7 As to the meaning of 'main river' see PARA 574; and as to the meaning of 'main river map' see PARA 574 note 6: definitions applied by the Environment Act 1995 Sch 4 para 1(6) (subject to the Water Resources Act 1991 s 194: see PARA 574).



8 Environment Act 1995 Sch 4 para 1(2).

9 As to the meaning of 'person' see PARA 13 note 29.

10 Environment Act 1995 Sch 4 para 2(1)(a). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 Environment Act 1995 Sch 4 para 2(1)(b).

12 The notice must state the relevant minister's intention to make the order and its general effect; specify the places where copies of the draft order and of any map to which it refers may be inspected by any person free of charge at all reasonable times during the period of 28 days beginning with the date on which the notice is first published otherwise than in the London Gazette; and state that any person may, within that period, object to the making of the order by giving notice in writing to the relevant minister: Environment Act 1995 Sch 4 para 2(2)(a)-(c). As to the meaning of 'writing' see PARA 22 note 1.

13 Environment Act 1995 Sch 4 para 2(1)(c).

14 As to the service of documents see PARA 22.

15 As to the meaning of 'enactment' see PARA 14 note 31.

16 Environment Act 1995 Sch 4 para 2(3).

17 Environment Act 1995 Sch 4 para 3(1).

18 Environment Act 1995 Sch 4 para 3(2).

19 'Modifications' includes additions, alterations and omissions and cognate expressions are to be construed accordingly: Environment Act 1995 s 124(1).

20 Environment Act 1995 Sch 4 para 3(3).

21 Environment Act 1995 Sch 4 para 4(1).

22 Environment Act 1995 Sch 4 para 4(2).

23 Environment Act 1995 Sch 4 para 4(3). A statutory instrument containing such an order which is not subject to special parliamentary procedure is subject to annulment in pursuance of a resolution of either House of Parliament: Sch 4 para 4(4). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

24 Environment Act 1995 Sch 4 para 5(1). In the case of an order to which Sch 4 para 4(2) applies (see the text to note 22), the notice must not be published until the end of the period of 28 days referred to therein and must state whether or not the order is to be subject to special parliamentary procedure: Sch 4 para 5(2).

25 This provision does not apply to any order which is confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARAS 925-926); and has effect in relation to any other order which is subject to special parliamentary procedure by virtue of the provisions of the Environment Act 1995 Sch 4 as if the reference to the date of the first publication of the notice required by Sch 4 para 5 (see the text to note 24) were a reference to the date on which the order becomes operative under that 1945 Act: Environment Act 1995 Sch 4 para 6(3).

26 Environment Act 1995 Sch 4 para 6(1)(a).

27 Environment Act 1995 Sch 4 para 6(1)(b).

28 Environment Act 1995 Sch 4 para 6(1). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

29 Environment Act 1995 Sch 4 para 6(2)(a).

30 Environment Act 1995 Sch 4 para 6(2)(b).

31 Environment Act 1995 Sch 4 para 6(2).

32 Environment Act 1995 Sch 4 para 6(4). As to judicial review of such decisions see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(i) Flood Defence Committees and Internal Drainage Boards/A. REGIONAL FLOOD DEFENCE COMMITTEES/561. Composition of regional flood defence committees generally.

### **561. Composition of regional flood defence committees generally.**

A regional flood defence committee<sup>1</sup> consists of a chairman and a number of other members appointed by the Secretary of State or, in relation to the regional flood defence committee for an area the whole or the greater part of which is in Wales, the Welsh Ministers (the 'relevant minister')<sup>2</sup>, two members appointed by the Environment Agency<sup>3</sup>, and a number of members appointed by or on behalf of the constituent councils<sup>4</sup>. None of the members may be a member of the Agency<sup>5</sup>. In appointing a person to be the chairman or a member of a regional flood defence committee, the relevant minister or a constituent council must have regard to the desirability of appointing a person who has experience of, and has shown capacity in, some matter relevant to the functions of the committee<sup>6</sup>.

The total number of members of a new committee for any area must be the same as the total number of members of the old committee for that area immediately before the transfer date<sup>7</sup>. Additional provision is made as to the membership of committees<sup>8</sup>.

The Agency may from time to time make a determination varying the total number of members of a regional flood defence committee<sup>9</sup>; and must submit any such determination to the relevant minister<sup>10</sup>. For these purposes, the total number of members of a regional flood defence committee (including the chairman) must not be less than 11<sup>11</sup>, and any determination by the Agency that a regional flood defence committee should consist of more than 17 members is provisional and takes effect only if the relevant minister makes an order to that effect<sup>12</sup>. Whenever the total number of members of a regional flood defence committee is varied, or whenever the relevant minister considers it necessary or expedient, he may make an order by statutory instrument specifying the number of members to be appointed to the committee by each of the constituent councils<sup>13</sup>.

The chairman of a regional flood defence committee may resign his office at any time by giving notice to the chairman of the Agency and to the Secretary of State or, as appropriate, the Welsh Ministers<sup>14</sup>. Any other member of such a committee may resign his office at any time by giving notice to the chairman of the committee and also to the Secretary of State or the Welsh Ministers if he was appointed by either of them<sup>15</sup>.

1 As to regional flood defence committees see PARA 559.

2 Environment Act 1995 s 15(1)(a). 'Relevant minister' means: (1) in relation to the regional flood defence committee for an area the whole or the greater part of which is in Wales, the Secretary of State; and (2) in relation to any other regional flood defence committee, the minister: Environment Act 1995 ss 15(7), 16(9). The functions of the Secretary of State under the Environment Act 1995 ss 15, 16 were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'the minister' see PARA 560 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Environment Act 1995 s 15(1)(b). As to the Environment Agency see PARA 17.

4 Environment Act 1995 s 15(1)(c). The councils of every county, county borough, metropolitan district or London borough any part of which is in the area of a regional flood defence committee are the constituent councils for the regional flood defence committee for that area, and the Common Council of the City of London is a constituent council for the regional flood defence committee for any area which comprises any part of the City: s 15(6). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

5 Environment Act 1995 s 15(1). Any person who immediately before 1 April 1996 was, by virtue of his appointment by a Minister of the Crown, by or on behalf of any council, or by the former National Rivers Authority (the 'NRA'), the chairman or a member of an old committee which, by virtue of s 14 (see PARA 559), is replaced by a new committee is to be treated, on and after that date, for the remainder of the period for which he would, under the terms of his appointment, have held office in relation to the old committee, as if he had been appointed as the chairman or, as the case may be, a member of the new committee, and on the same terms, by that minister, by or on behalf of that council, or, in the case of a person appointed by the NRA, by the Agency: see s 15(2); and the Environment Act 1995 (Commencement No 5) Order 1996, SI 1996/186, art 3. 'Old committee' has the same meaning as in s 14 (see PARA 559 note 2); and 'new committee' means a regional flood defence committee established under s 14: s 15(7).

6 Environment Act 1995 s 15(5).

7 Environment Act 1995 s 15(3)(a). The number of members to be appointed to a new committee for any area by or on behalf of each of the constituent councils or jointly by or on behalf of more than one of them must be the same as the number of members of the old committee for that area which fell to be so appointed immediately before the transfer date: s 15(3)(b). Section 15(3) is subject to s 16 (see the text to notes 9-13); and to any order under Sch 4 (see PARA 560): s 15(3). In any case where the appointment of one or more members of a regional flood defence committee is to be made jointly by more than one constituent council, and the councils by whom that appointment is to be made are unable to agree on an appointment, the member or members in question must be appointed by the relevant minister on behalf of those councils: s 15(4).

8 See the Environment Act 1995 Sch 5; and PARA 566.

9 Environment Act 1995 s 16(1).

10 Environment Act 1995 s 16(2).

11 Environment Act 1995 s 16(3)(a). In s 16 'member', in relation to a regional flood defence committee, includes the chairman of the committee: s 16(9).

12 Environment Act 1995 s 16(3)(b). If the Agency submits a provisional determination to the relevant minister with respect to any regional flood defence committee and he considers that the committee should consist of more than 17 members, he may confirm the determination or substitute for the number of members determined by the Agency some other number not less than 17: s 16(4).

13 Environment Act 1995 s 16(5). Where the order is made because the total number of members has been varied, it relates to times after the coming into force of that variation; but where it is made because the relevant minister considers it necessary or expedient, it may relate to such times as are specified in the order: see s 16(6). The order must be so framed that the total number of members appointed by the relevant minister and the Agency is one less than the number appointed by or on behalf of the constituent councils: s 16(7). For the purpose of determining the number of persons to be appointed to a regional flood defence committee by or on behalf of each constituent council, the relevant minister may: (1) if he considers it to be inappropriate that that council should appoint a member of the committee; or (2) if he considers that one or more members should be appointed jointly by that council and one or more other constituent councils, include provision to that effect in the order: s 16(8). Such orders, being local in nature, are not recorded in this work. However, for an example of such an order see the Yorkshire Regional Flood Defence Committee Order 2005, SI 2005/1607.

14 Environment Act 1995 Sch 5 para 5(1). The statutory wording is 'to one of the Ministers'. As to the meaning of 'the ministers' see PARA 560 note 1.

15 See the Environment Act 1995 Sch 5 para 5(2).

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## **562. Composition of regional flood defence committees in Wales.**

The following provisions apply in relation to any regional flood defence committee<sup>1</sup> which satisfies, or which, upon the coming into force of an order<sup>2</sup> will satisfy both of the statutory conditions (a 'Welsh committee')<sup>3</sup>. The statutory conditions are: (1) that the whole or the greater part of the committee's area is in Wales<sup>4</sup>; and (2) that no local flood defence scheme<sup>5</sup> is in force in relation to the area of the committee<sup>6</sup>.

The Welsh Ministers<sup>7</sup> may by order made by statutory instrument<sup>8</sup> make provision determining<sup>9</sup>: (a) the total number of members of a Welsh committee<sup>10</sup>; and (b) the method of selection and appointment of the chairman and other members of the committee, including who is to appoint them<sup>11</sup>.

The Welsh Regional Flood Defence Committee<sup>12</sup> consists of the following, none of whom may be a member of the Environment Agency<sup>13</sup>, that is to say: (i) a chairperson and seven other members appointed by the Welsh Ministers<sup>14</sup>; (ii) two members appointed by the Agency<sup>15</sup>; and (iii) one member appointed by or on behalf of each group of the constituent councils<sup>16</sup>. In appointing a person to be the chairperson or a member of the committee, the Welsh Ministers or, as the case may be, a constituent council must have regard to the desirability of appointing a person who has experience of, and has shown capacity in, some matter relevant to the functions of the committee<sup>17</sup>.

1 As to regional flood defence committees see PARA 559.

2 Ie an order under the Environment Act 1995 Sch 4: see PARA 560.

3 Environment Act 1995 s 16A(1) (ss 16A, 16B added by the Water Act 2003 s 67).

4 Environment Act 1995 s 16A(2)(a) (as added: see note 3). As to the meaning of 'Wales' see PARA 16 note 2.

5 As to local flood defence schemes see PARA 563.

6 Environment Act 1995 s 16A(2)(b) (as added: see note 3).

7 As to the Welsh Ministers see PARA 16 note 5. Functions under the Environment Act 1995 s 16A and the Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980 (see the text to notes 12-17), were originally vested in the National Assembly for Wales, but are now vested in the Welsh Ministers by virtue of the Government of Wales Act 2006 Sch 11 para 30.

8 In relation to a Welsh committee whose area is not wholly in Wales, the power to make an order under the Environment Act 1995 s 16A(3) may be exercised only with the agreement of the Secretary of State, and a statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: s 16A(5) (as added: see note 3). Section 15 (see PARA 561) or, where the order is being made in conjunction with an order under Sch 4, Sch 4 (see PARA 560) does not apply for the purposes of making an order under s 16A(3): s 16A(7) (as so added). An order under s 16A(3) may apply either to Welsh committees generally or to a particular Welsh committee and may include such supplemental, consequential and transitional provision as the Welsh Ministers consider appropriate: s 16A(4) (as so added); Government of Wales Act 2006 Sch 11 para 32. As to the Secretary of State see PARA 15 note 1. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

The Environment Act 1995 ss 15, 16 (see PARA 561) and s 18A(3) (see PARA 565) do not apply to a regional flood defence committee in respect of which an order under s 16A is in force: s 16B(1) (as so added). In relation to

any such committee, s 18 (see PARA 564) has effect as if: (1) s 18(4)(b) read 'other members appointed in accordance with and subject to the terms of the local flood defence scheme'; and (2) s 18(4)(c), (5) were omitted: s 16B(2) (as so added). In relation to any such committee whose membership does not include any member appointed by or on behalf of a constituent council, Sch 5 (see PARA 566) has effect as if: (a) in Sch 5 para 1(1), the words 'other than those appointed by or on behalf of one or more constituent councils' were omitted; (b) Sch 5 para 1(2), (3) and (4) were omitted; and (c) Sch 5 paras 2, 9 were omitted: s 16B(3) (as so added).

9 Environment Act 1995 s 16A(3) (as added: see note 3); Government of Wales Act 2006 Sch 11 para 32.

10 Environment Act 1995 s 16A(3)(a) (as added: see note 3).

11 Environment Act 1995 s 16A(3)(b) (as added: see note 3).

12 See the Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980, art 1(2).

13 As to the Environment Agency see PARA 17.

14 Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980, art 2(1)(a); Government of Wales Act 2006 Sch 11 para 32.

15 Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980, art 2(1)(b).

16 See the Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980, art 2(1)(c). As to the constituent councils and the groups thereof see Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980, Schedule. The appointments under art 2(1)(c) are to be made by the councils in each group acting jointly in respect of the member appointed for that group: art 2(2). Where the councils specified in any group in the Schedule are unable to make such an appointment, the Welsh Ministers may appoint a member for that group on behalf of those councils: art 2(3); Government of Wales Act 2006 Sch 11 para 32.

17 Welsh Regional Flood Defence Committee (Composition) Order 2006, SI 2006/980, art 2(4); Government of Wales Act 2006 Sch 11 para 32.

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## ***B. LOCAL FLOOD DEFENCE SCHEMES AND COMMITTEES***

### **563. Local flood defence schemes.**

The Environment Agency<sup>1</sup> may, in accordance with the following provisions, make a local flood defence scheme:

- 1238 (1) for the creation in the area of a regional flood defence committee<sup>2</sup> of one or more districts, to be known as local flood defence districts<sup>3</sup>; and
- 1239 (2) for the constitution, membership, functions and procedure of a committee for each such district, to be known as the 'local flood defence committee' for that district<sup>4</sup>.

Any local flood defence scheme<sup>5</sup> which was in force immediately before 1 April 1996<sup>6</sup> in relation to the area of a regional flood defence committee has effect on or after that date, and may be amended or revoked, as if it were a local flood defence scheme made under these provisions in relation to that area<sup>7</sup>.

A regional flood defence committee may at any time submit to the Agency: (a) a local flood defence scheme for any part of its area for which there is then no such scheme in force<sup>8</sup>; or (b) a scheme varying a local flood defence scheme or revoking such a scheme and, if the committee thinks fit, replacing it with another such scheme<sup>9</sup>. Before submitting such a scheme to the Agency, a regional flood defence committee must consult every local authority any part of whose area will fall within the area to which the scheme is proposed to relate<sup>10</sup>, and such organisations representative of persons<sup>11</sup> interested in flood defence<sup>12</sup> or agriculture as the regional flood defence committee considers to be appropriate<sup>13</sup>. The Agency must send any scheme submitted to it to the Secretary of State<sup>14</sup> or, in relation to the regional flood defence committee for an area the whole or the greater part of which is in Wales, the Welsh Ministers<sup>15</sup>.

A local flood defence scheme may define a local flood defence district by reference to: (i) the districts which were local land drainage districts immediately before 1 September 1989<sup>16</sup>; (ii) the area of the regional flood defence committee in which that district is situated<sup>17</sup>; (iii) a map<sup>18</sup>, or partly by one of those means and partly by another or others<sup>19</sup>. A scheme may contain incidental, consequential and supplementary provisions<sup>20</sup>. The provisions for the recovery of expenses by the Agency by the issuing of levies or precepts or by the raising of general and special drainage charges apply to each local flood defence district separately<sup>21</sup>.

Either the Secretary of State or, as the case may be, the Welsh Ministers may approve a local flood defence scheme with or without modifications<sup>22</sup>; and any scheme so approved comes into force on a date fixed by the Secretary of State or, as appropriate, the Welsh Ministers<sup>23</sup>.

1 As to the Environment Agency see PARA 17.

2 As to regional flood defence committees see PARA 559.

3 Environment Act 1995 s 17(1)(a).

4 Environment Act 1995 s 17(1)(b).

5 le any such scheme made under the Water Resources Act 1991 or continued in force by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 14(1): Environment Act 1995 s 17(2). In any case where, immediately before the coming into force of s 17 (ie 1 April 1996), any scheme or committee so continued to be treated as a local flood defence scheme or a local flood defence committee, the scheme or committee continues to be so treated notwithstanding the provisions of s 18 (see PARA 564) or the repeal of any enactment by the Environment Act 1995: s 120(2), Sch 23 para 23(1)(a).

6 le the 'transfer date': see the Environment Act 1995 (Commencement No 5) Order 1996, SI 1996/186, art 3.

7 Environment Act 1995 s 17(2). Accordingly, subject to any such amendment or revocation: (1) any local flood defence district created by that scheme and in being immediately before that date is treated, on or after that date, as a local flood defence district created by a scheme under s 17 in relation to the area of that local flood defence committee (s 17(2)(a)); and (2) any local flood defence committee created by that scheme for any such district and in being immediately before that date is treated, on and after that date, as the local flood defence committee for that district (s 17(2)(b)). See also note 5.

8 Environment Act 1995 s 17(3)(a).

9 Environment Act 1995 s 17(3)(b). References in s 17(4)-(8) (see the text to notes 10-23), s 18 (see PARA 564), s 18A (see PARA 565) to local flood defence schemes are references to schemes under either of head (a) or head (b) in the text: s 17(3) (amended by the Water Act 2003 s 66(1), (3)).

10 Environment Act 1995 s 17(4)(a). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 As to the meaning of 'person' see PARA 13 note 29.

12 As to the meaning of 'flood defence' see PARA 573: definition applied by the Environment Act 1995 s 17(4)(b).

13 Environment Act 1995 s 17(4)(b).

14 The statutory wording is 'to one of the ministers': see the Environment Act 1995 s 17(5). As to the meaning of 'the ministers' and as to the abolition of the Ministry of Agriculture, Fisheries and Food see PARA 560 note 1. As to the Secretary of State see PARA 15 note 1.

15 Environment Act 1995 s 17(5). Functions under the Environment Act 1995 s 17 in relation to the regional flood defence committee for an area the whole or the greater part of which is in Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the Welsh regional flood defence committee see PARA 562.

16 Environment Act 1995 s 17(6)(a).

17 Environment Act 1995 s 17(6)(b).

18 Environment Act 1995 s 17(6)(c).

19 Environment Act 1995 s 17(6).

20 Environment Act 1995 s 17(7).

21 See the Water Resources Act 1991 s 118; and PARA 611. A scheme therefore provides a more local control of flood defence expenditure with the expense being borne within that district.

22 As to the meaning of 'modifications' see PARA 560 note 19.

23 Environment Act 1995 s 17(8).



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#### **564. Constitution of local flood defence committees.**

A local flood defence scheme<sup>1</sup> must provide that any local flood defence committee<sup>2</sup> to which it relates is to consist of not less than 11 and not more than 15 members<sup>3</sup>. A regional flood defence committee<sup>4</sup> may, however, include in a local flood defence scheme which it submits to the Environment Agency<sup>5</sup> a recommendation that a committee to which the scheme relates should consist of a number of members greater than 15, and a scheme so submitted is taken to provide for the number of members of a committee if it contains such a recommendation relating to that committee<sup>6</sup>.

A local flood defence committee must consist of: (1) a chairman appointed from among its own members by the regional flood defence committee<sup>7</sup>; (2) other members appointed by that committee<sup>8</sup>; and (3) members appointed, in accordance with and subject to the terms of the local flood defence scheme, by or on behalf of constituent councils<sup>9</sup>. The number of members appointed by or on behalf of constituent councils must be one more than the total number appointed by the regional flood defence committee<sup>10</sup>.

In appointing a person to be a member of a local flood defence committee, the regional flood defence committee must have regard to the desirability of appointing a person who has experience of, and has shown capacity in, some matter relevant to the functions of the committee to which he is appointed<sup>11</sup>.

The chairman of a local flood defence committee may resign his office at any time by giving notice to the chairman of the regional flood defence committee<sup>12</sup>; and any other member may resign his office at any time by giving notice to the chairman of that local flood defence committee<sup>13</sup>. Further provision is made in relation to the terms of office of members, the proceedings of the committee, and other related matters<sup>14</sup>.

1 As to the meaning of 'local flood defence scheme' see PARA 563 note 9. As to the making of local flood defence schemes see PARA 563.

2 As to local flood defence committees see PARA 563.

3 Environment Act 1995 s 18(1).

4 As to regional flood defence committees see PARA 559.

5 As to the Environment Agency see PARA 17.

6 Environment Act 1995 s 18(2). The power conferred on the Secretary of State or the Welsh Ministers by s 17(8) (see PARA 563) includes power to direct that a committee to which such a recommendation relates is to consist either of the recommended number of members or of some other number of members greater than 15: see s 18(3). As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

7 Environment Act 1995 s 18(4)(a). As to the membership of regional flood defence committees see PARA 561.

8 Environment Act 1995 s 18(4)(b).

9 Environment Act 1995 s 18(4)(c). The councils of every county, county borough, metropolitan district or London borough any part of which is in a local flood defence district are the constituent councils for the local

flood defence committee for that district; and the Common Council of the City of London is a constituent council for the local flood defence committee of any local flood defence district which comprises any part of the City: s 18(8). Any person who, immediately before 1 April 1996, is, by virtue of an appointment by an old regional committee or by or on behalf of any council, the chairman or a member of a local flood defence committee which is continued in force by virtue of s 17(2) (see **PARA 563**) is treated, on and after that date, for the remainder of the period for which he would, under the terms of his appointment, have held office in relation to the local flood defence committee: (1) as if he had been appointed as such under s 18 by the regional flood defence committee or by or on behalf of that council (s 18(7)(a)); and (2) in the case of the chairman, as if he were a member of the regional flood defence committee (s 18(7)(b)). 'Old regional committee' means a regional flood defence committee for the purposes of the Water Resources Act 1991 s 9 (repealed): Environment Act 1995 s 18(9). Where, immediately before the coming into force of s 18 (ie 1 April 1996), any person continued, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 14, to hold office, the person so continues to hold office notwithstanding the provisions of the Environment Act 1995 s 18, or of Sch 5, or the repeal of any enactment by the Environment Act 1995: s 120(2), Sch 23 para 23(1)(b). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) **PARA 22** et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) **PARA 35** et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) **PARAS 51-55**. As to the meaning of 'enactment' see **PARA 14** note 31.

- 10 Environment Act 1995 s 18(5).
- 11 Environment Act 1995 s 18(6).
- 12 Environment Act 1995 Sch 5 para 6(1).
- 13 Environment Act 1995 Sch 5 para 6(2). As to disqualification for and removal from office see **PARA 566**.
- 14 See the Environment Act 1995 Sch 5; and **PARA 566** et seq.

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### **565. Power to revoke local flood defence schemes.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may by order made by statutory instrument<sup>3</sup> revoke any local flood defence scheme<sup>4</sup>.

The power to make such an order includes power to make such supplemental, consequential and transitional provision as the Secretary of State or the Welsh Ministers consider appropriate<sup>5</sup>; and the provision which may be so made includes provision altering: (1) the total number of members of the regional flood defence committee in whose area the local flood defence district created by the scheme was situated<sup>6</sup>; and (2) the total number of such members to be appointed by the constituent councils of that committee<sup>7</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Functions under the Environment Act 1995 s 18A were transferred to the National Assembly for Wales in relation to the local flood defence scheme for a district which is in the area of a regional flood defence committee the whole or the greater part of which is in Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (amended by the Water Act 2003, s 100(5)(b)). These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'local flood defence scheme' see PARA 563 note 9. As to the making of local flood defence schemes see PARA 563. As to regional flood defence committees see PARA 559. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 The Environment Act 1995 s 14(2), Sch 4 paras 2-6 (see PARA 560), apart from Sch 4 para 3(3), apply in relation to an order under s 18A as they apply in relation to an order under that Schedule, reading references there to the relevant minister as references to the Secretary of State or, as the case may be, the Welsh Ministers: see s 18A(4) (s 18A added by the Water Act 2003 s 66(1), (2)). Such orders, being local in nature, are not recorded in this work.

4 Environment Act 1995 s 18A(1) (as added: see note 3).

5 Environment Act 1995 s 18A(2) (as added: see note 3).

6 Environment Act 1995 s 18A(3)(a) (as added: see note 3). The provisions of s 16(7), (8) (see PARA 561) apply in relation to so much of an order under s 18A as is made by virtue of s 18A(3) as they apply in relation to an order under s 16(5): s 18A(3) (as so added).

7 Environment Act 1995 s 18A(3)(b) (as added: see note 3). See also note 6.

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### ***C. MEMBERSHIP AND PROCEEDINGS OF FLOOD DEFENCE COMMITTEES***

#### **566. Membership of flood defence committees.**

Members<sup>1</sup> of a flood defence committee<sup>2</sup>, other than those appointed by or on behalf of one or more constituent councils<sup>3</sup>, hold and vacate office in accordance with the terms of their appointment<sup>4</sup>. The first members of a local flood defence committee appointed by or on behalf of any one or more constituent councils come into office on the day on which the committee comes into existence or, in the case of a member who is for any reason appointed after that day, on the day on which the appointment is made<sup>5</sup>, and hold office<sup>6</sup> until the end of May in the year specified in the scheme<sup>7</sup> establishing the committee<sup>8</sup>. Any members of a flood defence committee appointed by or on behalf of any one or more constituent councils to whom the above provision does not apply come into office at the beginning of the June next following the day on which they are appointed<sup>9</sup> and hold office<sup>10</sup> for a term of four years<sup>11</sup>. If for any reason any such member is appointed on or after the day on which he ought to have come into office, he comes into office on the day on which he is appointed<sup>12</sup>, and holds office<sup>13</sup> for the remainder of the term<sup>14</sup>.

A person is disqualified for appointment as a member of a flood defence committee if he is a paid officer of the Environment Agency<sup>15</sup>. He is also disqualified for appointment if:

- 1240 (1) he is a person who has been adjudged bankrupt or had his estate sequestrated, or who has made a composition or arrangement with, or granted a trust deed for, his creditors<sup>16</sup>;
- 1241 (2) within the period of five years before the day of his appointment, he has been convicted, in the United Kingdom<sup>17</sup>, the Channel Islands or the Isle of Man, of any offence and has had passed on him a sentence of imprisonment, whether suspended or not, for a period of not less than three months without the option of a fine<sup>18</sup>; or
- 1242 (3) he is disqualified<sup>19</sup> for being elected or for being a member of a local authority<sup>20</sup>.

The office of a member of a flood defence committee becomes vacant upon the fulfilment of any of the following conditions:

- 1243 (a) the person holding that office is adjudged bankrupt, or is a person whose estate is sequestrated, or he makes a composition or arrangement with, or grants a trust deed for, his creditors<sup>21</sup>;
- 1244 (b) that person is convicted of such an offence as is described in head (2) above<sup>22</sup>;
- 1245 (c) that person is disqualified as mentioned in head (3) above<sup>23</sup>; or
- 1246 (d) that person has, for a period of six consecutive months, been absent from meetings of the committee, otherwise than by reason of illness or some other cause approved during the period by the committee<sup>24</sup>.

Where, for any reason whatsoever, the office of a member of a flood defence committee becomes vacant before the end of his term of office, the vacancy must be filled by the appointment of a new member if the unexpired portion of the term of office of the vacating member is six months or more<sup>25</sup>, and may be so filled in any other case<sup>26</sup>. A person so appointed to fill a casual vacancy holds office for so long only as the former member would have held office<sup>27</sup>. Subject to the above provisions<sup>28</sup>, a member of a flood defence committee is eligible for reappointment<sup>29</sup>.

A person nominated<sup>30</sup> by one or more constituent councils may act as deputy for a member of a flood defence committee appointed by or on behalf of that council or those councils and may, accordingly, attend and vote at a meeting of the committee instead of that member<sup>31</sup>. A person acting as deputy for a member of a flood defence committee is treated for the purposes for which he is nominated as a member of that committee<sup>32</sup>, but he may not act as deputy for a member of a flood defence committee unless his nomination has been notified to the officer of the Agency appointed to receive such nominations<sup>33</sup>. A person must not act as deputy for more than one member of a flood defence committee<sup>34</sup>; and nothing in these provisions entitles a person to attend and vote at a meeting of a local flood defence committee by reason of his nomination as deputy for a member of a regional flood defence committee<sup>35</sup>.

The Agency must pay to any person who is a chairman of a flood defence committee such remuneration and allowances as may be determined by the Secretary of State or, as the case may be, the Welsh Ministers (the 'relevant minister')<sup>36</sup>; and may pay to any person who is a member of a flood defence committee such allowances as may be determined by the relevant minister<sup>37</sup>. If the relevant minister so determines in the case of any person who is or has been chairman of a flood defence committee, the Agency must pay or make arrangements for the payment of a pension<sup>38</sup> in relation to that person in accordance with the determination<sup>39</sup>. If a person ceases to be chairman of a flood defence committee and it appears to the relevant minister that there are special circumstances which make it right that that person should receive compensation in respect of his ceasing to be chairman, the relevant minister may require the Agency to pay to that person a sum of such amount as that minister may determine<sup>40</sup>.

1 References to a 'member' of a flood defence committee include references to the chairman of such a committee: Environment Act 1995 Sch 5 para 1(5).

2 'Flood defence committee' means either a regional flood defence committee (see PARAS 559-562) or a local flood defence committee (see PARAS 563-565): Environment Act 1995 Sch 5 para 1(1).

3 As to the constituent councils for regional flood defence committees see PARA 561; and as to the constituent councils for local flood defence committees see PARA 564. Members of a flood defence committee appointed by or on behalf of any one or more constituent councils may be members of that council, or one of those councils, or other persons: Environment Act 1995 Sch 5 para 2(1). Any member of a flood defence committee so appointed who at the time of his appointment was a member of that council who ceases to be a member of that council also ceases to be a member of the committee at the end of the period of three months beginning with the date when he ceases to be a member of the council (Sch 5 para 2(2)(a)), or with the appointment of another person in his place (Sch 5 para 2(2)(b)), whichever is the earlier (Sch 5 para 2(2)). However, a member of a council is not deemed to have ceased to be a member of it by reason of retirement if he has been re-elected a member of it not later than the date of his retirement: Sch 5 para 2(3). As to the meaning of 'month' see PARA 23 note 10.

4 Environment Act 1995 Sch 5 para 1(1).

5 Environment Act 1995 Sch 5 para 1(2)(a).

6 Ie subject to the Environment Act 1995 Sch 5.

7 As to local flood defence schemes see PARA 563.

8 Environment Act 1995 Sch 5 para 1(2)(b). As to resignation from office in relation to regional flood defence committees see Sch 5 para 5 (PARA 561); and in relation to local flood defence committees see Sch 5 para 6 (PARA 564).

9 Environment Act 1995 Sch 5 para 1(3)(a).

10 Ie subject to the Environment Act 1995 Sch 5.

11 Environment Act 1995 Sch 5 para 1(3)(b).

12 Environment Act 1995 Sch 5 para 1(4)(a).

13 Ie subject to the Environment Act 1995 Sch 5.

14 Environment Act 1995 Sch 5 para 1(4)(b).

15 Environment Act 1995 Sch 5 para 3(1)(a). As to the Environment Agency see PARA 17.

16 Environment Act 1995 Sch 5 para 3(1)(b). Where a person is disqualified by reason of having been adjudged bankrupt, the disqualification ceases on his discharge from bankruptcy, unless the bankruptcy order made against him is previously annulled, in which case his disqualification ceases on the date of the annulment: Sch 5 para 3(2). Similar provisions apply where a person has had his estate sequestrated (in Scotland): see Sch 5 para 3(3). Where a person is disqualified by reason of his having made a composition or arrangement with, or having granted a trust deed for, his creditors, the disqualification ceases: (1) if he pays his debts in full, on the date on which the payment is completed; and (2) in any other case, at the end of five years from the date on which the terms of the deed of composition or arrangement, or of the trust deed, are fulfilled: Sch 5 para 3(4). Where a person is disqualified for membership of a regional flood defence committee or local flood defence committee by virtue of having been adjudged bankrupt before the coming into force of the Insolvency Act 1986 (ie 29 December 1986), the rules applicable apart from the repeals made by the Water Consolidation (Consequential Provisions) Act 1991 or the Environment Act 1995 apply, rather than Sch 5 para 3(2), for determining when that disqualification ceases: s 120(3), Sch 23 paras 22, 23(2). As to bankruptcy and arrangements and compositions with creditors see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

17 As to the meaning of 'United Kingdom' see PARA 22 note 5.

18 Environment Act 1995 Sch 5 para 3(1)(c). For these purposes, the date of the conviction is taken to be the ordinary date on which the period allowed for making an appeal or application with respect to the conviction expires; or, if such an appeal or application is made, the date on which it is finally disposed of or abandoned or fails by reason of non-prosecution: Sch 5 para 3(5).

19 Ie under the Audit Commission Act 1998 or under the Representation of the People Act 1983 Pt III (ss 120-186) (legal proceedings): see further **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 760; **LOCAL GOVERNMENT** vol 69 (2009) PARA 119.

20 Environment Act 1995 Sch 5 para 3(1)(d) (amended by the Audit Commission Act 1998 s 54(1), Sch 3 para 29). The Local Government Act 1972 s 92 (proceedings for disqualification: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 301) applies in relation to disqualification for appointment as a member of a flood defence committee as it applies in relation to disqualification for acting as a member of a local authority: Environment Act 1995 Sch 5 para 3(6).

21 Environment Act 1995 Sch 5 para 4(1)(a).

22 See Environment Act 1995 Sch 5 para 4(1)(b).

23 See Environment Act 1995 Sch 5 para 4(1)(c) (amended by the Audit Commission Act 1998 s 54(1), Sch 3 para 29).

24 Environment Act 1995 Sch 5 para 4(1)(d). For these purposes, the attendance of a member of a flood defence committee at a meeting of any sub-committee of the committee of which he is a member, or at any joint committee to which he has been appointed by that committee, is treated as attendance at a meeting of the committee: Sch 5 para 4(2). As to sub-committees and joint committees see PARA 567.

25 Environment Act 1995 Sch 5 para 7(1)(a).

26 Environment Act 1995 Sch 5 para 7(1)(b).

27 Environment Act 1995 Sch 5 para 7(2).

28 Ie subject to the provisions of the Environment Act 1995 Sch 5.

29 Environment Act 1995 Sch 5 para 8.

30 The nomination must be in writing and may apply either to a particular meeting or to all meetings during a stated period or until the nomination is revoked: Environment Act 1995 Sch 5 para 9(5). As to the meaning of 'writing' see PARA 22 note 1.

31 Environment Act 1995 Sch 5 para 9(1). A person so nominated may, by virtue of that nomination, attend and vote at a meeting of a sub-committee of the flood defence committee which has been appointed by that committee under Sch 5 Pt II (paras 11-16) (see PARA 567) (Sch 5 para 9(2)(a)), and is a committee to which the member for whom he is a deputy belongs (Sch 5 para 9(2)(b)).

32 Environment Act 1995 Sch 5 para 9(3).

33 Environment Act 1995 Sch 5 para 9(4).

34 Environment Act 1995 Sch 5 para 9(6).

35 Environment Act 1995 Sch 5 para 9(7).

36 Environment Act 1995 Sch 5 para 10(1). 'Relevant minister': (1) in relation to the regional flood defence committee for an area the whole or the greater part of which is in Wales and in relation to any local flood defence committee for any district comprised in the area of such a regional flood defence committee, means the Secretary of State; and (2) in relation to any other flood defence committee, means the minister: Sch 10(5) (a), (b). As to the Secretary of State see PARA 15 note 1. As to the meaning of 'the minister' see PARA 560 note 1. Functions of a Minister of the Crown under the Environment Act 1995 Sch 5 were transferred to the National Assembly for Wales in relation to any regional flood defence committee for an area wholly or mainly in Wales and in relation to any local flood defence committee for a district within the area of that regional flood defence committee: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

37 Environment Act 1995 Sch 5 para 10(4).

38 'Pension', in relation to any person, means a pension (whether contributory or not) of any kind payable to or in respect of him, and includes an allowance, gratuity or lump sum so payable and a return of contributions with or without interest or any other addition: Environment Act 1995 Sch 5 para 10(5).

39 Environment Act 1995 Sch 5 para 10(2).

40 Environment Act 1995 Sch 5 para 10(3).

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### **567. Appointment of sub-committees and delegation of functions.**

A flood defence committee<sup>1</sup> may arrange<sup>2</sup> for the carrying out of any of its functions<sup>3</sup>: (1) by a sub-committee, or an under sub-committee of the committee, or an officer of the Environment Agency<sup>4</sup>; or (2) by any other regional or, as the case may be, local flood defence committee<sup>5</sup>. Any two or more regional flood defence committees, or any two or more local flood defence committees, may arrange<sup>6</sup> to carry out any of their functions jointly or may arrange for the carrying out of any of their functions by a joint sub-committee of theirs<sup>7</sup>.

For these purposes: (a) a flood defence committee may appoint a sub-committee of the committee<sup>8</sup>; (b) two or more regional flood defence committees or two or more local flood defence committees may appoint a joint sub-committee of those committees<sup>9</sup>; and (c) any sub-committee may appoint one or more committees of that sub-committee ('under sub-committees')<sup>10</sup>. The number of members<sup>11</sup> of any sub-committee and their terms of office must be fixed by the appointing committee or committees or, in the case of an under sub-committee, by the appointing sub-committee<sup>12</sup>.

Where by virtue of these provisions any functions of a flood defence committee or of two or more such committees may be carried out by a sub-committee, then, unless the committee or committees otherwise directs or direct, the sub-committee may arrange for the carrying out of any of those functions by an under sub-committee or by an officer of the Agency<sup>13</sup>; and where any such functions may be so carried out by an under sub-committee, the under sub-committee may arrange for the carrying out of any of those functions by such an officer, unless the committee, committees or sub-committee otherwise directs or direct<sup>14</sup>.

Any arrangements made under these provisions for the carrying out of any function do not, however, prevent the flood defence committee from discharging its functions itself<sup>15</sup>. A regional flood defence committee may not make arrangements under these provisions for the carrying out in a local flood defence district<sup>16</sup> of any functions which fall to be carried out there by the local flood defence committee<sup>17</sup>.

1 As to the meaning of 'flood defence committee' see PARA 566 note 2.

2 I.e. subject to the Water Resources Act 1991 s 106 (see PARA 573) and to any other express provision contained in any enactment: Environment Act 1995 Sch 5 para 12(1). As to the meaning of 'enactment' see PARA 14 note 31.

3 References to the carrying out of any functions of a flood defence committee include references to the doing of anything which is calculated to facilitate, or is conducive or incidental to, the carrying out of any of those functions: Environment Act 1995 Sch 5 para 12(5). As to the interpretation of a similar provision in relation to local government see **LOCAL GOVERNMENT** vol 69 (2009) PARA 462.

4 Environment Act 1995 Sch 5 para 12(1)(a). As to the Environment Agency see PARA 17.

5 Environment Act 1995 Sch 5 para 12(1)(b).

6 I.e. subject to the Water Resources Act 1991 s 106 (see PARA 573) and to any other express provision contained in any enactment: Environment Act 1995 Sch 5 para 12(1).



- 7 Environment Act 1995 Sch 5 para 12(1).
- 8 Environment Act 1995 Sch 5 para 11(1)(a).
- 9 Environment Act 1995 Sch 5 para 11(1)(b).
- 10 Environment Act 1995 Sch 5 para 11(1)(c).
- 11 As to the meaning of 'member' see PARA 566 note 1.
- 12 Environment Act 1995 Sch 5 para 11(2). A sub-committee appointed under these provisions may include persons who are not members of the appointing committee or committees or, in the case of an under sub-committee, the committee or committees of which it is an under sub-committee; but at least two thirds of the members appointed to any such sub-committee must be members of that committee or those committees as the case may be: Sch 5 para 11(3). A person who is disqualified for being a member of a flood defence committee (see PARA 566) is also disqualified for being a member of a sub-committee or under sub-committee so appointed: Sch 5 para 11(4). As to the membership of flood defence committees see PARA 566.
- 13 Environment Act 1995 Sch 5 para 12(2).
- 14 Environment Act 1995 Sch 5 para 12(3).
- 15 Environment Act 1995 Sch 5 para 12(4).
- 16 As to local flood defence districts see PARA 563.
- 17 Environment Act 1995 Sch 5 para 12(6).

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### **568. Proceedings of flood defence committees.**

A flood defence committee<sup>1</sup> may, with the approval of the Secretary of State or, as the case may be, the Welsh Ministers (the 'relevant minister')<sup>2</sup>, make rules for regulating the proceedings of the committee<sup>3</sup>.

The statutory provisions relating to the pecuniary interests of members of local authorities<sup>4</sup> apply in relation to members<sup>5</sup> of a flood defence committee as they apply in relation to members of local authorities<sup>6</sup>. A member of a flood defence committee is disqualified, for so long as he remains such a member and for 12 months<sup>7</sup> after he ceases to be one, for appointment to any paid office by the Environment Agency or any regional flood defence committee<sup>8</sup>; but this does not disqualify any person for appointment to the office of chairman of a local flood defence committee<sup>9</sup>.

Any notice or other document which a flood defence committee is required or authorised to give, make or issue by or under any enactment<sup>10</sup> may be signed on behalf of the committee by any member of the committee or any officer of the Agency who is generally or specifically authorised for that purpose by a resolution of the committee<sup>11</sup>; and any document purporting to bear the signature<sup>12</sup> of a person expressed to be so authorised is deemed, unless the contrary is shown, to be duly given, made or issued by authority of the committee<sup>13</sup>. A minute of the proceedings of a meeting of a flood defence committee, purporting to be signed at that or at the next ensuing meeting by the chairman of the meeting to the proceedings of which it relates, or by the chairman of the next ensuing meeting, is evidence of the proceedings and must be received in evidence without further proof<sup>14</sup>. Where a minute has been so signed in respect of a meeting of a committee or sub-committee, then, unless the contrary is shown, the meeting is deemed to have been duly convened and held, all the proceedings had at the meeting are deemed to have been duly had and that committee or sub-committee is deemed to have been duly constituted and to have had power to deal with the matters referred to in the minute<sup>15</sup>.

The validity of any proceedings of a flood defence committee is not affected by any vacancy among the members of the committee or by any defect in the appointment of such a member<sup>16</sup>.

1 As to the meaning of 'flood defence committee' see PARA 566 note 2.

2 As to the meaning of 'relevant minister' see PARA 566 note 36: definition applied by the Environment Act 1995 Sch 5 para 13(3). As to the transfer of functions to the Welsh Ministers see PARA 566 note 36. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

3 Environment Act 1995 Sch 5 para 13(1). Such rules, not being made by statutory instrument, are not recorded in this work. Nothing in s 6(4) (see PARA 573) or in the Water Resources Act 1991 ss 105, 106 (see PARA 573) entitles the Environment Agency to make any arrangements or give any directions for regulating the proceedings of any flood defence committee: Environment Act 1995 Sch 5 para 13(2). As to the Environment Agency see PARA 17.

4 Ie the Local Government Act 1972 ss 94-98: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 286 et seq.

5 As to the meaning of 'member' see PARA 566 note 1.

6 Environment Act 1995 Sch 5 para 14(1). In their application those provisions have effect in accordance with the following modifications: (1) for references to meeting of the local authority there are substituted references to meetings of the committee; (2) in the Local Government Act 1972 s 94(4) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 286), for the reference to provision being made by standing orders of a local authority there is substituted a reference to provisions being made by directions of the committee; (3) in s 96 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 289), for references to the proper officer of the local authority there is substituted a reference to an officer of the Environment Agency appointed for these purposes; and (4) s 97 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 292) applies as it applies to a local authority other than a parish or community council: Environment Act 1995 Sch 5 para 14(2)(a)-(d).

7 As to the meaning of 'month' see PARA 23 note 10.

8 Environment Act 1995 Sch 5 para 14(3). As to regional flood defence committees see PARA 559 et seq.

9 Environment Act 1995 Sch 5 para 14(4). As to local flood defence committees see PARAS 563-565; and as to the appointment of a chairman see PARA 564.

10 As to the meaning of 'enactment' see PARA 14 note 31.

11 Environment Act 1995 Sch 5 para 15(1).

12 'Signature' includes a facsimile of a signature, by whatever process reproduced: Environment Act 1995 Sch 5 para 15(3).

13 Environment Act 1995 Sch 5 para 15(2).

14 Environment Act 1995 Sch 5 para 16(1).

15 Environment Act 1995 Sch 5 para 16(2). As to sub-committees see PARA 567.

16 Environment Act 1995 Sch 5 para 16(3).

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## ***D. INTERNAL DRAINAGE DISTRICTS AND BOARDS***

### **569. In general.**

For the purposes of the drainage<sup>1</sup> of land<sup>2</sup>:

1247 (1) there are districts, known as 'internal drainage districts', which are such areas within the areas of the regional flood defence committees<sup>3</sup> as will derive benefit, or avoid danger, as a result of drainage operations<sup>4</sup>; and

1248 (2) there are boards, known as 'internal drainage boards', each of which is the drainage board for an internal drainage district<sup>5</sup>.

An internal drainage board exercises a general supervision over all matters relating to the drainage of land within its district and has such other powers and performs such other duties as are conferred or imposed on internal drainage boards by the Land Drainage Act 1991<sup>6</sup>.

An internal drainage board is a body corporate which consists of members elected and holding office in accordance with the statutory provisions<sup>7</sup> and members appointed in accordance with those provisions by local billing authorities<sup>8</sup>. The first members of an internal drainage board must be persons appointed by the Secretary of State or, as the case may be, the Welsh Ministers (the 'relevant minister')<sup>9</sup>, together with any persons appointed by local billing authorities<sup>10</sup>.

1 As to the meaning of 'drainage' see PARA 573.

2 'Land' includes water and any interests in land or water and any easement or right in, to or over land or water: Land Drainage Act 1991 s 72(1).

3 As to regional flood defence committees see PARA 559 et seq.

4 Land Drainage Act 1991 s 1(1)(a). The internal drainage districts which were such districts immediately before the coming into force of s 1 (ie 1 December 1991: see s 72(2)) and the boards for those districts continue as such districts and boards: s 1(1). As to the review of boundaries of internal drainage districts see PARA 577. As to schemes for the reorganisation of such districts see PARA 578.

5 Land Drainage Act 1991 s 1(1)(b). See also note 4. As to the power to make the Environment Agency an internal drainage board see PARA 579. As to the general functions of internal drainage boards see PARA 581 et seq. As to the Environment Agency see PARA 17.

6 Land Drainage Act 1991 s 1(2). See further PARA 573 et seq.

7 Ie in accordance with provisions made by or under the Land Drainage Act 1991 Sch 1: see PARA 570.

8 Land Drainage Act 1991 s 1(3) (amended by virtue of the Local Government Finance Act 1992 s 1). As to such appointment see PARA 633. As to local billing authorities see the Local Government Finance Act 1992 s 1; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 229. So far as members of an internal drainage board are so required to be elected, this provision has effect in relation to an internal drainage board in existence on 1 August 1930 only to such an extent as: (1) it is applied to the board by a scheme made or having effect as if made under the Land Drainage Act 1991 s 3 (see PARA 578); or (2) immediately before 1 December 1991, corresponding provision otherwise applied in relation to that board by virtue of the Land Drainage Act 1976 s 7(4) (repealed): Land Drainage Act 1991 s 1(6).

9 'Relevant minister' means: (1) in relation to internal drainage districts which are neither wholly nor partly in Wales or to the boards for such districts, the minister; (2) in relation to internal drainage districts which are partly in Wales or to the boards for such districts, the ministers; and (3) in relation to internal drainage districts which are wholly in Wales or to the boards for such districts, the Secretary of State: Land Drainage Act 1991 s 72(1). 'The minister' means the Minister of Agriculture, Fisheries and Food; and 'the ministers' means the minister and the Secretary of State, and in relation to anything which falls to be done by the ministers, means those ministers acting jointly: s 72(1).

The functions of a Minister of the Crown under the Land Drainage Act 1991, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales except s 31 (see PARA 588), and except the functions of the Minister of Agriculture, Fisheries and Food under ss 1-7 (see PARAS 570-573, 577-581), ss 9, 10 (see PARA 582) s 19 (see PARA 590), ss 33, 34 (see PARA 592), ss 38, 39 (see PARA 631), s 47 (see PARA 632), s 51 (see PARA 636), s 52 (see PARA 626), s 55 (see PARA 640), ss 57, 58 (see PARA 613), ss 61A, 61B (see PARA 642), s 61D (see PARA 645), ss 62(1), 63 (see PARA 609), s 66 (see PARAS 605-607) and s 69 (see PARA 657), and Sch 1 (see PARAS 570, 633), Sch 2 (see PARAS 571, 572), Sch 3 para 8 (see PARA 583) (so far as relating to matters concerning orders under ss 3-5) and Sch 5 (see PARAS 606-607): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

On 27 March 2002, the Ministry of Agriculture, Fisheries and Food was dissolved and the functions of the Minister of Agriculture, Fisheries and Food were transferred to the Secretary of State, with any function which was exercisable by the Minister of Agriculture, Fisheries and Food and the Secretary of State acting jointly also being transferred to the Secretary of State: see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794, arts 1(2), 2(1)-(3).

10 Land Drainage Act 1991 s 1(4).

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### **570. Election of members.**

An election of members of an internal drainage board<sup>1</sup> must be conducted in accordance with rules contained in regulations<sup>2</sup> made by the Secretary of State<sup>3</sup> or, as appropriate, by the Welsh Ministers (the 'relevant minister')<sup>4</sup>:

- 1249 (1) for the preparation of registers of electors and for securing that the registers are open to inspection<sup>5</sup>;
- 1250 (2) with respect to the holding and conduct of elections, including provisions as to returning officers, nominations, polls and the counting of votes<sup>6</sup>; and
- 1251 (3) for allowing any person<sup>7</sup> or body of persons entitled to vote at an election to vote by a deputy<sup>8</sup>.

The electors for members of an internal drainage board are the persons who at the date of the election occupy land<sup>9</sup> in the board's district on which a drainage rate has been levied in the year immediately preceding<sup>10</sup>. Each elector is entitled to one or more votes according to the assessable value<sup>11</sup> of the property in respect of which he is entitled to vote<sup>12</sup>.

A person is not qualified for election as a member of an internal drainage board unless he is:

- 1252 (a) both the owner and the occupier of not less than 4 hectares of land in respect of which a drainage rate may be levied by the board and which is situated in the electoral district for which he is a candidate for election<sup>13</sup>;
- 1253 (b) the occupier, whether under tenancies of year to year or otherwise, of not less than 8 hectares of such land<sup>14</sup>;
- 1254 (c) the occupier of land which is of an assessable value<sup>15</sup> of £30 or upwards and is situated in the electoral district for which he is a candidate for election<sup>16</sup>; or
- 1255 (d) a person nominated as a candidate for election by the person, whether an individual or a body of persons, who is both the owner and the occupier of land which is situated in the electoral district in question and is either of not less than 4 hectares in extent or of an assessable value of £30 or upwards<sup>17</sup>.

Elected members<sup>18</sup> of an internal drainage board come into office on 1 November next after the day on which they are elected and hold office for a term of three years<sup>19</sup>. An elected member may resign his office by notice given to the chairman of the board<sup>20</sup> and must, if he is absent from meetings of the board for more than six months<sup>21</sup> consecutively, vacate his office at the end of that six months unless his absence is due to illness or some other reason approved by the board<sup>22</sup>. If for any reason whatsoever the place of an elected member of an internal drainage board becomes vacant before the end of his term of office, the vacancy must be filled by the election by the board of a new member<sup>23</sup>, except where the unexpired portion of the term of his office is less than six months, in which case the vacancy need not be filled<sup>24</sup>. A person elected to fill a casual vacancy holds office so long as the vacating member would have held it<sup>25</sup>.

Subject to the above provisions, a vacating member of an internal drainage board is eligible for re-election or reappointment<sup>26</sup>.

- 1 As to internal drainage boards see PARA 569.
- 2 As to the making of regulations see PARA 583.
- 3 As to the Secretary of State see PARA 15 note 1.
- 4 As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Welsh Ministers see PARA 16 note 5.
- 5 Land Drainage Act 1991 Sch 1 para 1(1)(a).
- 6 Land Drainage Act 1991 Sch 1 para 1(1)(b).
- 7 As to the meaning of 'person' see PARA 13 note 29.
- 8 Land Drainage Act 1991 Sch 1 para 1(1)(c). Provision so made may include provision with respect to the making of objections to entries in registers and with respect to the hearing and determination of such objections: Sch 1 para 1(2). By virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1, the Land Drainage (Election of Drainage Boards) Regulations 1938, SR & O 1938/558 (amended by SI 1977/366; and by virtue of the Water Act 1989 s 190, Sch 26 para 36(2) and the Environment Act 1995 s 120(1), Sch 22 para 233(1)), have effect as if made under these provisions. See the Land Drainage (Election of Drainage Boards) Regulations 1938, SR & O 1938/558, regs 1-3 (as so amended) (division into districts and preparation, approval and revisions of registers); regs 4-12 (as so amended) (appointment of returning officer, publication of notice of election and nominations); regs 13-26 (as so amended) (conduct of elections and declaration of result); reg 27 (care of voting papers).
- The Land Drainage Act 1991 Sch 1 Pt I (paras 1-4) has effect in relation to an internal drainage board in existence on 1 August 1930 only to such an extent as: (1) it is applied to the board by a scheme made or having effect as if made under the Land Drainage Act 1991 s 3 (see PARA 578); or (2) immediately before 1 December 1991, corresponding provision otherwise applied in relation to that board by virtue of the Land Drainage Act 1976 s 7(4) (repealed): Land Drainage Act 1991 s 1(6).
- 9 The owner of any hereditament is deemed to be its occupier for these purposes during any period in which it is unoccupied: Land Drainage Act 1991 Sch 1 para 2(3). As to the meaning of 'land' see PARA 569 note 2.
- 10 Land Drainage Act 1991 Sch 1 para 2(1). As to drainage rates see PARA 627 et seq. A person is not entitled to be an elector by reason of his occupation of land if at the date of the election any amount demanded in respect of any drainage rate levied on that land has remained unpaid for more than a month: Sch 1 para 2(2). An elector owning or occupying property in two or more electoral districts must be entered on the register in respect of his property in each district: see the Land Drainage (Election of Drainage Boards) Regulations 1938, SR & O 1938/558, reg 2(1).
- 11 This reference to the assessable value of any land is a reference to the amount which for the purposes of any drainage rate levied at the relevant date would be the annual value of the land; and 'relevant date' means the date as at which the qualification of electors is determined for the purposes of the election in accordance with rules made under the Land Drainage Act 1995 Sch 1 para 1 (see the text to notes 1-8): Sch 1 para 3(2), (3). For transitional provision with respect to electors who qualify by reference to drainage rates made in respect of years beginning before 1993 see Sch 1 para 2(4); and the Water Consolidation (Consequential Provisions) Act 1991 Sch 2 para 17. As to annual value see PARA 627.
- 12 Land Drainage Act 1991 Sch 1 para 3(1). The scale set out in Sch 1 para 3(1) provides for one vote if the assessable value is less than £50, two if it is less than £100, three if it is less than £150, four if it is less than £200, five if it is less than £250, six if it is less than £500, eight if it is less than £1,000 and ten if it is £1,000 or more: see Sch 1 para 3(1), Table. This scale is identical to that set out in the Land Drainage Act 1976: see s 7(3), Sch 2 para 23(1) (repealed).
- 13 Land Drainage Act 1991 Sch 1 para 4(1)(a). A person is not qualified as being an occupier of any land, or as being the owner and occupier of any land, or as a person nominated by the owner and occupier of any land (see head (d) in the text) for these purposes if at the date of the election any amount demanded in respect of any drainage rate levied on that land has remained unpaid for more than one month: Sch 1 para 4(2). As to the meaning of 'month' see PARA 23 note 10.
- 14 Land Drainage Act 1991 Sch 1 para 4(1)(b). See also note 13.
- 15 This reference to the assessable value of any land is a reference to the amount which for the purposes of any drainage rate levied at the relevant date would be the annual value of the land; and 'relevant date' means the date as at which the qualifications of candidates for the election in question are determined in accordance

with rules made under the Land Drainage Act 1991 Sch 1 para 1 (see the text to notes 1-8): Sch 1 para 4(3), (5). Schedule 1 para 4 has effect subject to the provisions of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 18, which makes provision with respect to relevant dates falling before 1 April 1993: Land Drainage Act 1991 Sch 1 para 4(4).

16 Land Drainage Act 1991 Sch 1 para 4(1)(c). See also note 13.

17 Land Drainage Act 1991 Sch 1 para 4(1)(d). See also note 13.

18 For these purposes, references to an elected member in relation to an internal drainage board are references to any member of that board other than a member appointed by one or more local billing authorities: Land Drainage Act 1991 Sch 1 para 12 (amended by virtue of the Local Government Finance Act 1992 s 1). As to local billing authorities see the Local Government Finance Act 1992 s 1; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 229. As to members so appointed see PARA 633. The terms of appointment of any such appointed member are determined by the authority or authorities by which he is appointed: Land Drainage Act 1991 Sch 1 para 7(2).

19 Land Drainage Act 1991 Sch 1 para 7(1). The members of an internal drainage board who are appointed by the relevant minister as first members of that board hold office until the end of one year from the 1 November next following the day on which they are appointed: Sch 1 para 7(3). Schedule 1 Pt III (paras 7-12) has effect in relation to an internal drainage board in existence on 1 August 1930 only to such an extent as: (1) it is applied to the board by a scheme made or having effect as if made under the Land Drainage Act 1991 s 3 (see PARA 578); or (2) immediately before 1 December 1991, corresponding provision otherwise applied in relation to that board by virtue of the Land Drainage Act 1976 s 7(4) (repealed): Land Drainage Act 1991 s 1(6).

20 Land Drainage Act 1991 Sch 1 para 8(1).

21 As to the meaning of 'month' see PARA 23 note 10.

22 Land Drainage Act 1991 Sch 1 para 8(2).

23 Land Drainage Act 1991 Sch 1 para 10(1).

24 See the Land Drainage Act 1991 Sch 1 para 10(2).

25 Land Drainage Act 1991 Sch 1 para 10(3).

26 Land Drainage Act 1991 Sch 1 para 11.



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### **571. Proceedings of internal drainage boards.**

An internal drainage board<sup>1</sup> may, with the approval of the Secretary of State<sup>2</sup> or, as appropriate, the Welsh Ministers (the 'relevant minister')<sup>3</sup>, make rules: (1) for regulating its proceedings, including quorum, place of meetings and notices to be given of meetings<sup>4</sup>; (2) with respect to the appointment of a chairman and a vice-chairman<sup>5</sup>; (3) for enabling it to constitute committees<sup>6</sup>; and (4) for authorising the delegation to committees of any of the powers of the board and for regulating the proceedings of committees, including quorum, place of meetings and notices to be given of meetings<sup>7</sup>.

The first meeting of an internal drainage board must be held on a day, and at a time and place, fixed by the relevant minister; and the relevant minister must cause notice of the meeting to be sent to each member of the board not less than 14 days before the appointed day<sup>8</sup>.

Any member of an internal drainage board who is interested in any company with which the board has, or proposes to make, any contract must disclose to the board the fact and nature of his interest and may not take part in any deliberation or decision of the board relating to that contract<sup>9</sup>.

A minute of the proceedings of a meeting of an internal drainage board, or of a committee of such a board, purporting to be signed at that or the next ensuing meeting by a person describing himself as, or appearing to be, the chairman of the meeting to the proceedings of which the minute relates is evidence of the proceedings and must be received in evidence without further proof<sup>10</sup>. Until the contrary is proved, every meeting in respect of the proceedings of which a minute has been so signed is deemed to have duly convened and held, all the proceedings had at any such meeting are deemed to have been duly had, and where the proceedings at any such meeting are the proceedings of a committee, the committee is deemed to have been duly constituted and to have had power to deal with the matters referred to in the minute<sup>11</sup>. The proceedings of an internal drainage board are not invalidated by any vacancy in the membership of the board or by any defect in the appointment or qualification of any member of the board<sup>12</sup>.

The relevant minister may, if he thinks fit, by order authorise an internal drainage board to pay to the chairman of the board, for the purpose of enabling him to meet the expenses of his office, such allowance as may be specified in the order<sup>13</sup>. An internal drainage board may pay any reasonable expenses incurred by its members and officers in: (a) attending meetings of the board or a committee or sub-committee thereof<sup>14</sup>; (b) carrying out inspections necessary for the discharge of the functions of the board<sup>15</sup>; or (c) attending conferences or meetings convened by one or more internal drainage boards, or by any association of internal drainage boards, for the purpose of discussing matters connected with the discharge of the functions of internal drainage boards<sup>16</sup>; and may pay any reasonable expenses incurred by its members or officers in purchasing reports of the proceedings of any such conference or meeting<sup>17</sup>.

An internal drainage board may pay to persons employed by it such reasonable remuneration as it thinks fit<sup>18</sup>; and an internal drainage board may provide housing accommodation for persons employed by it<sup>19</sup>.

1 As to internal drainage boards see PARA 569.

- 2 As to the Secretary of State see PARA 15 note 1.
- 3 As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Welsh Ministers see PARA 16 note 5.
- 4 Land Drainage Act 1991 Sch 2 para 3(1)(a).
- 5 Land Drainage Act 1991 Sch 2 para 3(1)(b).
- 6 Land Drainage Act 1991 Sch 2 para 3(1)(c).
- 7 Land Drainage Act 1991 Sch 2 para 3(1)(d). Schedule 2 para 3 has effect in relation to an internal drainage board in existence on 1 August 1930 only to such an extent as: (1) it is applied to the board by a scheme made or having effect as if made under s 3 (see PARA 578); or (2) immediately before 1 December 1991, corresponding provision otherwise applied in relation to that board by virtue of the Land Drainage Act 1976 s 7(4) (repealed): Land Drainage Act 1991 s 1(6).
- 8 Land Drainage Act 1991 Sch 2 para 3(2).
- 9 Land Drainage Act 1991 Sch 2 para 3(3). The disclosure must be recorded forthwith in the minutes of the board: Sch 2 para 3(3).
- 10 Land Drainage Act 1991 Sch 2 para 3(4).
- 11 Land Drainage Act 1991 Sch 2 para 3(5).
- 12 Land Drainage Act 1991 Sch 2 para 3(6).
- 13 Land Drainage Act 1991 Sch 2 para 1(1).
- 14 Land Drainage Act 1991 Sch 2 para 1(2)(a).
- 15 Land Drainage Act 1991 Sch 2 para 1(2)(b).
- 16 Land Drainage Act 1991 Sch 2 para 1(2)(c).
- 17 Land Drainage Act 1991 Sch 2 para 1(2). Without prejudice to the other provisions of Schedule 2: (1) an internal drainage board may enter into a contract with any person under which, in consideration of payments made by the board by way of premium or otherwise, that person undertakes to pay to the board such sums as may be provided in the contract in the event of any member of the board or of any of its committees meeting with a personal accident, whether fatal or not, while he is engaged on the business of the board; (2) any sum received by an internal drainage board under any such contract must, after deduction of any expenses incurred in the recovery of that sum, be paid by the board to, or to the personal representatives of, the person in respect of whose accident the sum is received; and the provisions of the Life Assurance Act 1774 (see **INSURANCE** vol 25 (2003 Reissue) PARA 535 et seq) do not apply to any such contract: Land Drainage Act 1991 Sch 2 para 1(3). As to the meaning of 'person' see PARA 13 note 29.
- 18 Land Drainage Act 1991 Sch 2 para 2(1).
- 19 Land Drainage Act 1991 Sch 2 para 2(2). A board may, accordingly, acquire land for that purpose under s 62 (see PARA 609): Sch 2 para 2(2).

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## **572. Report and accounts.**

Before a date in every year fixed by the Secretary of State<sup>1</sup> or, as appropriate, the Welsh Ministers (the 'relevant minister')<sup>2</sup>, an internal drainage board<sup>3</sup> must send to that minister a report of its proceedings during the preceding year<sup>4</sup>. At the same time, the board must send a copy of its report to the Environment Agency<sup>5</sup> and to the council of every county, county borough and London borough in which any part of the board's district is situated<sup>6</sup>. Every such report must be in such form and must contain particulars with respect to such matters as the relevant minister may direct<sup>7</sup>.

As soon as its accounts have been audited, an internal drainage board must send a copy of them to the relevant minister, to the Agency, and to the council of every county, county borough and London borough in which any part of the board's district is situated<sup>8</sup>. A copy of the board's audited accounts must be kept at the board's office and any person<sup>9</sup> who is liable to pay drainage rates<sup>10</sup> in the board's district is entitled, without payment, to inspect that copy and to take copies of it or extracts from it<sup>11</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Welsh Ministers see PARA 16 note 5.

3 As to internal drainage boards see PARA 569.

4 Land Drainage Act 1991 Sch 2 para 4(1)(a). Schedule 2 paras 4, 5 (see the text to notes 8-11) have effect in relation to an internal drainage board in existence on 1 August 1930 only to such an extent as: (1) they were applied to the board by a scheme made or having effect as if made under s 3 (see PARA 578); or (2) immediately before 1 December 1991, corresponding provisions otherwise applied in relation to that board by virtue of the Land Drainage Act 1976 s 7(4) (repealed): Land Drainage Act 1991 s 1(6). A report for the year ending 31 March must be sent to the relevant minister before the following 1 July: see the Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 3(1). The Land Drainage (General) Regulations 1932, SR & O 1932/64, have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1.

5 As to the Environment Agency see PARA 17.

6 Land Drainage Act 1991 Sch 2 para 4(1)(b) (Sch 2 paras 4(1), 5(1) amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(13); and by virtue of the Environment Act 1995 s 120(1), Sch 22 para 191). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq.

7 Land Drainage Act 1991 Sch 2 para 4(2). For the form of the report see the Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 3(2), Schedule, Form B.

8 Land Drainage Act 1991 Sch 2 para 5(1) (as amended: see note 6). See also note 4.

9 As to the meaning of 'person' see PARA 13 note 29.

10 As to liability to pay drainage rates see PARA 627 et seq.

11 Land Drainage Act 1991 Sch 2 para 5(2).

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## **(ii) General Powers and Duties to Drain Land and Protect Land from Flooding**

### **A. INTRODUCTION**

#### **573. General duties and powers.**

Under English law, the primary obligation to drain and protect land is that of the individual landowner and the common law has established a regime of rights and duties of and upon landowners in this respect<sup>1</sup>. The scheme of the various Acts<sup>2</sup> is generally not to remove such rights and duties but to confer additional powers on the various relevant statutory bodies<sup>3</sup> and in certain cases the landowners themselves<sup>4</sup> and to require the consent of the appropriate statutory body before a landowner may undertake certain activities<sup>5</sup>. It is important to bear in mind that the legislative framework generally confers powers and does not impose duties on statutory bodies exercising flood defence or land drainage functions<sup>6</sup>.

For the purposes of the legislation on the land drainage powers and duties of statutory bodies, 'drainage' includes defence against water (including sea water<sup>7</sup>), irrigation, other than spray irrigation<sup>8</sup>, warping<sup>9</sup> and the carrying on for any purpose of any other practice which involves management of the level of water in a watercourse<sup>10</sup>. 'Flood defence' means the drainage of land and the provision of flood warning systems<sup>11</sup>.

The division of responsibility between the various drainage bodies, which are the Environment Agency<sup>12</sup>, internal drainage boards<sup>13</sup>, local authorities<sup>14</sup> and any other body having power to make or maintain works for the drainage of land<sup>15</sup>, depends primarily on the status of the watercourses involved. For the purpose of the relevant legislation, a watercourse is either a 'main river' or an 'ordinary watercourse'<sup>16</sup>.

The Agency exercises a general supervision over all matters relating to flood defence<sup>17</sup> and is required for the purpose of carrying out its flood defence functions<sup>18</sup> to carry out from time to time surveys of the areas in relation to which it carries out those functions<sup>19</sup>. It must also be consulted by a local planning authority on the flood defence implications of any application for planning permission<sup>20</sup>. The Agency must arrange for its functions under the Land Drainage Act 1991 and those of its functions under the Water Resources Act 1991 that relate to flood defence to be carried out by regional flood defence committees<sup>21</sup>. The arrangements must ensure that those functions are carried out in relation to the area of each regional flood defence committee by the committee for that area<sup>22</sup>. However, the issuing of levies, the making of drainage charges and the borrowing of money must not be included in such arrangements<sup>23</sup>. The Agency must maintain a principal office for the area of each regional flood defence committee<sup>24</sup>. The Agency may give to a regional flood defence committee a direction of a general or specific character as to the carrying out of any function relating to flood defence (other than one of that committee's internal drainage functions<sup>25</sup>) so far as the carrying out of that function appears to the Agency likely to affect materially its management of water for purposes other than flood defence<sup>26</sup>; and it is the duty of the regional flood defence committee to comply with that direction<sup>27</sup>.

A scheme (a 'local flood defence scheme') may also be made by the Agency for the creation, in the area of a regional flood defence committee, of one or more local flood defence districts and for the constitution, membership, functions and procedure of a local flood defence committee for each such district<sup>28</sup>. With certain exceptions, however, most notably that of defence against tidal water<sup>29</sup>, the Agency's power to maintain, improve and construct flood defence works relates only to those watercourses designated as 'main river', and the Agency's powers of control, including the power to make byelaws<sup>30</sup>, vary as to whether a watercourse is a main river or an ordinary watercourse.

An internal drainage board exercises a general supervision over all matters relating to the drainage of land in its district<sup>31</sup>, and is empowered to carry out drainage works within that district on ordinary watercourses<sup>32</sup>. The powers of local authorities under the Land Drainage Act 1991 also apply only to ordinary watercourses<sup>33</sup> and are usually subject to first obtaining the Agency's consent<sup>34</sup>.

1 As to such rights and duties see PARA 81 et seq.

2 I.e. the Land Drainage Act 1991 and the Water Resources Act 1991: see PARA 569-572, PARA 574 et seq.

3 As to such powers see PARA 589 et seq.

4 As to such powers see PARA 587.

5 See in particular PARA 602 et seq.

6 As to the law relating to the conferring of such powers and confirming that duties are not imposed see PARA 589 note 4.

7 As to the law and history relating to sea walls see *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548, [1936] 3 All ER 908, CA. As to other statutory powers relating to the protection of the coast against encroachment by the sea see PARA 502 et seq.

8 'Spray irrigation' is not defined in the Land Drainage Act 1991 or in the flood defence provisions of the Water Resources Act 1991. For its meaning in the Water Resources Act 1991 for the purposes of Pt II Ch II (ss 24-72) see s 72(1); and PARA 262.

9 'Warping' is the controlled flooding of land for the purpose of fertilisation by silt or alluvial mud.

10 Land Drainage Act 1991 s 72(1) (definition substituted by the Environment Act 1995 s 100(2)); Water Resources Act 1991 s 113(1) (definition amended by the Environment Act 1995 s 100(1)). For these purposes, 'watercourse' includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers, and passages through which water flows, except a public sewer: Land Drainage Act 1991 s 72(1); Water Resources Act 1991 s 113(1). As to the meaning of 'public sewer' see PARA 138 note 11. See *Raglan Housing Association Ltd v Southampton City Council* [2007] EWCA Civ 785, [2008] 2 All ER 44, [2007] NLJR 1391, [2007] All ER (D) 461 (Jul).

11 Water Resources Act 1991 s 113(1). As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'flood warning systems' see PARA 596.

12 As to the Environment Agency see PARA 17.

13 As to internal drainage boards see PARA 569.

14 'Local authority' means the council of a county, county borough, district or London borough or the Common Council of the City of London: Land Drainage Act 1991 s 72(1) (definition amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(12)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

15 'Drainage body' means the Environment Agency, an internal drainage board or any other body having power to make or maintain works for the drainage of land: Land Drainage Act 1991 s 72(1) (definition amended by the Environment Act 1991 s 120(1), Sch 22 para 191). As to the meaning of 'land' in this context see PARA 569 note 2.

16 'Ordinary watercourse' means a watercourse that does not form part of a main river: Land Drainage Act 1991 s 72(1). As to the meaning of 'main river' see PARA 574.

17 Environment Act 1995 s 6(4). This provision is expressed to be subject to the Water Resources Act 1991 s 106 (obligation to carry out flood defence functions through committees): see the text to notes 21-23. The duty includes the supervision of internal drainage boards (see PARA 581) but does not entitle the Agency to make any arrangements or give any directions for regulating the proceedings of any flood defence committee: see the Environment Act 1995 Sch 5 para 13(2); and PARA 568 note 3.

18 'Flood defence functions' in relation to the Environment Agency means: (1) its functions with respect to flood defence and land drainage by virtue of the Water Resources Act 1991 Pt IV (ss 105-113), the Land Drainage Act 1991 and the Environment Act 1995 s 6 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 76); (2) those functions transferred to the Agency by the Environment Act 1995 s 2(1)(a)(iii) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 70) which were previously transferred to the National Rivers Authority by virtue of the Water Act 1989 s 136(8), Sch 15 para 1(3); and (3) other functions of the Agency under any of the flood defence provisions of the Water Resources Act 1991: s 221(1) (definition substituted by the Environment Act 1995 s 120(1), Sch 22 para 177(2), (7)); definition applied in relation to functions under the Environment Act 1995 by s 56(1). As to the meaning of 'flood defence provisions' see PARA 20 note 2. The Agency's flood defence functions extend to the territorial sea adjacent to England and Wales in so far as: (a) the area of any regional flood defence committee includes any area of that territorial sea; or (b) the Water Resources Act 1991 s 165(2) or (3) (drainage works for the purpose of defence against sea water or tidal water, and works to secure an adequate outfall for a main river: see PARA 589) provide for the exercise of any power in the territorial sea: Environment Act 1995 s 6(5). In relation to these flood defence functions, the Agency and any regional flood defence committee for an area wholly or partly in England may be investigated for maladministration by the Commission for Local Administration in England: see the Local Government Act 1974 s 25(1)(d) (substituted by the Environment Act 1995 Sch 22 para 18; and amended by the Public Services Ombudsman (Wales) Act 2005 s 39(1), Sch 6 paras 7, 10(f)). Similarly, the Public Services Ombudsman for Wales may investigate the Agency or any regional flood defence committee for an area wholly or partly in Wales: see the Public Services Ombudsman (Wales) Act 2005 s 28, Sch 3. See further **LOCAL GOVERNMENT** vol 69 (2009) PARA 839 et seq. As to the territorial sea see PARA 31. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

19 Water Resources Act 1991 s 105(2) (amended by the Environment Act 1995 Sch 22 para 128). Nothing in the Water Resources Act 1991 ss 105, 106 (see the text to notes 21-23) entitles the Agency to make any arrangements or give any directions for regulating the proceedings of any flood defence committee: see the Environment Act 1995 Sch 5 para 13(2); and PARA 568 note 3.

20 As to statutory consultees in relation to planning permission see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 70.

21 Water Resources Act 1991 s 106(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to regional flood defence committees see PARA 559 et seq. See also note 19.

22 Water Resources Act 1991 s 106(1)(a). In cases involving the areas of more than one regional flood defence committee, the arrangements must ensure that the functions are carried out by such committee, or jointly by such committees, as may be determined in accordance with the arrangements: see s 106(1)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

23 See the Water Resources Act 1991 s 106(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to levies see PARA 612; as to drainage charges see PARA 614 et seq; and as to the borrowing of money for flood defence purposes see PARA 611 note 6.

24 Environment Act 1995 s 14(3).

25 'Internal drainage functions' means the functions of the Agency under the Water Resources Act 1991 s 108 (see PARA 575), ss 139, 140 (see PARA 613), and under the Land Drainage Act 1991 ss 2-9 (see PARAS 577-582), ss 38, 39 (see PARA 631), s 47 (see PARA 632), ss 57, 58(1) (see PARA 613): Water Resources Act 1991 s 106(5) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

26 Water Resources Act 1991 s 106(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

27 Water Resources Act 1991 s 106(4).

28 See the Environment Act 1995 s 17; and PARA 563.

29 See the Water Resources Act 1991 s 165(2); and PARA 589.

- 30 As to the power of the Environment Agency to make byelaws see PARA 605.
- 31 See the Land Drainage Act 1991 s 1(2)(a); and PARA 569.
- 32 See the Land Drainage Act 1991 s 14(1), (2); and PARA 589.
- 33 See the Land Drainage Act 1991 s 14(1), (2); and PARA 589.
- 34 See the Land Drainage Act 1991 ss 16, 17; and PARA 589.

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#### **574. Main rivers.**

The powers conferred by the Water Resources Act 1991 or the Land Drainage Act 1991 on drainage bodies<sup>1</sup> are, so far as concerns main rivers, their banks<sup>2</sup> and drainage works<sup>3</sup> in connection with main rivers, exercisable only by the Environment Agency<sup>4</sup>.

A main river is<sup>5</sup> a watercourse which is shown as such on a main river map<sup>6</sup>.

A main river map is conclusive evidence for all purposes as to what is a main river<sup>7</sup>. The Agency must keep the main river map for the area of a regional flood defence committee at the principal office of the Agency for that area<sup>8</sup> and provide reasonable facilities for inspecting that map and taking copies of and extracts from it<sup>9</sup>. Any local authority<sup>10</sup> whose area is wholly or partly within the area of a regional flood defence committee is entitled, on application to the Agency, to be furnished with copies of the main river map for the area of that committee on payment of such sum as may be agreed between the Agency and that local authority<sup>11</sup>.

Either the Secretary of State or, in relation to Wales, the Welsh Ministers may at any time send the Agency one or more new maps to be substituted for the whole or any part of a main river map and containing a statement to that effect<sup>12</sup> and specifying the date on which the substitution is to take effect<sup>13</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers (the 'relevant minister') must take such action as is considered appropriate where: (1) the area of a regional flood defence committee is altered<sup>14</sup> so as to affect any of the particulars shown on its main river map for that area<sup>15</sup>; (2) a scheme is confirmed<sup>16</sup> for the designation of watercourses and the raising of a special drainage charge<sup>17</sup>; or (3) the Agency applies to the relevant minister for the variation of a main river map so far as it shows the extent to which any watercourse is to be treated as, or as part of, a main river<sup>18</sup>. The action to be taken by the relevant minister is: (a) the alteration of a main river map<sup>19</sup>; (b) the preparation of a new map<sup>20</sup>; or (c) the notification of the Agency that he does not intend to vary the main river map in question<sup>21</sup>. Before, however, the relevant minister alters a main river map or prepares a new map, he must give notice<sup>22</sup> of his intention to do so in such manner as he thinks best adapted for informing persons affected<sup>23</sup>. He must consider any objections made to him within the time and in the manner specified in the notice<sup>24</sup>, and may then alter or prepare the map either in accordance with the proposals contained in the notice or otherwise<sup>25</sup>.

1 As to the meaning of 'drainage body' see PARA 573 note 15.

2 'Banks' means banks, walls or embankments adjoining or confining or constructed for the purposes of or in connection with any channel or sea-front and includes all land and water between the bank and low-water mark: Water Resources Act 1991 s 113(1); Land Drainage Act 1991 s 72(1). A bank is not limited to the actual slope or vertical face where the banks meet the river but includes the land adjoining or near to the river to the extent to which it serves a function of confining the river: *Jones v Mersey River Board* [1958] 1 QB 143, [1957] 3 All ER 375, CA.

3 The expression 'drainage works' is not defined in the Land Drainage Act 1991 or the Water Resources Act 1991. References in the Land Drainage Act 1991 to the carrying out of drainage works include references to the improvement of drainage works: s 72(5). As to the meaning of 'drainage' see PARA 573. If any question arises under the Water Resources Act 1991 Pt IV (ss 105-113): (1) whether any work is a drainage work in connection with a main river; or (2) whether any proposed work will, if constructed, be such a drainage work, the question



must be referred to the Secretary of State or, in relation to Wales, the Welsh Ministers for decision or, if either of the parties so requires, to arbitration: s 113(2). Where any question is so required to be referred to arbitration it must be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, in default of agreement, by the President of the Institution of Civil Engineers, on the application of either party: s 113(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

The functions of the Secretary of State under the Water Resources Act 1991 s 113 and ss 193, 194 (see note 6, and the text to notes 7-25), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 This is the effect of the Land Drainage Act 1991 s 14(2) (see PARA 589) and the Water Resources Act 1991 ss 107(1), 165(1) (see PARA 589). As to agreements entered into by the Environment Agency with other bodies for work to be done by those bodies see PARA 590.

The Water Resources Act 1991 s 107 has effect for conferring functions in relation to main rivers on the Agency which are functions of drainage boards in relation to other watercourses: s 107(1) (s 107(1)-(4), (6) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Those functions of the Agency are in addition to its functions which, by virtue of the provisions of the Land Drainage Act 1991, are exercisable concurrently with an internal drainage board: Water Resources Act 1991 s 107(6) (as so amended). In s 107, references to the exercise of a power in relation to a main river include a reference to its exercise in connection with a main river or in relation to the banks of such a river or any drainage works in connection with such a river; and expressions used both therein and in a provision applied thereby have the same meanings: s 107(5). See further s 107(2) (applying the Land Drainage Act 1991 s 21); and PARA 592; the Water Resources Act 1991 s 107(3) (applying the Land Drainage Act 1991 ss 25, 27); and PARAS 599-600; and the Water Resources Act 1991 s 107(4) (applying the Land Drainage Act 1991 ss 33, 34); and PARA 592. As to drainage boards see PARA 569. As to the meaning of 'watercourse' see PARA 573 note 10.

5 le subject to the Water Resources Act 1991 s 137(4): see PARA 617.

6 Water Resources Act 1991 s 113(1). A main river includes any structure or appliance for controlling or regulating the flow of water into, in or out of the channel which is a structure or appliance situated in the channel or in any part of the banks of the channel, and is not a structure or appliance vested in or controlled by an internal drainage board: s 113(1).

'Main river map' has, subject to s 194 (see the text to notes 12-25), the meaning given by s 193(2): s 221(1). A 'main river map' is a map relating to the area of a regional flood defence committee which: (1) shows by a distinctive colour the extent to which any watercourse in that area is to be treated as a main river, or part of a main river, for the purposes of the Water Resources Act 1991; and (2) indicates (by a distinctive colour or otherwise) which (if any) of those watercourses are watercourses designated in a scheme made under s 137 (see PARA 615); and, subject to s 194, references to a main river map, in relation to the area of a regional flood defence committee, include so much of any map as, by virtue of the Water Act 1989 Sch 26 para 38, has effect as such a map at 1 December 1991 (ie the coming into force of the Water Resources Act 1991: see s 225(2)): s 193(2). As to regional flood defence committees see PARA 559.

7 Water Resources Act 1991 s 193(3)(a). The map is to be taken for the purposes of the Documentary Evidence Act 1868 (see **CIVIL PROCEDURE** vol 11 (2009) PARAS 892-894) as it applies to either the Secretary of State or, in relation to Wales, the Welsh Ministers to be a document within the meaning of that Act and to have been issued by him or by them: see the Water Resources Act 1991 s 193(3)(b).

8 Water Resources Act 1991 s 193(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the obligation of the Agency to maintain an office for the area of each regional flood defence committee see PARA 559.

9 Water Resources Act 1991 s 193(1)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

10 As to the meaning of 'local authority' see PARA 187 note 2.

11 Water Resources Act 1991 s 193(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

12 Water Resources Act 1991 s 194(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

13 See the Water Resources Act 1991 s 194(2). The substitution then takes effect in accordance with the statement: s 194(2).

- 14 As to the alteration of the area of a regional flood defence committee see PARA 560.
- 15 Water Resources Act 1991 s 194(3)(a).
- 16 le under the Water Resources Act 1991 s 137: see PARA 615.
- 17 Water Resources Act 1991 s 194(3)(b).
- 18 Water Resources Act 1991 s 194(3)(c) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 19 See the Water Resources Act 1991 s 194(4)(a). The Secretary of State or, as appropriate, the Welsh Ministers may require the Agency to send to them any part of the main river map in question, and may alter it and send it back to the Agency: see s 194(4)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 20 See the Water Resources Act 1991 s 194(4)(b). The Secretary of State or, as appropriate, the Welsh Ministers may prepare a new map and send it to the Agency: see s 194(4)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 21 Water Resources Act 1991 s 194(4)(c) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 22 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 23 Water Resources Act 1991 s 194(5)(a). As to the meaning of 'person' see PARA 13 note 29.
- 24 Water Resources Act 1991 s 194(5)(b).
- 25 Water Resources Act 1991 s 194(5).

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### **575. Schemes for transfer of functions in relation to main river.**

The Environment Agency<sup>1</sup> may at any time, and if so directed by the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> must, prepare and submit to him or them for confirmation a scheme for the transfer to the Agency from any drainage body<sup>4</sup> of all rights, powers, duties, obligations and liabilities (including liabilities incurred in connection with works) over or in connection with a main river<sup>5</sup>, and of any property held by that body for the purpose of, or in connection with, any functions so transferred<sup>6</sup>. The Secretary of State or, as the case may be, the Welsh Ministers to whom such a scheme is submitted may by order<sup>7</sup> confirm it either with or without modifications<sup>8</sup>. Where under such a scheme liabilities incurred in connection with drainage works are transferred to the Agency from a local authority, the Agency may require the local authority to make contributions towards the discharge of the liabilities<sup>9</sup>. Any dispute as to the amount of these contributions is to be referred to a single arbitrator appointed in default of agreement by the Secretary of State or, as the case may be, the Welsh Ministers<sup>10</sup>.

The relevant minister<sup>11</sup> must by regulations<sup>12</sup> provide for the payment, subject to such exceptions or conditions as may be specified in the regulations, of compensation by the Agency to any officer or other employee of a drainage body who suffers loss of employment, or loss or diminution of emoluments, which is attributable to such a scheme or anything done in pursuance of it<sup>13</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 s 108 and Sch 14 (see PARA 586) (except those of the Minister of Agriculture, Fisheries and Food as the 'relevant minister' (see note 11)), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the abolition of the Ministry of Agriculture, Fisheries and Food and the transfer of his functions see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 For these purposes, 'drainage body' means an internal drainage board or any other body having power to make or maintain works for the drainage of land: Water Resources Act 1991 s 108(9). As to internal drainage boards see PARA 569. As to the meaning of 'drainage' see PARA 573. As to the meaning of 'land' see PARA 14 note 21.

5 Water Resources Act 1991 s 108(1)(a) (s 108(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'main river' see PARA 574.

6 Water Resources Act 1991 s 108(1)(b). The scheme may make provisions for any matter supplemental to or consequential on the transfers for which it provides: s 108(2). As soon as any scheme has been submitted to the Secretary of State or the Welsh Ministers, the Agency must: (1) send copies of the scheme to every internal drainage board, local authority, navigation authority, harbour authority and conservancy authority affected by it (Sch 14 para 1(a)); and (2) publish, in one or more local newspapers circulating in the area affected by the scheme, a notice stating that the scheme has been submitted, that a copy of the scheme is open to inspection at a specified place, and that representations with respect to the scheme may be made to the Secretary of

State or, as appropriate, the Welsh Ministers within one month after publication of the notice (Sch 14 para 1(b) (Sch 14 para 1 amended by the Environment Act 1995 s 120(1), Sch 22 para 128)). As to the meaning of 'local authority' see PARA 187 note 2. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3. As to the meaning of 'month' see PARA 23 note 10.

7 The order must be made by statutory instrument: Water Resources Act 1991 s 108(3). The order may contain provisions with respect to the persons by whom all or any of the expenses incurred by the Secretary of State, the Welsh Ministers or other persons in connection with the making or confirmation of the order, or with the making of the scheme confirmed by the order, are to be borne: see s 108(4). As to the procedure to be followed on the making of such order see Sch 14; and PARA 583. As to the meaning of 'person' see PARA 13 note 29. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 See the Water Resources Act 1991 s 108(3), Sch 14 para 3(2). As to the meaning of 'modifications' see PARA 141 note 20.

9 Water Resources Act 1991 108(5) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

10 See the Water Resources Act 1991 s 108(6) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

11 For these purposes, 'relevant minister' means: (1) in relation to employees of a drainage body wholly in Wales, the Welsh Ministers; (2) in relation to employees of a drainage body partly in Wales, the Secretary of State and the Welsh Ministers; and (3) in any other case, the Secretary of State: Water Resources Act 1991 s 108(9). See also note 3.

12 As to the making of regulations see PARA 21.

13 Water Resources Act 1991 s 108(7) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Such regulations may include provision: (1) as to the manner in which and the persons to whom any claim for compensation by virtue of the regulations is to be made; and (2) for the determination of all questions arising under them: s 108(8). As to the regulations made see the Land Drainage (Compensation) Regulations 1977, SI 1977/339 (amended by SI 2002/2469; SI 2005/2114; and by virtue of the Employment Rights (Dispute Resolution) Act 1998 s 1(2)), which have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 1 para 1(1), (2).

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## **576. Savings and protective provisions.**

Nothing in Part IV of the Water Resources Act 1991<sup>1</sup> affects the powers exercisable by the Environment Agency<sup>2</sup>, and nothing in the Land Drainage Act 1991 affects the powers exercisable by any internal drainage board<sup>3</sup>, under any local Act as they existed immediately before 1 December 1991<sup>4</sup>. Certain undertakers and their undertakings are given protection from flood defence or land drainage operations which might interfere with them<sup>5</sup>.

Nothing in the flood defence provisions of the Water Resources Act 1991<sup>6</sup> or in the Land Drainage Act 1991 confers power to do anything which, directly or indirectly, prejudices the exercise of any statutory power, authority or jurisdiction from time to time vested in or exercisable by any protected undertaker<sup>7</sup>. Furthermore those Acts do not authorise any person (save with the consent of the undertaker) to do any work which, whether directly or indirectly, interferes or will interfere with, or with the use of, the works or any property which is vested in or under the control of the undertaker in its capacity as such, in such a manner as to affect injuriously those works or that property or the carrying on of the undertaking<sup>8</sup>. Such consent may be given subject to reasonable conditions but must not be unreasonably withheld<sup>9</sup>. Any dispute arising is to be referred to a single arbitrator to be appointed, failing agreement, by the President of the Institution of Civil Engineers<sup>10</sup>.

Protection is also afforded to ancient monuments and fisheries, as nothing in the Land Drainage Act 1991 or the flood defence provisions of the Water Resources Act 1991 authorises any person carrying out works to do anything in contravention of the Ancient Monuments and Archaeological Areas Act 1979<sup>11</sup> or prejudices the fisheries functions of the Environment Agency<sup>12</sup> or the provisions of the Salmon and Freshwater Fisheries Act 1975<sup>13</sup>.

1    le the Water Resources Act 1991 Pt IV (ss 105-113) which contains provisions relating to flood defence committees (see PARA 559 et seq) and main river functions (see PARAS 574-575, 603).

2    As to the Environment Agency see PARA 17.

3    As to internal drainage boards see PARA 569.

4    Water Resources Act 1991 s 113(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128); Land Drainage Act 1991 s 67(8). 1 December 1991 is the date of the coming into force of the Water Resources Act 1991 (see s 225(2)) and the Land Drainage Act 1991 (see s 76(2)). As to local legislation see PARA 14.

5    As to the meanings of 'flood defence' and 'drainage' see PARA 573. The following are protected undertakings for these purposes: (1) the Environment Agency, the Civil Aviation Authority, the Coal Authority, and a universal service provider (so far as it is his undertaking in relation to the provision of a universal postal service); (2) the undertaking of any water undertaker or sewerage undertaker; (3) any undertaking consisting in the provision of an electronic communications code network; (4) any airport to which the Airports Act 1986 Pt V (ss 57-62) applies; (5) the undertaking of any gas transporter within the meaning of the Gas Act 1986 Pt I (ss 4AA-48); (6) the undertaking of any person authorised by a licence under the Electricity Act 1989 Pt I (ss 3A-64) to generate, supply or participate in the transmission of electricity; (7) the undertaking of any navigation authority, harbour authority or conservancy authority; (8) any public utility undertaking carried on by a local authority under any Act or under any order having the force of an Act; (9) the undertaking of any licensed operator, within the meaning of the Coal Industry Act 1994; (10) the undertaking of a person who holds a licence under the Transport Act 2000 Pt I Ch I (ss 1-40) (air traffic services) to the extent that it is the person's undertaking as licence holder: Land Drainage Act 1991 Sch 6 para 1(1) (amended by the Coal Industry Act 1994 s 67, Sch 9 para 44; the Environment Act 1995 s 120, Sch 22 para 191; the Transport Act 2000 s 37, Sch 5 para

16; SI 2001/1149; the Communications Act 2003 s 406(1), Sch 17 para 116; the Energy Act 2004 s 143(1), Sch 19 para 19; and by virtue of the Gas Act 1995 s 16(1), Sch 4 para 2(2)(o) and the Utilities Act 2000 s 76(7)). 'Universal service provider' has the same meaning as in the Postal Services Act 2000; and the reference to the provision of a universal postal service is to be construed in accordance with that Act: Land Drainage Act 1991 Sch 6 para 1(1A) (added by SI 2001/1149). Any reference, in relation to any such airport as is mentioned in head (4) above, to the persons carrying on the undertaking is a reference to the airport operator: Land Drainage Act 1991 Sch 6 para 1(2). As to the Civil Aviation Authority see **AIR LAW** vol 2 (2008) PARA 50. As to the Coal Authority see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 52. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3. As to the meaning of 'local authority' see PARA 573 note 14. As to the meaning of 'person' see PARA 13 note 29.

The Water Resources Act 1991 contains a similar list with the addition of internal drainage boards and railway companies: see Sch 22 para 1(4); and PARA 490 note 6. In addition, neither the flood defence provisions of the Water Resources Act 1991 (see note 6) nor the provisions of the Land Drainage Act 1991 authorise any interference with a railway bridge or other work connected with a railway or the structure, use or maintenance of a railway or the traffic on it without the consent of the railway company in question: see the Water Resources Act 1991 Sch 22 para 4(1); the Land Drainage Act 1991 Sch 6 para 4 (amended by SI 2003/1615).

6 As to the meaning of 'flood defence provisions' see PARA 20 note 2.

7 See the Land Drainage Act 1991 Sch 6 para 2; and the Water Resources Act 1991 Sch 22 para 2 (amended by the Environment Act 1995 s 120, Sch 22 paras 128, 189). However the provisions of the Water Resources Act 1991 s 109 (see PARA 603) are still applicable to such undertakers: see Sch 22 para 2(2).

8 See the Water Resources Act 1991 Sch 22 para 1(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128); the Land Drainage Act 1991 Sch 6 para 3.

9 See the Water Resources Act 1991 Sch 22 paras 1(2), 4(2); the Land Drainage Act 1991 Sch 6 para 5.

10 See the Water Resources Act 1991 Sch 22 para 1(3), 4(3); the Land Drainage Act 1991 Sch 6 para 6. The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

11 Water Resources Act 1991 s 183(2); Land Drainage Act 1991 s 67(3); and see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1002 et seq.

12 As to the Agency's fisheries functions see the Environment Act 1995 s 2(1)(a)(v); and **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 847.

13 See the Water Resources Act 1991 s 105(4); the Land Drainage Act 1991 s 67(5) (amended the Environment Act 1995 s 120, Sch 22 para 191).

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## ***B. REVIEW AND REORGANISATION OF INTERNAL DRAINAGE DISTRICTS AND BOARDS***

### **577. Review of boundaries of internal drainage districts.**

Where a petition for the alteration of the boundaries of an internal drainage district<sup>1</sup> is made to the Environment Agency<sup>2</sup> by a sufficient number of qualified persons<sup>3</sup> or by a qualified authority<sup>4</sup>, and the boundaries of that district have for a period exceeding ten years been neither reviewed on such a petition nor altered<sup>5</sup>, the Agency must review those boundaries<sup>6</sup>. In carrying out any such review the Agency must consult the drainage board<sup>7</sup> for the internal drainage district in question, unless it is itself the drainage board, and must consider any representations duly made to it<sup>8</sup>.

Within six months<sup>9</sup> after such a petition is made, or such longer period as the relevant minister may allow, the Agency must inform the relevant minister whether, as a result of the review, it proposes to submit to him a scheme<sup>10</sup> for reorganisation<sup>11</sup> and, if so, what provision it proposes to make by the scheme<sup>12</sup>. Where it does not propose to submit such a scheme<sup>13</sup> but it appears to the Agency that an order subdividing a district<sup>14</sup>, or an order varying or revoking a previous such order, should be made by the drainage board for the internal drainage district in question<sup>15</sup>, the Agency may direct the drainage board to make such an order in such terms as may be specified in the direction<sup>16</sup>. If an internal drainage board to which such a direction has been given objects to it, the direction has no effect unless it is confirmed, with or without modifications, by the relevant minister<sup>17</sup>.

These provisions do not require the Agency to carry out a review or publish any notice on a petition which, in the opinion of the relevant minister, is frivolous<sup>18</sup>.

1 As to internal drainage districts see PARA 569.

2 As to the Environment Agency see PARA 17. As to the Agency's general supervisory functions in respect of flood defence functions see PARA 573.

3 Subject to the provisions of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 19 (which makes provision with respect to qualification by reference to drainage rates levied on land in respect of years beginning before 1993), where any provision of the Land Drainage Act 1991 refers, in relation to an internal drainage district, to the making of any appeal or petition by a sufficient number of qualified persons: (1) the persons who are qualified are the occupiers of any land in the internal drainage district in respect of which a drainage rate is levied (see PARA 627) (s 72(2)(a)); and (2) their number is sufficient if, but only if, (a) they are not less than 40; or (b) they are not less than one-fifth of the number of persons qualified to make the petition or appeal; or (c) the assessable value for the purposes of the last drainage rate levied in the district of all the land in respect of which they are qualified persons is not less than one-fifth of the assessable value of all the land in respect of which that rate was levied (s 72(2)(b)(i)-(iii)). In relation to a district divided into sub-districts the persons qualified to make a petition under s 39 (see PARA 631) as being the occupiers of land in one of the sub-districts are also sufficient in any case where the condition in head (b) or (c) above would be satisfied if the sub-district were an internal drainage district: s 72(3). The references to the assessable value of any land in head (2) above are references to the amount which for the purposes of the drainage rate mentioned in that head would be the annual value of the land: s 72(4). As to assessable value see PARA 629. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'land' see PARA 569 note 2.

4 Land Drainage Act 1991 s 2(1)(a) (s 2 amended by the Environment Act 1995 s 120(1), Sch 22 para 191). 'Qualified authority', in relation to an internal drainage district, means a billing authority for an area wholly or partly included in the relevant internal drainage district: Land Drainage Act 1991 s 72(1) (amended by virtue of the Local Government Finance Act 1992 s 1). As to local billing authorities see the Local Government Finance Act 1992 s 1; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 229.

5 Land Drainage Act 1991 s 2(1)(b).

6 Land Drainage Act 1991 s 2(1) (as amended: see note 4). Where such a petition is received in such circumstances, the Agency must inform the Secretary of State or, as the case may be, the Welsh Ministers (the 'relevant minister') (Land Drainage Act 1991 s 2(2)(a)), and must publish, in one or more newspapers circulating in the internal drainage district, a notice stating: (1) that the petition has been received; (2) that a review of the boundaries is being undertaken; and (3) that representations may be made to the Agency within a period stated in the notice, which must not be less than 30 days (s 2(2)(b) (as so amended)). As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

7 As to internal drainage boards see PARA 569. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

8 Land Drainage Act 1991 s 2(3) (as amended: see note 4).

9 As to the meaning of 'month' see PARA 23 note 10.

10 Ie a scheme under the Land Drainage Act 1991 s 3: see PARA 578.

11 Land Drainage Act 1991 s 2(4)(a) (s 2(4) as amended: see note 4).

12 Land Drainage Act 1991 s 2(4)(b).

13 See the Land Drainage Act 1991 s 2(5)(a) (as amended: see note 4).

14 Ie an order under the Land Drainage Act 1991 s 38: see PARA 631.

15 Land Drainage Act 1991 s 2(5)(b) (as amended: see note 4).

16 Land Drainage Act 1991 s 2(5) (as amended: see note 4).

17 Land Drainage Act 1991 s 2(6).

18 Land Drainage Act 1991 s 2(7).



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### **578. Schemes for reorganisation of internal drainage districts etc.**

The Environment Agency<sup>1</sup> may at any time<sup>2</sup>, and must if directed to do so by the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>3</sup>, prepare and submit to them for confirmation a scheme making provision for any of the following matters<sup>4</sup>:

- 1256 (1) the alteration of the boundaries of any internal drainage district<sup>5</sup>;
- 1257 (2) the amalgamation of the whole or any part of any internal drainage district with any other district<sup>6</sup>;
- 1258 (3) the abolition, from a date specified in the scheme, of Commissioners of Sewers exercising jurisdiction within the area for which the Agency carries out flood defence functions<sup>7</sup>;
- 1259 (4) the abolition or reconstitution of any internal drainage district and of the drainage board<sup>8</sup> for that district<sup>9</sup>;
- 1260 (5) the constitution of new internal drainage districts<sup>10</sup>;
- 1261 (6) the constitution of internal drainage boards for all or any of the separate internal drainage districts constituted by the scheme<sup>11</sup>;
- 1262 (7) where it appears desirable so to provide in the case of any internal drainage board, the amendment of the method of constituting that board so far as is necessary to secure that members of the board include persons elected as such in accordance with the statutory provisions<sup>12</sup> for that purpose<sup>13</sup>;
- 1263 (8) the making of alterations in, and the addition of supplemental provisions to, the provisions of any local Act or of any award made under any such Act, where such alterations or supplemental provisions are necessary or expedient for enabling the area for the benefit of which drainage works<sup>14</sup> are authorised by the local Act or award to be drained effectually<sup>15</sup>;
- 1264 (9) any matters supplemental to or consequential on the matters mentioned in heads (1) to (8) above for which it appears necessary or desirable to make provision, including the transfer to the Agency or an internal drainage board of any property, rights, powers, duties, obligations and liabilities vested in or to be discharged by the Agency or by the internal drainage board affected by the scheme<sup>16</sup>.

As soon as any such scheme has been submitted to the relevant minister, the Agency must send copies of it to every internal drainage board, local authority<sup>17</sup>, navigation authority<sup>18</sup>, harbour authority<sup>19</sup> and conservancy authority<sup>20</sup> affected by it<sup>21</sup>. The Agency must also publish, in one or more newspapers circulating in the area affected by the scheme, a notice stating that the scheme has been so submitted, that a copy of it is open to inspection at a specified place and that representations with respect to it may be made to the relevant minister at any time within one month<sup>22</sup> after the publication of the notice<sup>23</sup>.

The relevant minister may by order<sup>24</sup> confirm any scheme so submitted to him, either with or without modifications<sup>25</sup>.

Where the boundaries of an internal drainage district are altered under these provisions, all powers exercisable under any local Act by the drainage board for the district with respect to land<sup>26</sup> included in it are exercisable with respect to land added to the district, except so far as provision is otherwise made by the scheme effecting the alteration or by the order confirming that scheme<sup>27</sup>.

1 As to the Environment Agency see PARA 17.

2 Ie whether in consequence of a review under the Land Drainage Act 1991 s 2 (see PARA 577) or otherwise: s 3(1)(a).

3 As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

4 Land Drainage Act 1991 s 3(1)(a), (b) (s 3 amended by the Environment Act 1995 s 120, Sch 22 para 191).

5 Land Drainage Act 1991 s 3(2)(a). As to internal drainage districts see PARA 569.

6 Land Drainage Act 1991 s 3(2)(b).

7 Land Drainage Act 1991 s 3(2)(c) (as amended: see note 4). The flood defence functions referred to are such functions within the meaning of the Water Resources Act 1991 (see PARA 573 note 18): Land Drainage Act 1991 s 3(2)(c).

8 As to internal drainage boards see PARA 569.

9 Land Drainage Act 1991 s 3(2)(d).

10 Land Drainage Act 1991 s 3(2)(e).

11 Land Drainage Act 1991 s 3(2)(f).

12 Ie the provisions contained in the Land Drainage Act 1991 Sch 1: see PARA 570.

13 Land Drainage Act 1991 s 3(2)(g).

14 As to the meaning of 'drainage' see PARA 573.

15 Land Drainage Act 1991 s 3(2)(h).

16 Land Drainage Act 1991 s 3(2)(i) (as amended: see note 4). A scheme under s 3 may provide for the revocation or amendment of, and for the retransfer of property, rights, powers, duties, obligations and liabilities transferred by, any previous such scheme: s 3(3). As to powers to make the Environment Agency a drainage board see PARA 579. As to the transfer of functions back from the Agency see PARA 580.

17 As to the meaning of 'local authority' see PARA 573 note 14.

18 As to the meaning of 'navigation authority' see PARA 189 note 1.

19 As to the meaning of 'harbour authority' see PARA 189 note 2.

20 As to the meaning of 'conservancy authority' see PARA 189 note 3.

21 Land Drainage Act 1991 s 3(4)(a) (as amended: see note 4).

22 As to the meaning of 'month' see PARA 23 note 10.

23 Land Drainage Act 1991 s 3(4)(b) (as amended: see note 4).

24 The order must be made by statutory instrument: Land Drainage Act 1991 s 3(5). As to the procedure for making the order see s 3(6), Sch 3; and PARA 585. Such orders, being of local effect, are not recorded in this work.

25 Land Drainage Act 1991 s 3(5). An order confirming a scheme under s 3 may contain provision with respect to the persons by whom all or any of the expenses incurred by the relevant minister or other persons in

connection with the making or confirmation of the order, or the making of the scheme, are to be borne: s 3(7). As to the meaning of 'person' see PARA 13 note 29.

26 As to the meaning of 'land' see PARA 569 note 2.

27 Land Drainage Act 1991 s 3(8). Provision is made for the payment of compensation to any officer or other employee of a drainage body who suffers loss of employment or loss or diminution of emoluments which is attributable to a scheme under s 3 or anything done in pursuance of such a scheme: see s 6(1), (3) (s 6(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 191); and the Land Drainage (Compensation) Regulations 1977, SI 1977/339 (amended by SI 2002/2469; SI 2005/2114; and by virtue of the Employment Rights (Dispute Resolution) Act 1998 s 1(2)), which, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), have effect as if made under the Land Drainage Act 1991 s 6.

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### **579. Powers to make the Environment Agency a drainage board.**

The Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>1</sup> may, on a petition presented to them by the Environment Agency<sup>2</sup>, by order made by statutory instrument transfer to the Agency the powers, duties, liabilities, obligations and property<sup>3</sup> of the drainage board<sup>4</sup> for any internal drainage district<sup>5</sup>. On such a transfer, the Agency becomes the drainage board for the district in question; and any expenses incurred by the Agency as the drainage board for that district are to be defrayed under and in accordance with the powers transferred by the order and not in any other manner<sup>6</sup>.

Without prejudice to the above provisions, a scheme<sup>7</sup> which provides for the constitution of a new internal drainage district may also provide for the Agency to be constituted the drainage board for that district, and for conferring on the Agency in relation to that district the powers and duties of an internal drainage board<sup>8</sup>.

<sup>1</sup> As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

<sup>2</sup> As to the Environment Agency see PARA 17.

<sup>3</sup> ie including deeds, maps, books, papers and other documents: Land Drainage Act 1991 s 4(1).

<sup>4</sup> As to internal drainage boards see PARA 569.

<sup>5</sup> Land Drainage Act 1991 s 4(1) (s 4 amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to internal drainage districts see PARA 569 et seq. As to the procedure on making the order see the Land Drainage Act 1991 s 4(4), Sch 3; and PARA 585. Such an order may contain provisions with respect to the persons by whom all or any of the expenses incurred by the relevant minister or other persons in connection with the making or confirmation of the order are to be borne: s 4(5). As to the meaning of 'person' see PARA 13 note 29. Such orders, being of local effect, are not recorded in this work.

<sup>6</sup> Land Drainage Act 1991 s 4(2) (as amended: see note 5). As to the transfer of functions back from the Agency see PARA 580.

<sup>7</sup> ie a scheme under the Land Drainage Act 1991 s 3: see PARA 578.

<sup>8</sup> Land Drainage Act 1991 s 4(3) (as amended: see note 5). Any expenses incurred by the Agency as the internal drainage board for such a district are to be defrayed under and in accordance with the powers so conferred and not in any other manner: s 4(3) (as so amended). Provision is made for the payment of compensation to any officer or other employee of an internal drainage board who suffers loss of employment or loss or diminution of emoluments which is attributable to an order under s 4 or anything done in pursuance of such an order: see s 6(2)(a), (3) (s 6(2) amended by the Environment Act 1995 s 120(1), Sch 22 para 191); and the Land Drainage (Compensation) Regulations 1977, SI 1977/339 (amended by SI 2002/2469; SI 2005/2114; and by virtue of the Employment Rights (Dispute Resolution) Act 1998 s 1(2)), which, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), have effect as if made under the Land Drainage Act 1991 s 6.

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### **580. Transfer of functions etc back from the Environment Agency.**

Where the Environment Agency<sup>1</sup> is the drainage board<sup>2</sup> for an internal drainage district<sup>3</sup>, and a petition for constituting an internal drainage board for that district is made to the Agency by a sufficient number of qualified persons<sup>4</sup> or by a qualified authority<sup>5</sup>, the Secretary of State<sup>6</sup> or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>7</sup> may by order<sup>8</sup> constitute an internal drainage board for that district<sup>9</sup>. Where the Agency receives such a petition, the Agency must send a copy of it to the relevant minister<sup>10</sup>, and must inform him, within six months<sup>11</sup> of the date on which the petition is received, whether in its opinion an order constituting an internal drainage board should be made<sup>12</sup>. Before making such an order the relevant minister must consider the views expressed by the Agency<sup>13</sup>.

An order under the above provisions transfers to the internal drainage board constituted by the order the property and liabilities of the Agency so far as they are vested in or incurred by the Agency in its capacity as the drainage board for that district<sup>14</sup>.

1 As to the Environment Agency see PARA 17.

2 I.e. whether by virtue of a scheme under the Land Drainage Act 1991 s 3 (see PARA 578) or an order under s 4 (see PARA 579). As to internal drainage boards see PARA 569.

3 Land Drainage Act 1991 s 5(1)(a) (s 5 amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to internal drainage districts see PARA 569 et seq.

4 As to the meaning of 'qualified persons', and as to a sufficient number of such persons, see PARA 577 note 3.

5 Land Drainage Act 1991 s 5(1)(b) (as amended: see note 3). As to the meaning of 'qualified authority' see PARA 577 note 4.

6 As to the Secretary of State see PARA 15 note 1.

7 As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Welsh Ministers see PARA 16 note 5.

8 The order must be made by statutory instrument: Land Drainage Act 1991 s 5(1). As to the procedure on making the order see s 5(5), Sch 3; and PARA 585. Such orders, being of local effect, are not recorded in this work.

9 Land Drainage Act 1991 s 5(1) (as amended: see note 3). An order so made may contain provisions with respect to the persons by whom all or any of the expenses incurred by the relevant minister or other persons in connection with the making or confirmation of the order are to be borne: s 5(6). As to the meaning of 'person' see PARA 13 note 29.

10 Land Drainage Act 1991 s 5(2) (as amended: see note 3).

11 As to the meaning of 'month' see PARA 23 note 10.

12 Land Drainage Act 1991 s 5(3) (as amended: see note 3).

13 Land Drainage Act 1991 s 5(4) (as amended: see note 3).

14 See the Land Drainage Act 1991 s 5(1) (as amended: see note 3). Provision is made for the payment of compensation to any officer or other employee of the Agency who suffers loss of employment or loss or diminution of emoluments which is attributable to an order under s 5 or anything done in pursuance of such an order: see s 6(2)(b), (3) (s 6(2)(b) amended by the Environment Act 1995 s 120(1), Sch 22 para 191); and the Land Drainage (Compensation) Regulations 1977, SI 1977/339 (amended by SI 2002/2469; SI 2005/2114; and by virtue of the Employment Rights (Dispute Resolution) Act 1998 s 1(2)), which, by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), have effect as if made under the Land Drainage Act 1991 s 6.

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### **C. GENERAL SUPERVISION OF DRAINAGE BOARDS**

#### **581. Supervision by the Environment Agency.**

For the purpose of securing the efficient working and maintenance of existing drainage works<sup>1</sup> and the construction of such new drainage works as may be necessary<sup>2</sup>, the Environment Agency<sup>3</sup> may give such general or special directions as it considers reasonable for the guidance of the internal drainage boards<sup>4</sup> with respect to the exercise and performance by those boards of their powers and duties<sup>5</sup>.

Except with the Agency's consent, which may not be unreasonably withheld and which may be subject to reasonable conditions<sup>6</sup>, an internal drainage board must not construct or alter any drainage works if the construction or alteration will in any way affect the interests of, or the working of any drainage works belonging to, any other internal drainage board<sup>7</sup>. Furthermore an internal drainage board must not construct or alter any structure<sup>8</sup>, appliance or channel for the discharge of water from its district into a main river<sup>9</sup>, otherwise than by way of maintaining an existing work, except on such terms as may be agreed between the Agency and the board or as, in default of agreement, may be determined by the relevant minister<sup>10</sup>. If an internal drainage board acts in contravention of these restrictions, the Agency may carry out and maintain any works and do any things which are necessary in its opinion in order to prevent or remedy any damage that may result or that has resulted from the board's actions<sup>11</sup>; and the Agency is entitled to recover from that board the amount of any expenses reasonably incurred by the Agency in the exercise of this power<sup>12</sup>.

1 Land Drainage Act 1991 s 7(1)(a). As to the meaning of 'drainage' see PARA 573. As to existing works see PARA 589.

2 Land Drainage Act 1991 s 7(1)(b). As to new works see PARA 589.

3 As to the Environment Agency see PARA 17.

4 As to internal drainage boards see PARA 569.

5 Land Drainage Act 1991 s 7(1) (s 7 amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

6 See the Land Drainage Act 1991 s 7(3) (as amended: see note 5). If any question arises whether the Agency's consent is unreasonably withheld or whether any condition subject to which that consent is given is reasonable, it must be referred to the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister') for decision: s 7(5) (as so amended). Where the relevant minister gives any decision under s 7, he must make and cause to be laid before Parliament a report giving particulars of the question referred to him and of the reasons for his decision: s 7(6). As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

7 Land Drainage Act 1991 s 7(2)(a) (as amended: see note 5).

8 As to the meaning of the word 'structure' see *Hobday v Nicol* [1944] 1 All ER 302, DC.

9 As to the meaning of 'main river' see PARA 574.

10 Land Drainage Act 1991 s 7(2)(b) (as amended: see note 5).

11 Land Drainage Act 1991 s 7(4)(a) (as amended: see note 5)

12 Land Drainage Act 1991 s 7(4)(b) (as amended: see note 5). Any question whether any expenses have been reasonably incurred by the Agency in pursuance of this provision is to be referred to the relevant minister for decision: s 7(5) (as so amended).



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## **582. Concurrent and default powers of the Environment Agency.**

The powers of an internal drainage board<sup>1</sup> in relation to its district to enforce certain repairing obligations<sup>2</sup> and to prevent obstructions to watercourses<sup>3</sup> are exercisable concurrently with that board by the Environment Agency<sup>4</sup>.

Without prejudice to the above provisions, where in the Agency's opinion any land<sup>5</sup> is injured or likely to be injured by flooding or inadequate drainage<sup>6</sup> that might be remedied wholly or partially by the exercise of drainage powers<sup>7</sup> vested in any internal drainage board which either are not being exercised at all<sup>8</sup>, or which, in the Agency's opinion, are not being exercised to the necessary extent<sup>9</sup>, the Agency may exercise all or any of those powers and also any power vested in that board for the purpose of defraying expenses incurred in the exercise by that board of those powers or for any purposes incidental to the exercise of those powers<sup>10</sup>. Before exercising any such powers the Agency must give to the internal drainage board in whose default it proposes to exercise them not less than 30 days' notice<sup>11</sup> of its intention to do so<sup>12</sup>; and if, before the end of that period of notice, the board in question intimates in writing<sup>13</sup> to the Agency its objection to their exercise by the Agency, the Agency may not exercise them except with the consent of the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>14</sup>. If he thinks fit, the relevant minister may cause a public inquiry to be held with respect to such an objection<sup>15</sup>.

Where the Agency is so exercising the powers of the drainage board for an internal drainage district<sup>16</sup>, any person authorised by the Agency in that behalf may so far as is reasonably necessary<sup>17</sup> inspect and take copies of any deeds, maps, books, papers or other documents which are in the possession of the board and relate to land drainage or the provision of flood warning systems in that district<sup>18</sup>. Any person who intentionally obstructs or impedes a person so authorised in the exercise of these powers commits an offence<sup>19</sup>.

On the application of the council of any county, county borough, metropolitan district<sup>20</sup> or London borough council<sup>21</sup>, the Agency may direct that these default powers<sup>22</sup> are to be exercisable, in respect of land in its area, by that council instead of by the Agency<sup>23</sup>. If the Agency refuses to comply with any such application, the council by which the application was made may appeal against the refusal to the relevant minister and he may, if he thinks fit, require the Agency to comply with the application<sup>24</sup>.

1 As to internal drainage boards see PARA 569.

2 I.e the board's powers under the Land Drainage Act 1991 s 21: see PARA 592.

3 I.e the board's powers under the Land Drainage Act 1991 s 23: see PARA 602.

4 Land Drainage Act 1991 s 8 (ss 8, 9, 10 amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to the Environment Agency see PARA 17.

5 As to the meaning of 'land' see PARA 569 note 2.

6 As to the meaning of 'drainage' see PARA 573.

7 As to drainage powers see PARAS 589, 597-599, 603.

- 8 Land Drainage Act 1991 s 9(1)(a).
- 9 Land Drainage Act 1991 s 9(1)(b) (as amended: see note 4).
- 10 Land Drainage Act 1991 s 9(1) (as amended: see note 4).
- 11 As to the service of documents see [PARA 22](#).
- 12 Land Drainage Act 1991 s 9(2) (as amended: see note 4).
- 13 As to the meaning of 'writing' see [PARA 22](#) note 1.
- 14 Land Drainage Act 1991 s 9(3) (as amended: see note 4). As to the meaning of 'relevant minister', and as to the transfer of functions to the Welsh Ministers, see [PARA 569](#) note 9. As to the Secretary of State see [PARA 15](#) note 1. As to the Welsh Ministers see [PARA 16](#) note 5. As to the meaning of 'Wales' see [PARA 16](#) note 2.
- 15 Land Drainage Act 1991 s 9(4). As to local inquiries see [PARA 657](#).
- 16 As to internal drainage districts see [PARA 569](#) et seq.
- 17 le for the purpose of, and in connection with, the exercise by the Agency of the powers of the drainage board: Land Drainage Act 1991 s 9(5) (as amended: see note 4).
- 18 Land Drainage Act 1991 s 9(5) (as amended: see note 4). 'Flood warning systems' is not defined in the Land Drainage Act 1991. For its meaning in the Water Resources Act 1991 see [PARA 596](#).
- 19 Land Drainage Act 1991 s 9(6). The penalty for such an offence is, on summary conviction, a fine not exceeding level 4 on the standard scale: s 9(6). As to the standard scale see [PARA 141](#) note 18.
- 20 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) [PARA 22](#) et seq.
- 21 As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) [PARA 35](#) et seq.
- 22 le the powers conferred on the Agency by the Land Drainage Act 1991 s 9: see the text to notes 5-19.
- 23 Land Drainage Act 1991 s 10(1) (as amended: see note 4; and further amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(1)). Without prejudice to the Agency's power to give a new direction, the Agency may revoke any such direction, subject to the consent of the relevant minister and on giving the council concerned not less than six months' notice of its intention to do so: Land Drainage Act 1991 s 10(3) (as amended: see note 4). As to the meaning of 'month' see [PARA 23](#) note 10.
- 24 Land Drainage Act 1991 s 10(2) (as amended: see note 4).

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## **D. REGULATIONS AND ORDERS**

### **583. Powers to make regulations.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may make regulations for the purpose of prescribing anything which may be prescribed under the Land Drainage Act 1991<sup>3</sup> and generally for the purpose of carrying that Act or the flood defence provisions<sup>4</sup> of the Water Resources Act 1991 into effect<sup>5</sup>. Such regulations are made by statutory instrument subject in the case of regulations made by the Secretary of State, with one exception<sup>6</sup>, to annulment in pursuance of a resolution of either House of Parliament<sup>7</sup>.

In respect of certain orders<sup>8</sup> the Secretary of State or the Welsh Ministers (the 'appropriate minister') may make regulations in relation to the publication of notices and advertisements, the holding of and procedure at public local inquiries and any other matters or procedure relating to the making of orders<sup>9</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of Ministers of the Crown under the Land Drainage Act 1991 s 65 and the Water Resources Act 1991 s 112, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Ie other than under the Land Drainage Act 1991 74 (Crown land) (see PARA 20): see s 65(1)(a).

4 As to the meaning of 'flood defence provisions' see PARA 20 note 2.

5 Land Drainage Act 1991 s 65(1)(b); Water Resources Act 1991 s 112.

6 Ie except in the case of regulations made by virtue of the Water Resources Act 1991 Sch 15 para 1(3) (drainage charges) (see PARA 619): see s 219(1).

7 Land Drainage Act 1991 s 65(2); Water Resources Act 1991 s 219(1). As to the making of regulations under the Water Resources Act 1991 generally see PARA 21. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 Ie orders under the Water Resources Act 1991 s 108 (see PARA 575); s 137 (see PARA 615); and under the Land Drainage Act 1991 ss 3-5 (see PARAS 578-580), s 32 (see PARA 593), and s 35 (see PARA 594).

9 Water Resources Act 1991 ss 108(3), 137(6), Sch 14 para 6, Sch 16 para 9; Land Drainage Act 1991 ss 3(6), 4(4), 5(5), 32(6), 35(5), Sch 3 para 8. At the date at which this title states the law, no such regulations had been made.

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#### **584. Powers to make orders; in general.**

The powers to make orders under the Land Drainage Act 1991 and under the flood defence provisions<sup>1</sup> of the Water Resources Act 1991 are exercisable by statutory instrument<sup>2</sup>. With certain exceptions<sup>3</sup> these orders, if made in relation to England, are subject to special parliamentary procedure if opposed<sup>4</sup>.

Specific statutory procedures must be complied with in making certain orders under the Land Drainage Act 1991<sup>5</sup>, orders transferring main river functions to the Environment Agency<sup>6</sup>, orders for schemes imposing special drainage charges<sup>7</sup> and orders relating to navigation tolls<sup>8</sup>.

1 As to the meaning of 'flood defence provisions' see PARA 20 note 2.

2 See the Land Drainage Act 1991 ss 3(5), 4(1), 5(1) (PARAS 578-580), ss 32(5), 35(1) (PARA 593); and the Water Resources Act 1991 s 108(3) (PARA 575), ss 135(6), 137(6), 138(6), Sch 16 para 2(1) (PARAS 614-618), s 143(3), Sch 17 para 1 (PARA 710).

3 I.e. an order under the Water Resources Act 1991 s 108(3) (see PARA 575), s 135(6) (see PARA 614) or s 138(6) (see PARA 618).

4 See the Land Drainage Act 1991 ss 3(6), 4(4), 5(5), 32(6), 35(5), Sch 3 para 5(2); and the Water Resources Act 1991 ss 137(6), 143(3), Sch 16 para 6(2), Sch 17 para 4(2). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. The Secretary of State may, in any event: (1) direct that the order be subject to special parliamentary procedure (Land Drainage Act 1991 Sch 3 para 5(3); Water Resources Act 1991 Sch 16 para 6(3), Sch 17 para 4(3)); and (2) revoke any order either wholly or partially, at any time before it is laid before Parliament (Land Drainage Act 1991 Sch 3 para 5(4); Water Resources Act 1991 Sch 16 para 6(4), Sch 17 para 4(4)). As to the making of subordinate legislation by the Welsh Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

5 See PARA 585.

6 See PARA 586.

7 See PARA 615.

8 See PARA 710.

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### **585. Procedure with respect to certain orders under the land drainage legislation.**

The following procedure applies with respect to any order confirming a scheme for reorganisation of an internal drainage board<sup>1</sup> or for the variation of any award<sup>2</sup>, and also with respect to any order making the Environment Agency<sup>3</sup> a drainage board for an internal drainage district<sup>4</sup>, transferring functions back from the Agency<sup>5</sup>, or varying<sup>6</sup> navigation rights<sup>7</sup>.

Before making any such order, the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'appropriate minister')<sup>8</sup> must cause notice of his intention to make it, the place where copies of the draft order may be inspected and obtained, and the period within which, and the manner in which, objections to the draft order may be made, to be published in the London Gazette and in such other manner as he thinks best adapted for informing persons affected<sup>9</sup>. Notice<sup>10</sup> must be sent to:

- 1265 (1) every county council, county borough council or London borough council in whose area any part of the area proposed to be affected by the order is situated and, if any part of that area is situated in the City of London, to the Common Council of the City of London<sup>11</sup>;
- 1266 (2) every drainage body<sup>12</sup>, navigation authority<sup>13</sup>, harbour authority<sup>14</sup> or conservancy authority<sup>15</sup> that is known to the appropriate minister to be exercising jurisdiction within the area proposed to be affected by the order<sup>16</sup>.

The appropriate minister must, before making any such order, consider any objections duly made to the draft order and may, in any case, cause a public local inquiry<sup>17</sup> to be held with respect to any objections to it<sup>18</sup>. In making the order he may make such modifications in the terms of the draft as appear to him to be desirable<sup>19</sup>. After the appropriate Minister has made an order, the order, together with a notice, must be published in such manner as he thinks best adapted for informing the persons affected<sup>20</sup>. The notice must state that the order has been made<sup>21</sup> and will become final and have effect unless, within such period of not less than 30 days as may be specified in the notice, a request that the order be subject to special parliamentary procedure<sup>22</sup> is presented to that minister by a person who is affected by the order and has such interest as may be prescribed<sup>23</sup> as being sufficient for the purpose<sup>24</sup>. If no such request has been presented within the specified period, or every request so presented has been withdrawn, the appropriate minister must confirm the order and it thereupon has effect<sup>25</sup>. If, however, such a request has been presented and not withdrawn, the order, unless made by the Welsh Ministers, is subject to special parliamentary procedure<sup>26</sup> and it is, in any event, so subject if the Secretary of State so directs<sup>27</sup>. At any time before such an order subject to special parliamentary procedure has been laid before Parliament the Secretary of State may revoke it either wholly or partially<sup>28</sup>.

As soon as may be after an unconfirmed order<sup>29</sup> has effect, the appropriate minister must publish in the London Gazette and in such other manner as he thinks best adapted for informing persons affected a notice stating that it has come into force and naming a place where a copy of it may be seen at all reasonable hours<sup>30</sup>. If any person aggrieved<sup>31</sup> by an unconfirmed order desires to question its validity on the ground (a) that it is not within the powers of the Land Drainage Act 1991<sup>32</sup>; or (b) that any requirement of the Act has not been

complied with<sup>33</sup>, he may make application to the High Court<sup>34</sup>. If the court is satisfied that the order is not within the powers of the Act or that the applicant's interests have been substantially prejudiced by any requirements of the Act not having been complied with, the court may quash the order either generally or in so far as it affects the applicant<sup>35</sup>. Subject to these provisions, an unconfirmed order may not at any time be questioned in any legal proceedings whatsoever<sup>36</sup>.

1    Ie a scheme under the Land Drainage Act 1991 s 3: see PARA 578. As to internal drainage boards see PARA 569.

2    Ie a scheme under the Land Drainage Act 1991 s 32: see PARA 593.

3    As to the Environment Agency see PARA 17.

4    Ie an order under the Land Drainage Act 1991 s 4: see PARA 579. As to internal drainage districts see PARA 569 et seq.

5    Ie an order under the Land Drainage Act 1991 s 5: see PARA 580.

6    Ie an order under the Land Drainage Act 1991 s 35: see PARA 594.

7    Land Drainage Act 1991 Sch 3 para 1(1).

8    'Appropriate minister', in relation to any order or proposed order, means the minister or ministers by whom the order is being or has been made or, as the case may be, by whom the proposal to make the order has been made: Land Drainage Act 1991 Sch 3 para 1(3). As to the meanings of 'the minister' and 'the ministers', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

9    Land Drainage Act 1991 Sch 3 para 2(1). As to the meaning of 'person' see PARA 13 note 29.

10   As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

11   Land Drainage Act 1991 Sch 3 para 2(2)(a) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(14)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

12   As to the meaning of 'drainage body' see PARA 573 note 15.

13   As to the meaning of 'navigation authority' see PARA 189 note 1.

14   As to the meaning of 'harbour authority' see PARA 189 note 2.

15   As to the meaning of 'conservancy authority' see PARA 189 note 3.

16   Land Drainage Act 1991 Sch 3 para 2(2)(b).

17   As to local inquiries see PARA 657.

18   Land Drainage Act 1991 Sch 3 para 3(1).

19   Land Drainage Act 1991 Sch 3 para 3(2).

20   Land Drainage Act 1991 Sch 3 para 4(1).

21   Land Drainage Act 1991 Sch 3 para 4(2)(a).

22   As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. Special parliamentary procedure does not apply in relation to orders made by the Welsh Ministers. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

23   'Prescribed' means prescribed by regulations under the Land Drainage Act 1991 s 65 (see PARA 583): s 72(1). At the date at which this title states the law, no such regulations had been made.

- 24 See the Land Drainage Act 1991 Sch 3 para 4(2)(b).
- 25 Land Drainage Act 1991 Sch 3 para 5(1).
- 26 See the Land Drainage Act 1991 Sch 3 para 5(2). See also note 22.
- 27 See the Land Drainage Act 1991 Sch 3 para 5(3). See also note 22.
- 28 See the Land Drainage Act 1991 Sch 3 para 5(4). See also note 22.
- 29 References to an unconfirmed order are references to any order to which the Land Drainage Act 1991 Sch 3 applies other than one confirmed under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARA 926): Land Drainage Act 1991 Sch 3 para 1(2).
- 30 Land Drainage Act 1991 Sch 3 para 6.
- 31 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664. See also *Cook v Southend Borough Council* [1990] 2 QB 1, [1990] 1 All ER 243, CA.
- 32 Land Drainage Act 1991 Sch 3 para 7(1)(a).
- 33 Land Drainage Act 1991 Sch 3 para 7(1)(b).
- 34 Land Drainage Act 1991 Sch 3 para 7(1). The application must be made within six weeks from the date when the order becomes operative under the Statutory Orders (Special Procedure) Act 1945 or, if the order is not subject to special parliamentary procedure, from the date of the publication of the notice that the order has come into force: see the Land Drainage Act 1991 Sch 3 para 7(1), (5). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.
- 35 Land Drainage Act 1991 Sch 3 para 7(2). Except by leave of the Court of Appeal, no appeal lies to the House of Lords from a decision of the Court of Appeal in such proceedings: Sch 3 para 7(3). As from a day to be appointed this provision is amended so as to read: Except by leave of the Court of Appeal, no appeal lies to the Supreme Court from a decision of the Court of Appeal in such proceedings: Sch 3 para 7(3) (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 56). At the date at which this volume states the law no such day had been appointed.
- 36 Land Drainage Act 1991 Sch 3 para 7(4). As to judicial review of decisions so expressed to be immune to challenge see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

## UPDATE

### 585 Procedure with respect to certain orders under the land drainage legislation

NOTE 35--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(ii) General Powers and Duties to Drain Land and Protect Land from Flooding/D. REGULATIONS AND ORDERS/586. Procedure with respect to orders relating to main river functions.

#### **586. Procedure with respect to orders relating to main river functions.**

As soon as any scheme for transferring main river functions to the Environment Agency<sup>1</sup> has been submitted to the Secretary of State<sup>2</sup> or, as the case may be, the Welsh Ministers<sup>3</sup>, the Agency must:

- 1267 (1) send copies of the scheme to every internal drainage board<sup>4</sup>, local authority<sup>5</sup>, navigation authority<sup>6</sup>, harbour authority<sup>7</sup> and conservancy authority<sup>8</sup> affected by it<sup>9</sup>; and
- 1268 (2) publish, in one or more newspapers circulating in the area affected by the scheme, a notice stating that the scheme has been so submitted, that a copy of it is open to inspection at a specified place, and that representations with respect to the scheme may be made to the Secretary of State or, as appropriate, the Welsh Ministers at any time within one month<sup>10</sup> after the publication of the notice<sup>11</sup>.

Before either the Secretary of State or the Welsh Ministers make an order for such a scheme, they must cause notice of their intention to make it to be published in the London Gazette and in such other manner as they think best adapted for informing persons affected<sup>12</sup>. In addition, the notice must contain details of the place where copies of the draft order may be inspected and obtained and of the period within which, and the manner in which, objections to the draft order may be made<sup>13</sup>. Notice<sup>14</sup> must also be sent to:

- 1269 (a) every county council, county borough council or London borough council in whose area any part of the area proposed to be affected by the order is situated and, if any part of that area is situated in the City of London, to the Common Council of the City of London<sup>15</sup>;
- 1270 (b) the Agency and every drainage body<sup>16</sup>, navigation authority, harbour authority or conservancy authority that is known to the Secretary of State or, as the case may be, the Welsh Ministers to be exercising jurisdiction within the area proposed to be affected by the order<sup>17</sup>.

The Secretary of State or, as appropriate, the Welsh Ministers must, before making any such order, consider any objections duly made to the draft order<sup>18</sup> and may, in any case, cause a public local inquiry to be held with respect to any objections to it<sup>19</sup>. In making the order the Secretary of State or Welsh Ministers may make such modifications<sup>20</sup> in the terms of the draft as appear to them to be desirable and may confirm the scheme to which the order relates either with or without modifications<sup>21</sup>. As soon as may be after such an order has effect, the Secretary of State or the Welsh Ministers must publish in the London Gazette, and in such manner as they think best adapted for informing persons affected, a notice stating that the order has come into force<sup>22</sup> and naming a place where a copy of it may be seen at all reasonable hours<sup>23</sup>.

If any person aggrieved<sup>24</sup> by such an order desires to question its validity on the ground (i) that it is not within the powers of the Water Resources Act 1991<sup>25</sup>; or (ii) that any requirement of the Act has not been complied with<sup>26</sup>, he may make application to the High Court<sup>27</sup>. If the court is



satisfied that the order is not within the powers of the Act<sup>28</sup>, or that the applicant's interests have been substantially prejudiced by any requirements of the Act not having been complied with<sup>29</sup>, the court may quash the order either generally or in so far as it affects the applicant<sup>30</sup>. Subject to these provisions, the order may not at any time be questioned in any legal proceedings whatsoever<sup>31</sup>.

- 1     le a scheme under the Water Resources Act 1991 s 108: see PARA 575. As to the meaning of 'main river' see PARA 574. As to the Environment Agency see PARA 17.
- 2     As to the Secretary of State see PARA 15 note 1.
- 3     As to the transfer of functions under the Water Resources Act 1991 s 108 and Sch 14 to the Welsh Ministers see PARA 575 note 3. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.
- 4     As to internal drainage boards see PARA 569.
- 5     As to the meaning of 'local authority' see PARA 187 note 2.
- 6     As to the meaning of 'navigation authority' see PARA 189 note 1.
- 7     As to the meaning of 'harbour authority' see PARA 189 note 2.
- 8     As to the meaning of 'conservancy authority' see PARA 189 note 3.
- 9     Water Resources Act 1991 Sch 14 para 1(a) (Sch 1 para 1 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 10    As to the meaning of 'month' see PARA 23 note 10.
- 11    Water Resources Act 1991 Sch 14 para 1(b).
- 12    See the Water Resources Act 1991 Sch 14 para 2(1). As to the meaning of 'person' see PARA 13 note 29.
- 13    See the Water Resources Act 1991 Sch 14 para 2(1)(b), (c).
- 14    As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.
- 15    Water Resources Act 1991 Sch 14 para 2(2)(a) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(8)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.
- 16    As to the meaning of 'drainage body' see PARA 575 note 4: definition applied by the Water Resources Act 1991 Sch 14 para 2(3).
- 17    Water Resources Act 1991 Sch 14 para 2(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).
- 18    Water Resources Act 1991 Sch 14 para 3(1)(a).
- 19    Water Resources Act 1991 Sch 14 para 3(1)(b).
- 20    As to the meaning of 'modifications' see PARA 141 note 20.
- 21    Water Resources Act 1991 Sch 14 para 3(2).
- 22    Water Resources Act 1991 Sch 14 para 4(a).
- 23    Water Resources Act 1991 Sch 14 para 4(b).
- 24    As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
- 25    Water Resources Act 1991 Sch 14 para 5(1)(a).

26 Water Resources Act 1991 Sch 14 para 5(1)(b).

27 Water Resources Act 1991 Sch 14 para 5(1). The application must be made within six weeks from the date of the publication of the notice that the order has come into force: Sch 14 para 5(1). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

28 Water Resources Act 1991 Sch 14 para 5(2)(a).

29 Water Resources Act 1991 Sch 14 para 5(2)(b).

30 Water Resources Act 1991 Sch 14 para 5(2). Except by leave of the Court of Appeal, no appeal lies to the House of Lords from a decision of the Court of Appeal in such proceedings: Sch 14 para 5(3). As from a day to be appointed this provision is amended so as to read: Except by leave of the Court of Appeal, no appeal lies to the Supreme Court from a decision of the Court of Appeal in such proceedings: Sch 14 para 5(3) (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 55). At the date at which this volume states the law no such day had been appointed.

31 Water Resources Act 1991 Sch 14 para 5(4). As to judicial review of decisions so expressed to be immune to challenge see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

## **UPDATE**

### **586 Procedure with respect to orders relating to main river functions**

NOTE 30--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(ii) General Powers and Duties to Drain Land and Protect Land from Flooding/E. LANDOWNERS' POWER TO EXECUTE DRAINAGE WORKS/587. Powers to authorise landowners to carry out drainage works.

## ***E. LANDOWNERS' POWER TO EXECUTE DRAINAGE WORKS***

### **587. Powers to authorise landowners to carry out drainage works.**

Where any persons<sup>1</sup> interested in any land<sup>2</sup> are of the opinion that it is capable of improvement by drainage works<sup>3</sup>, but the works cannot be carried out by reason of the objection or disability of any person whose land would be entered upon, cut through or interfered with by or for the purpose of the works<sup>4</sup>, they may present an application to the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'appropriate minister')<sup>5</sup> for an order<sup>6</sup> authorising them to execute such drainage works as are expedient with a view to improvement of the land<sup>7</sup>. This procedure is also available to internal drainage boards<sup>8</sup> and local authorities<sup>9</sup> who wish to undertake drainage works for the benefit of their district or area in lands outside that district or area<sup>10</sup>.

The application must be in the prescribed form<sup>11</sup> and contain particulars of the proposed works and the persons by whom they are to be carried out and such further particulars as the appropriate minister may prescribe or require<sup>12</sup>. Notice of the application, of the place where it can be inspected and of the period within which objections to the proposed works may be made to the Secretary of State or, as the case may be, the Welsh Ministers must be given in the prescribed manner<sup>13</sup> to all persons, not parties to the application, whose lands are proposed to be entered upon, cut through or interfered with<sup>14</sup>, to the Environment Agency<sup>15</sup> and to any internal drainage board for any district within which all or any of the proposed works are to be carried out<sup>16</sup>. The applicants must give such security for expenses as may be required by the Secretary of State or the Welsh Ministers<sup>17</sup>.

On an application for such an order, if no objection has been made<sup>18</sup> or every such objection has been withdrawn, the Secretary of State or the Welsh Ministers may in their discretion either refuse to authorise the carrying out of the proposed works or by order authorise the carrying out with or without alteration<sup>19</sup>. If, however, an objection to the proposed works has been made to the Secretary of State or, as appropriate, to the Welsh Ministers within the prescribed period<sup>20</sup> by any person interested or in any way affected by the proposed works and that objection is not withdrawn, the Secretary of State or the Welsh Ministers must forthwith cause a public inquiry<sup>21</sup> to be held in the locality in which the proposed works are to be carried out<sup>22</sup> and must exercise their discretion to refuse to authorise, or to authorise, the carrying out of the works (with or without alteration) after receiving the report of that inquiry<sup>23</sup>.

The persons authorised by such an order to carry out works have full power to carry out the works and to maintain them forever thereafter<sup>24</sup>. Where, however, such an order is made, every person interested in the land affected by the order (other than any person who is one of those authorised to carry out the works) is entitled to compensation for any injury suffered by him in respect of that interest by reason of the works, and any dispute as to the amount of the compensation payable is to be determined by the Lands Tribunal<sup>25</sup>.

No order of the Secretary of State or the Welsh Ministers under these provisions may authorise any work by which the streams, reservoirs or feeders supplying any ornamental waters will be cut through, diverted or interfered with otherwise than by agreement and with the consent of the persons to whom those ornamental waters belong<sup>26</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'land' see PARA 569 note 2. Under the similar provisions of the Land Drainage Act 1847 s 14 (repealed) it was held that injury to a building on the land such as a mill was not sufficient: *Finch v Bannister* [1908] 2 KB 441, 77 LJB 718, CA.

3 Land Drainage Act 1991 s 22(1)(a). As to the meaning of 'drainage' see PARA 573. As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.

4 Land Drainage Act 1991 s 22(1)(b).

5 'Appropriate minister' means, in relation to England, the minister, and in relation to Wales, the Secretary of State: Land Drainage Act 1991 s 22(9). As to the meaning of 'the minister' see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Land Drainage Act 1991 s 22, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

6 Orders under the Land Drainage Act 1991 s 22 are not made by statutory instrument and are not recorded in this work.

7 Land Drainage Act 1991 s 22(1). As to improvement works by drainage boards and local authorities see PARA 649 et seq.

8 As to internal drainage boards see PARA 569.

9 As to the meaning of 'local authority' see PARA 573 note 14.

10 See the Land Drainage Act 1991 s 14(3). As to the powers of such boards and authorities to do work inside their districts or areas see s 14(1); and PARA 589. Any expenses incurred by an internal drainage board on work outside its district are to be defrayed as if the expenses had been incurred in its district: s 14(7).

11 Land Drainage Act 1991 s 22(2)(a). 'Prescribed' means prescribed by regulations under the Land Drainage Act 1991 s 65 (see PARA 583): s 72(1). No specific form is prescribed.

12 Land Drainage Act 1991 s 22(2)(b). The application must contain the following particulars: (1) the names of the persons by whom the proposed works are to be executed; (2) the nature of the proposed works, together with a map or plan showing them; (3) the description and situation of the land required to be entered upon, cut through or interfered with for the purpose of the proposed works or likely to be affected thereby; (4) a schedule showing the reputed owners and occupiers of the land proposed to be improved by the drainage works; (5) the estimated cost of the proposed works, including the amount of the compensation money in respect of land required to be entered upon, cut through or interfered with; (6) a statement of the actual condition of the land proposed to be drained or improved, and the probable increased value of the land consequent upon the proposed works; and (7) such further particulars as the minister may require: Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 6(1). The Land Drainage (General) Regulations 1932, SR & O 1932/64, have effect, by virtue of Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), as if made under the Land Drainage Act 1991 s 22. An application for such an order may require an environmental impact assessment under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783 (see PARA 649), and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

13 The notice must be served by registered post or by the recorded delivery service or by delivery to or at the residence of the person to whom it is addressed, or where addressed to the owner or occupier of premises, by delivery of the notice or a copy of it to some person on the premises, or, if there is no person on the premises to whom the notice or a copy can be delivered, by fixing the notice or a copy of it on some conspicuous part of the premises: Land Drainage (General) Regulations 1932, SR & O 1932/64, regs 6(2), 8(1) (amended by SI 1962/1734). Any notice required to be given to a corporation or public body must be sent by registered post or by the recorded delivery service or left at the principal office of business of the corporation or public body, or if no such office can after diligent inquiry be found, must be sent by registered post or by the recorded delivery service or served on some principal officer, if any, of the corporation or body: Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 8(2) (as so amended). As to the service of notice in the case of Crown land etc see reg 8(3). A copy of the notice must be published in a newspaper circulating in the district

in which all or any of the proposed works are to be executed: reg 6(2). As to the contents of such notice see reg 6(3), (4).

14 Land Drainage Act 1991 s 22(3)(a).

15 Land Drainage Act 1991 s 22(3)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to the Environment Agency see PARA 17.

16 Land Drainage Act 1991 s 22(3)(c). As to internal drainage districts see PARA 569.

17 Land Drainage Act 1991 s 22(2).

18 Ie as mentioned in the Land Drainage Act 1991 s 22(4): see the text to notes 20-22.

19 Land Drainage Act 1991 s 22(5). The exercise of this ministerial discretion is subject to the environmental duties imposed by the Land Drainage Act 1991: see PARA 642 et seq.

20 The objection must be presented to the minister within the period of one calendar month from and after: (1) the date on which notice of the application is sent to the objector; or, if no such notice was sent, (2) the date of the advertisement of a notice of the application: Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 6(5).

21 As to inquiries see PARA 657.

22 Land Drainage Act 1991 s 22(4).

23 Land Drainage Act 1991 s 22(5). See also note 17.

24 Land Drainage Act 1991 s 22(6).

25 Land Drainage Act 1991 s 22(7). Compensation payable under this provision carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from the date of the claim, and payments on account of such interest may be made: see the Planning and Compensation Act 1991 s 80(1)-(3), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58). As to compensation for injury in respect of works see PARA 591. As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

26 Land Drainage Act 1991 s 22(8).

## UPDATE

### 587 Powers to authorise landowners to carry out drainage works

TEXT AND NOTE 25--Reference to the Lands Tribunal is now to the Upper Tribunal: Land Drainage Act 1991 s 22(7) (amended by SI 2009/1307).

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(ii) General Powers and Duties to Drain Land and Protect Land from Flooding/E. LANDOWNERS' POWER TO EXECUTE DRAINAGE WORKS/588. Restoration and improvement of ditches.

### **588. Restoration and improvement of ditches.**

Where a ditch<sup>1</sup> is in such a condition as to cause injury to any land<sup>2</sup> or to prevent the improvement of the drainage<sup>3</sup> of any land, the Agricultural Land Tribunal<sup>4</sup>, on the application of the owner or occupier of the land, may if it thinks fit make an order requiring the person<sup>5</sup> or persons named in the order to carry out such remedial work<sup>6</sup> as may be specified in the order<sup>7</sup>. Such an order with respect to a ditch may name any person who is an owner or occupier of land through which the ditch passes or which abuts on the ditch<sup>8</sup>, and any other person who has a right to carry out the work specified in the order or any part of it<sup>9</sup>. The tribunal's order is sufficient authority for any person named in it to do the work specified in relation to him in the order<sup>10</sup>, and to enter any land so specified, so far as may be necessary for that purpose<sup>11</sup>. Before entering any land under these powers, however, the person entering it must give at least seven days' notice to the occupier of the land<sup>12</sup>. Where any person sustains any injury by reason of the exercise of any power so conferred, then unless the power was exercised in or for the purpose of the carrying out of any work which that person was required to carry out<sup>13</sup>, the person exercising the power is liable to make full compensation to the person sustaining the injury<sup>14</sup>. In case of dispute the amount of compensation payable is to be determined by the Lands Tribunal<sup>15</sup>.

Similarly, where the drainage of any land requires the carrying out of any work in connection with a ditch passing through other land<sup>16</sup>, or the replacement or construction of such a ditch<sup>17</sup>, or the alteration or removal of any drainage work in connection with such a ditch<sup>18</sup>, the Agricultural Land Tribunal, on the application of the owner or occupier of the first mentioned land, may, if it thinks fit, make an order<sup>19</sup> authorising the applicant to carry out such work as may be specified in the order<sup>20</sup> and, so far as may be necessary for that purpose, to enter any land so specified<sup>21</sup>.

1 'Ditch' includes a culverted and piped ditch but does not include a watercourse vested in, or under the control of, a drainage body: Land Drainage Act 1991 ss 28(5), 30(4). As to the meaning of 'watercourse' see PARA 573 note 10. As to the meaning of 'drainage body' see PARA 573 note 15.

2 As to the meaning of 'land' see PARA 569 note 2.

3 As to the meaning of 'drainage' see PARA 573.

4 The Lord Chancellor must draw up for each Agricultural Land Tribunal, and from time to time revise, a panel of persons appearing to him to be experienced in matters relating to the drainage of land: Land Drainage Act 1991 s 31(1). Before drawing up, or revising, such a panel, the Lord Chancellor must consult the Lord Chief Justice: s 31(1A) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1, para 222(1), (2)). For each hearing by an Agricultural Land Tribunal of an application under the Land Drainage Act 1991 s 28 or s 30 (see the text to notes 16-21) one of the members of the Tribunal must, instead of being a person nominated in accordance with the Agriculture Act 1947 Sch 9 para 16(1)(b) (see **AGRICULTURAL LAND** vol 1 (2008) PARA 671), be a person nominated by the chairman from the panel drawn up under these provisions: s 31(2). If the chairman is prevented by sickness or any other reason from making the nomination, that duty may be discharged by a person appointed from the panel of deputy-chairmen for that Tribunal by the chairman or, if the chairman is unable to make the appointment, by the Lord Chief Justice, after consulting the Lord Chancellor: see the Agriculture Act 1947 Sch 9 para 16A (added by the Agriculture Act 1958 s 8(1), Sch 1 Pt I para 5; and amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 29, 33(1), (3)); applied by the Land Drainage Act 1991 s 31(3). As to the Agricultural Land Tribunal see **AGRICULTURAL LAND** vol 1 (2008) PARA 670. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. As to the Lord Chief Justice see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 303; **COURTS** vol 10

(Reissue) PARA 515. The Lord Chancellor's function under s 31(1) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 As to the meaning of 'person' see PARA 13 note 29.

6 'Remedial work', in relation to a ditch, means work for cleansing the ditch, removing from it any matter which impedes the flow of water or otherwise putting it in proper order and for protecting it: Land Drainage Act 1991 s 28(5).

7 Land Drainage Act 1991 s 28(1). For the purpose of deciding any such application, or any application under s 30 (see the text to notes 16-21), the Agricultural Land Tribunal may authorise any of its members or any other person to enter and inspect any land: s 31(4). The provisions of s 29(3)-(6) (see note 11 and the text to notes 12-15) apply in relation to the power conferred by virtue of s 31(4) as they apply in relation to the powers conferred by virtue of s 29: s 31(5).

8 Land Drainage Act 1991 s 28(2)(a).

9 Land Drainage Act 1991 s 28(2)(b). Where the order names more than one person it may either require each of them to carry out a specified part of the work specified in the order, or require them all jointly to carry out the whole of that work: s 28(3). Where, however, the Agricultural Land Tribunal makes an order requiring persons jointly to carry out any work it may if it thinks fit, and without prejudice to their joint liability, specify in the order the proportions in which those persons are to contribute to the cost of doing so: s 28(4).

10 Land Drainage Act 1991 s 29(1)(a). The services for which provision may be made under the Agriculture Act 1986 s 1 (provision of agricultural goods and services: see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1313) include such services to the owner or occupier of any land as may enable him to carry out any work which he is authorised to carry out in exercise of any power so conferred: Land Drainage Act 1991 s 29(7).

11 Land Drainage Act 1991 s 29(1)(b). Where at the end of three months the specified work has not been carried out, the appropriate minister or any drainage body authorised by him, either generally or in a particular case, may carry out the work, enter any land which it is necessary to enter for that purpose and recover from any person named in the order the expenses reasonably incurred in carrying out any work which ought to have been carried out by that person (including any compensation payable in connection with the work under s 29(5) (see the text to notes 13-14)): s 29(2). A person entering land in pursuance of these provisions may take with him such other persons and equipment as may be necessary and must leave unoccupied land as effectually secured against trespassers as when he found it: s 29(3). As to the meaning of 'month' see PARA 23 note 10. 'Appropriate minister' means, in relation to England, the minister, and, in relation to Wales, the Secretary of State: s 29(8). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'the minister' see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Land Drainage Act 1991 s 29, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

12 Land Drainage Act 1991 s 29(4). As to the service of documents see PARA 22.

13 Ie by an order under the Land Drainage Act 1991 s 28: see the text to notes 1-9.

14 Land Drainage Act 1991 s 29(5). Compensation payable under this provision (including this provision as applied by s 30(3) (see note 21) and s 31(5) (see note 7)) carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from the date of the claim, and payments on account of such interest may be made: see the Planning and Compensation Act 1991 s 80(1)-(3), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58). As to compensation for injury in respect of works see PARA 591.

15 Land Drainage Act 1991 s 29(6). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

16 Land Drainage Act 1991 s 30(1)(a).

17 Land Drainage Act 1991 s 30(1)(b).

18 Land Drainage Act 1991 s 30(1)(c).

19 Land Drainage Act 1991 s 30(1).

20 Land Drainage Act 1991 s 30(2)(a).

21 Land Drainage Act 1991 s 30(2)(b). The provisions of s 29(3)-(7) (see notes 10, 11 and the text to notes 12-15) apply in relation to the powers so conferred as they apply in relation to the powers conferred by virtue of s 29: s 30(3).

## **UPDATE**

### **588 Restoration and improvement of ditches**

TEXT AND NOTE 15--Reference to the Lands Tribunal is now to the Upper Tribunal: Land Drainage Act 1991 s 29(6) (amended by SI 2009/1307).



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(iii) Powers of Drainage Bodies/A. DRAINAGE WORKS/589. Execution of drainage works by drainage bodies.

### **(iii) Powers of Drainage Bodies**

#### **A. DRAINAGE WORKS**

##### **589. Execution of drainage works by drainage bodies.**

The Environment Agency<sup>1</sup>, an internal drainage board<sup>2</sup> and a local authority<sup>3</sup> have power<sup>4</sup>:

- 1271 (1) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse<sup>5</sup> or drainage work<sup>6</sup>;
- 1272 (2) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse or remove or alter mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve any existing drainage work<sup>7</sup>; and
- 1273 (3) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act required for the drainage of any land<sup>8</sup>.

The Agency, however, is only empowered to do such work in connection with a main river<sup>9</sup>, except that it may exercise the power to maintain, improve or construct drainage works for the purpose of defence against sea water or tidal water both above and below the low-water mark, irrespective of whether such works are works in connection with a main river<sup>10</sup>.

The Agency may construct all such works and do all such things in the sea or in any estuary as it considers necessary to secure an adequate outfall for a main river<sup>11</sup>. The functions of the Agency as respects the doing of any work under the flood defence provisions of the Water Resources Act 1991<sup>12</sup>, and the functions of the Agency or an internal drainage board under the Land Drainage Act 1991, are not to be treated as limited by the fact that some other person is under an obligation by reason of custom, tenure, prescription or otherwise to do that work<sup>13</sup>. An internal drainage board is not empowered to do any work in connection with a main river or the banks<sup>14</sup> of such a river and is generally only empowered to do work within its own internal drainage district<sup>15</sup>; and the powers conferred on a local authority may only be used for the purpose of carrying out works in pursuance of a scheme<sup>16</sup> for the drainage of small areas<sup>17</sup>, or so far as may be necessary for the purpose of preventing flooding or remedying or mitigating damage caused by flooding in its area<sup>18</sup>. Moreover, save where works are carried out under a scheme for the drainage of a small area, a local authority may not carry out or maintain any drainage works<sup>19</sup> except with the consent of, and in accordance with reasonable conditions imposed by, the Agency<sup>20</sup>. The Agency must in turn consult with any internal drainage board before giving any such consent or imposing any such condition with respect to any drainage works in connection with a watercourse under the control of an internal drainage board<sup>21</sup>. The Agency's consent must not be unreasonably withheld<sup>22</sup>, and is deemed to have been given if it is not given or refused within two months<sup>23</sup> after the application for consent is made<sup>24</sup>. Any question as to whether the consent of the Agency is unreasonably withheld, or whether any condition imposed by the Agency is reasonable, must be referred to and determined by the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>25</sup>.

This requirement for a local authority to obtain consent does not apply to any work carried out in an emergency, but the local authority carrying out such emergency work must inform the Agency in writing<sup>26</sup> of the carrying out of that work and of the circumstances in which it was carried out as soon as practicable<sup>27</sup>. Where the above powers are conferred<sup>28</sup> on a non-metropolitan district council but are not exercised by that council, a county council may only exercise those powers either at the request of the appropriate non-metropolitan district council<sup>29</sup> or after giving six weeks' notice in writing to the district council<sup>30</sup>, but this restriction does not apply in relation to powers conferred on a Welsh county council or county borough council<sup>31</sup>. Where powers are conferred<sup>32</sup> on a metropolitan district council, a London borough council, the Common Council of the City of London or a Welsh county council or county borough council, the Agency may act in the same circumstances as might a county council under the above provisions<sup>33</sup>. Where the council to whom a notice has been given by a county council or the Agency, as the case may be, appeals against the notice to the Secretary of State or, as appropriate, the Welsh Ministers before it expires<sup>34</sup> and informs the county council or the Agency of the appeal<sup>35</sup>, the powers to which the notice relates must not be exercised in pursuance of the notice unless it is confirmed by the Secretary of State or the Welsh Ministers<sup>36</sup>.

If any question arises<sup>37</sup> as to (a) whether any work is a drainage work in connection with a main river<sup>38</sup>; or (b) whether any proposed work will, if constructed, be such a drainage work<sup>39</sup>, the question must be referred to the Secretary of State or, as appropriate, the Welsh Ministers<sup>40</sup> for decision or, if either of the parties so requires, to arbitration<sup>41</sup>.

The Environment Agency or an internal drainage board may also at its own expense, and on substituting other sewers, drains, culverts and pipes<sup>42</sup> which will be equally effectual and will entail no additional expense on the sewerage undertaker<sup>43</sup>, take up, divert or alter the level of any sewers, drains, culverts or pipes vested in the sewerage undertaker which pass under or interfere with, or interfere with the improvement or alteration of, any watercourse<sup>44</sup> or other works vested in or under the control of the Agency or board<sup>45</sup>.

1 As to the Environment Agency see PARA 17.

2 As to internal drainage boards see PARA 569.

3 As to the meaning of 'local authority' see PARA 573 note 14. Nothing in the Land Drainage Act 1991 s 14 authorises an English county council to exercise any power except in accordance with s 16 (see the text to notes 28-36): s 14(4)(b) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(2)).

4 These powers are discretionary and do not impose a duty; thus the body on which such powers are conferred is not liable for omitting to exercise such powers (*Smith v Cawdle Fen, Ely (Cambridge) Comrs* [1938] 4 All ER 64; *Gillett v Kent Rivers Catchment Board*, *Jones v Kent Rivers Catchment Board*, *Paine v Kent Rivers Catchment Board* [1938] 4 All ER 810; *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, [1940] 4 All ER 527, HL), unless it has bound itself by contract (see *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA; and **EQUITY** vol 16(2) (Reissue) PARA 614) or unless liability under an earlier local Act applies (*Sephton v Lancashire River Board* [1962] 1 All ER 183, [1962] 1 WLR 623). If a drainage body exercises a power, its only duty to any member of the public is not by doing so to add to the damage which he would have suffered if it had done nothing: *East Suffolk Rivers Catchment Board v Kent*. Cf the powers of the Environment Agency to act in default of an internal drainage board: see PARA 582. As to compensation see PARA 591. Nothing in the Water Resources Act 1991 s 165(1)-(3) or the Land Drainage Act 1991 s 14 authorises any person to enter on the land of any person except for the purpose of maintaining existing works: Water Resources Act 1991 s 165(6); Land Drainage Act 1991 s 14(4)(a). The Agency, however, has powers of entry under the Water Resources Act 1991 s 172; and internal drainage boards and local authorities have powers of entry under the Land Drainage Act 1991 s 64: see PARA 608. As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'land' for the purposes of the Land Drainage Act 1991 see PARA 569 note 2; and as to the meaning of 'land' generally see PARA 14 note 21.

The exercise of these powers may require an environmental impact assessment under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783 (see PARA 649) and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).

5 As to the meaning of 'watercourse' see PARA 573 note 10 (definition applied in the case of the Water Resources Act 1991 by s 165(7)). Section 113(2), (3) (see PARA 574 note 3) also applies for these purposes: see s 165(7).

6 Water Resources Act 1991 s 165(1)(a) (s 165 amended by the Environment Act 1995 s 120(1), Sch 22 para 128); Land Drainage Act 1991 s 14(1), (2)(a). As to the meaning of 'drainage' see PARA 573.

7 Water Resources Act 1991 s 165(1)(b); Land Drainage Act 1991 s 14(1), (2)(b).

8 Water Resources Act 1991 s 165(1)(c); Land Drainage Act 1991 s 14(1), (2)(c). As to the environmental duties governing the exercise of these powers see PARA 642 et seq.

9 Water Resources Act 1991 s 165(1) (as amended: see note 6). As to the meaning of 'main river' see PARA 574.

10 Water Resources Act 1991 s 165(2) (as amended: see note 6). As to tidal water see *Kingsway Furniture (Dartford) Ltd v Harpglow Ltd and Kylefield Ltd* [1991] Water Law 10 (Official Referee's Business).

11 Water Resources Act 1991 s 165(3) (as amended: see note 6).

12 As to the meaning of 'flood defence provisions' see PARA 20 note 2.

13 Water Resources Act 1991 s 185(2) (as amended: see note 6); Land Drainage Act 1991 s 72(6) (amended by the Environment Act 1995 Sch 22 para 191).

14 As to the meaning of 'banks' see PARA 574 note 2.

15 See the Land Drainage Act 1991 s 14(1)(a), (2). As to internal drainage districts see PARA 569 et seq. As to the powers of an internal drainage board to do work outside its district see ss 14(3), 22; and PARA 587.

16 Is a scheme under Land Drainage Act 1991 s 18: see PARA 595.

17 See the Land Drainage Act 1991 s 14(1)(b)(i).

18 See the Land Drainage Act 1991 s 14(1)(b)(ii). As to the powers of local authorities to do work outside their area see ss 14(3), 22; and PARA 587.

19 As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.

20 Land Drainage Act 1991 s 17(1) (s 17 amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

21 Land Drainage Act 1991 s 17(2) (as amended: see note 20). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

22 Land Drainage Act 1991 s 17(3)(a).

23 As to the meaning of 'month' see PARA 23 note 10.

24 Land Drainage Act 1991 s 17(3)(b).

25 Land Drainage Act 1991 s 17(4) (as amended: see note 20). The statutory wording is 'the ministers': see s 17(4). As to the meaning of 'the ministers', and as to the abolition of the Minister of Agriculture, Fisheries and Food, see PARA 569 note 9. The functions of the Secretary of State under the Land Drainage Act 1991 s 16 (see the text to notes 34-36), s 17, and s 73 (see the text to notes 40-41) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

26 As to the meaning of 'writing' see PARA 22 note 1.

27 Land Drainage Act 1991 s 17(5) (as amended: see note 20).

28 Is by the Land Drainage Act 1991 s 14: see the text to notes 1-8.

29 See the Land Drainage Act 1991 s 16(1)(a) (s 16(1) amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(4)).

- 30 Land Drainage Act 1991 s 16(1)(b) (as amended: see note 29).
- 31 Land Drainage Act 1991 s 16(3A) (added by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(4)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.
- 32 Ie by the Land Drainage Act 1991 s 14(1): see the text to notes 1-8.
- 33 See the Land Drainage Act 1991 s 16(2) (amended by the Local Government (Wales) Act 1994, s 22(5), Sch 11, para 4(4); Environment Act 1995 s 120(1), Sch 22 para 191). Any expenses incurred by the Agency in exercising those powers are recoverable from the council concerned by the Agency summarily as a civil debt: Land Drainage Act 1991 s 16(2) (as so amended; and further amended by the Water Act 2003 s 101(1), Sch 7 Pt 3 para 40(1), (2)). As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the summary recovery of civil debts see **MAGISTRATES** vol 29(2) (Reissue) PARA 826.
- 34 See the Land Drainage Act 1991 s 16(3)(a).
- 35 See the Land Drainage Act 1991 s 16(3)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191).
- 36 See the Land Drainage Act 1991 s 16(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191).
- 37 Ie under the Land Drainage Act 1991.
- 38 Land Drainage Act 1991 s 73(1)(a).
- 39 Land Drainage Act 1991 s 73(1)(b).
- 40 The statutory wording is 'the ministers': see s 73(1); and note 25.
- 41 Land Drainage Act 1991 s 73(1). Where any question is so required to be referred to arbitration it must be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, in default of agreement, by the President of the Institution of Civil Engineers on the application of either party: s 73(2). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration and any arbitration under the Water Industry Act 1991 s 184(3) (see note 43): see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.
- 42 As to the meanings of 'sewer', 'drain' and 'pipe' see PARA 138 note 11.
- 43 See the Water Industry Act 1991 s 184(2). As to the meaning of 'sewerage undertaker' see PARA 137 note 4. These provisions apply in relation to a new undertaker where the appointment or variation under Pt II Ch I (ss 6-17) (see PARA 137 et seq) has not come into force, as if it had done so: see s 10(2)-(4); and PARA 141. Any difference of opinion which arises between a sewerage undertaker and any person as to whether any sewers, drains, culverts or pipes of that undertaker are or will be equally effectual or entail, or will entail, additional expense for the sewerage undertaker, may, at the option of the party complaining, be referred to a single arbitrator appointed by agreement between the parties or, in default of agreement, by the President of the Institution of Civil Engineers: s 184(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see note 41.
- 44 As to the meaning of 'watercourse' for these purposes see PARA 187 note 2.
- 45 Water Industry Act 1991 s 184(1)(a), (b)(i) (amended by the Environment Act 1995 Sch 22 para 119). Reasonable notice must be given to the sewerage undertaker concerned: Water Industry Act 1991 s 184(1) (as so amended). As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22. Dock undertakers, railway undertakers, airport operators and licence holders (ie persons holding a licence under the Transport Act 2000 Pt I Ch I (ss 1-40) (air traffic services)) have similar powers: see s 184(1), (4) (as so amended; further amended by SI 2001/4050).

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### **590. Arrangements between drainage bodies and other persons.**

By agreement with any person<sup>1</sup>, the Environment Agency<sup>2</sup> may carry out, improve or maintain, at that person's expense<sup>3</sup>, any drainage<sup>4</sup> works which that person is entitled to carry out, improve or maintain<sup>5</sup>; and an internal drainage board has similar powers, whether within or outside its district<sup>6</sup>, to carry out or to maintain such drainage works<sup>7</sup>. Any local authority<sup>8</sup> other than, in England, the council of a non-metropolitan district<sup>9</sup>, may similarly by agreement do such work within the council's area<sup>10</sup>.

An internal drainage board may not however exercise such powers in connection with a main river<sup>11</sup>, the banks<sup>12</sup> of such a river or any drainage works in connection with a main river<sup>13</sup>. However, the Agency may enter into an agreement with any internal drainage board for the carrying out by the board, on such terms as to payment or otherwise as may be specified in the agreement, of any work in connection with a main river which the Agency is authorised to carry out<sup>14</sup>. Similar agreements may be made by the Agency with any local authority<sup>15</sup> or any navigation authority<sup>16</sup> for the carrying out of any work in connection with a main river which the Agency is authorised to carry out<sup>17</sup>.

With the consent of an internal drainage board and notwithstanding any restriction by reference to a main river of the powers conferred on the Agency<sup>18</sup>, the Agency may carry out and maintain in that board's district any works which the board might carry out or maintain<sup>19</sup>, on such terms as to payment or otherwise as may be agreed between the board and the Agency<sup>20</sup>. The Agency may likewise agree to contribute to the expense of the carrying out or maintenance of any works by any internal drainage board<sup>21</sup>. An internal drainage board may, with the consent of an internal drainage board for any other district, carry out and maintain in that other district any works which it might carry out and maintain in its own district on such terms as to payment or otherwise as may be agreed between the boards<sup>22</sup>, or may agree to contribute to the expense of the carrying out or maintenance of any works by any internal drainage board for any other district<sup>23</sup>. Any expense incurred by an internal drainage board under these provisions is to be defrayed as if the expense had been incurred in its own district<sup>24</sup>.

With a view to improving the drainage of any land<sup>25</sup> (or, in the case of an internal drainage board, any land situated in its district) the Agency or an internal drainage board may enter into an arrangement with a navigation authority or a conservancy authority<sup>26</sup>, with the necessary approval<sup>27</sup> and after publication of the required notice<sup>28</sup>, for:

- 1274 (1) the transfer to the Agency or board, as the case may be, of the whole or any part of the undertaking of, or of any of the rights, powers, duties, liabilities and obligations of, or any property vested as such in, the navigation or conservancy authority<sup>29</sup>;
- 1275 (2) the alteration or improvement by the Agency or board, as the case may be, of any of the works of the navigation or conservancy authority<sup>30</sup>;
- 1276 (3) the making of payments by the Agency or board to the authority, or by the authority to the Agency or board, in respect of any matter provided for by the arrangement<sup>31</sup>.

An internal drainage board is not, however, authorised to enter into any such arrangement in relation to a main river or the banks of a main river or in relation to any drainage works in connection with a main river<sup>32</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the Environment Agency see PARA 17.

3 Where the Agency carries out the work, the expense to be borne by the person in question does not include such part (if any) of the amount of any grant made under the Environment Act 1995 s 47 (grants to the new Agencies: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 93) as the Agency decides (subject to any terms on which the grant is made) to allocate for the works in question: Water Resources Act 1991 s 165(4) (substituted by the Water Act 2003 s 69(2)).

4 As to the meaning of 'drainage' see PARA 573.

5 Water Resources Act 1991 s 165(4) (as substituted: see note 3). As to the authorisation of landowners to execute drainage works on land of other persons see PARA 587.

6 As to internal drainage boards and districts see PARA 569.

7 See the Land Drainage Act 1991 s 20(1). Where an internal drainage board carries out the work, the obligation of any person to meet the expenses of any work is subject to the Land Drainage Act 1991 s 59(6) (see PARA 639): s 20(4). As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.

8 As to the meaning of 'local authority' see PARA 573 note 14.

9 See the Land Drainage Act 1991 s 20(5) (added by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(6)). As to the meaning of 'England' see PARA 19 note 8. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

10 See the Land Drainage Act 1991 s 20(2).

11 As to the meaning of 'main river' see PARA 574.

12 As to the meaning of 'banks' see PARA 574 note 2.

13 Land Drainage Act 1991 s 20(3).

14 Land Drainage Act 1991 s 11(1) (s 11(1), (2) amended by the Environment Act 1995 Sch 22 para 191). As to the Agency's general powers to do work see PARA 589.

15 As to the meaning of 'local authority' in this context see PARA 187 note 2.

16 As to the meaning of 'navigation authority' see PARA 189 note 1.

17 See the Water Resources Act 1991 s 165(5) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

18 Is any such restriction of the powers conferred by the Water Resources Act 1991 s 165: see PARA 589.

19 As to the general powers of an internal drainage board to do work see PARA 589.

20 Land Drainage Act 1991 s 11(2)(a) (as amended: see note 14).

21 Land Drainage Act 1991 s 11(2)(b) (as amended: see note 14).

22 Land Drainage Act 1991 s 11(3)(a).

23 Land Drainage Act 1991 s 11(3)(b).

24 Land Drainage Act 1991 s 11(4). As to the defrayal of expenses by an internal drainage board see PARA 627 et seq.

25 As to the meaning of 'land' in the Land Drainage Act 1991 see PARA 569 note 2. As to the meaning of 'land' generally see PARA 14 note 21.

26 As to the meaning of 'conservancy authority' see PARA 189 note 3.

27 In the approval of the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 111(2) (s 111 amended by the Environment Act 1995 s 120(1), Sch 22 para 128); Land Drainage Act 1991 s 19(3). The statutory wording, in relation to the Water Resources Act 1991 s 111, is 'the ministers' (as to the meaning of which see PARA 15 note 1) and, in relation to the Land Drainage Act 1991 s 19, the 'relevant minister and the Secretary of State'. The functions of the Secretary of State under the Water Resources Act 1991 s 111, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'relevant minister' and as to the transfer of functions under the Land Drainage Act 1991 s 19 to the Welsh Ministers see PARA 569 note 9. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

28 Notice of the Agency's or board's intention to enter into such an arrangement must be published as directed by either the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 111(3) (as amended: see note 27); Land Drainage Act 1991 s 19(4). Notice of the arrangement when made must be published in the prescribed form in the London Gazette, specifying the place at which a copy of the arrangement may be inspected by persons interested: see the Water Resources Act 1991 s 111(4), (5) (s 111(4) as so amended); Land Drainage Act 1991 s 19(5), (6). By virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), the Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 2, and the Land Drainage (River Authorities) General Regulations 1965, SI 1965/443, reg 5, have effect in relation to notices published by an internal drainage board or by the Agency respectively. The notice published in the London Gazette after the arrangement has been made must contain particulars of the parties involved, the date and purpose or purposes of the arrangement, and particulars of a place where a copy of it can be inspected by persons interested: see the Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 2(2); the Land Drainage (River Authorities) General Regulations 1965, SI 1965/443, reg 5(2) (amended by virtue of the Environment Act 1995 Sch 22 para 233(1)).

29 Water Resources Act 1991 s 111(1)(a) (as amended: see note 27); Land Drainage Act 1991 s 19(1)(a).

30 Water Resources Act 1991 s 111(1)(b) (as amended: see note 27); Land Drainage Act 1991 s 19(1)(b).

31 Water Resources Act 1991 s 111(1)(c) (as amended: see note 27); Land Drainage Act 1991 s 19(1)(c).

32 Land Drainage Act 1991 s 19(2).

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### 591. Compensation for injury.

Where injury<sup>1</sup> is sustained by any person<sup>2</sup> by reason of the exercise by the Environment Agency<sup>3</sup>, an internal drainage board<sup>4</sup> or a local authority<sup>5</sup> of any of their general powers to carry out drainage works<sup>6</sup>, the body concerned is liable to make full compensation to the injured person<sup>7</sup>. In the case of dispute the amount of compensation is to be determined by the Lands Tribunal<sup>8</sup>. Compensation is also payable where any injury is sustained by reason of the exercise of the power of entry by the Agency, an internal drainage board or a local authority<sup>9</sup>.

1 'Injury' is not defined in the Water Resources Act 1991 or the Land Drainage Act 1991 but has been held to refer to actual damage as a result of work carried out which would have been unlawful apart from the power conferred by the legislation: *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284, [1949] 2 All ER 1021, CA.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the Environment Agency see PARA 17.

4 As to internal drainage boards see PARA 569.

5 As to the meaning of 'local authority' see PARA 573 note 14.

6 I.e. the exercise by the Agency of any powers under the Water Resources Act 1991 s 165(1)-(3), or the exercise by a drainage board or local authority of any of their powers under the Land Drainage Act 1991 s 14: see PARA 589. As to the exemption in certain cases from the liability to pay compensation in respect of the disposal of spoil see PARA 597.

7 Water Resources Act 1991 Sch 21 para 5(1) (Sch 21 para 5 amended by the Environment Act 1995 s 120(1), Sch 22 para 128); Land Drainage Act 1991 s 14(5). Compensation payable under these provisions carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from the date of the claim, and payments on account of such interest may be made: see the Planning and Compensation Act 1991 s 80(1)-(3), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58).

8 Water Resources Act 1991 Sch 21 para 5(2); Land Drainage Act 1991 s 14(6). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

A claim for compensation is the only remedy (*Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284, [1949] 2 All ER 1021, CA), and a person whose rights are violated under the legislation cannot obtain an injunction in the absence of negligence by the body carrying out the works (*Proctor v Avon and Dorset River Catchment Board* (1953) 162 Estates Gazette 162). It is for the tribunal to determine not only the amount of compensation, but also whether a claimant is entitled to compensation: see *Marriage v East Norfolk Rivers Catchment Board*; *Robson v Northumberland and Tyneside River Board* (1952) 3 P & CR 150, Lands Tribunal; *Birch and Birch v Ancholme Drainage Board* (1958) 9 P & CR 268, Lands Tribunal. As to the assessment of compensation for the exercise of these powers and decisions by the Lands Tribunal under predecessor legislation see *Vincent v Thames Conservancy* (1953) 4 P & CR 66; *Scutt and Screeton v Lower Ouse Internal Drainage Board* (1953) 4 P & CR 71; *Oakes v Mersey River Board* (1957) 9 P & CR 145; and *Welsh National Water Authority (formerly Gwynedd River Authority) v Burgess* (1974) 28 P & CR 378.

9 See the Water Resources Act 1991 Sch 20 para 6; Land Drainage Act 1991 s 64(4), (5); and PARAS 485, 608.

### UPDATE



### **591 Compensation for injury**

TEXT AND NOTE 8--Reference to the Lands Tribunal is now to the Upper Tribunal: Water Resources Act 1991 Sch 21 para 5(2); Land Drainage Act 1991 s 14(6) (amended by SI 2009/1307).

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## **592. Commutation and enforcement of obligations.**

Where any person<sup>1</sup> is under an obligation imposed on him by reason of tenure, custom, prescription or otherwise to do any work in connection with the drainage<sup>2</sup> of land<sup>3</sup>, whether by way of repairing banks<sup>4</sup> or walls, maintaining watercourses<sup>5</sup> or otherwise, the Environment Agency<sup>6</sup> must take steps to commute the obligation if the work is in connection with a main river<sup>7</sup>. If the work is not in connection with a main river, the Agency or the internal drainage board for the internal drainage district<sup>8</sup> where the work falls to be done may commute the obligation with the consent of the Secretary of State<sup>9</sup> or, in relation to Wales, the Welsh Ministers (the 'appropriate minister')<sup>10</sup>.

Where the Agency or an internal drainage board proposes to commute any such obligation they must give notice<sup>11</sup> of the proposal in the manner directed by the appropriate minister<sup>12</sup>. If within one month<sup>13</sup> of any such notice being given, the person on whom the obligation is imposed gives notice to the Agency or the board of his objection to the proposal, the question whether the Agency or board is to proceed to commute the obligation is to be referred to the appropriate minister<sup>14</sup>. The decision of the appropriate minister is final<sup>15</sup>. Where any obligation is so commuted, any person who would, but for the commutation, be entitled to any exemption in respect of drainage rates<sup>16</sup> (either absolutely or conditionally on the performance of the obligation) is entitled absolutely to a like exemption<sup>17</sup>.

Subject to these commutation provisions, nothing in the Land Drainage Act 1991 or the flood defence provisions of the Water Resources Act 1991<sup>18</sup> operates to release a person from any obligation by reason of tenure, custom, prescription or otherwise to which he is subject<sup>19</sup>. If any person was subject before 1 December 1991<sup>20</sup> to such an obligation (except an obligation under an enactment<sup>21</sup> re-enacted in either the Land Drainage Act 1991 or the flood defence provisions of the Water Resources Act 1991)<sup>22</sup> and in pursuance of such an obligation is liable to do work in relation to any watercourse, bridge or drainage work (whether by way of repair, maintenance or otherwise) and fails to do the work, then the obligation may be enforced in the following manner by drainage board concerned<sup>23</sup>, being (1) the relevant internal drainage board in relation to any watercourse (other than a main river), bridge or drainage works in its internal drainage district<sup>24</sup>; or (2) the Agency in relation to any main river or other watercourse, bridge or drainage works<sup>25</sup>.

The drainage board concerned may serve a notice<sup>26</sup> requiring that person to do the necessary work with all reasonable and proper dispatch<sup>27</sup>. If any person served with such a notice fails within seven days to comply with it, the body that served the notice may do all such things as are necessary for that purpose<sup>28</sup>; and any expenses reasonably incurred by that body in the exercise of these powers may be recovered from the person liable to repair<sup>29</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'drainage' see PARA 573.

3 As to the meaning of 'land' generally see PARA 14 note 21. As to the meaning of 'land' in the Land Drainage Act 1991 see pPARA ara 569 note 2.

4 As to the meaning of 'banks' see PARA 574 note 2.

5 As to the meaning of 'watercourse' see PARA 573 note 10.

6 As to the Environment Agency see PARA 17.

7 See the Water Resources Act 1991 s 107(1), (4) (s 107 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The Land Drainage Act 1991 ss 33, 34 (see the text to notes 8-17) apply to work in connection with a main river in the circumstances set out in the text: see the Water Resources Act 1991 s 107(4) (as so amended). As to the meaning of 'main river' see PARA 574. This requirement deals only with obligations arising out of, or attached to, land and does not extend to purely personal obligations: *Eton RDC v Thames Conservators* [1950] Ch 540, [1950] 1 All ER 996. There is no obligation where a successor in title pays voluntarily under a covenant not binding on him: *Re Fitzherbert-Brockholes Agreement, River Wyre Catchment Board v Miller* [1940] Ch 51.

8 As to internal drainage boards and internal drainage districts see PARA 569.

9 As to the Secretary of State see PARA 15 note 1.

10 See the Land Drainage Act 1991 s 33(1) (ss 21, 33, 34 amended by the Environment Act 1995 Sch 22 para 191). This provision is expressed to be without prejudice to the Water Resources Act 1991 s 107(4) (see note 7): see the Land Drainage Act 1991 s 33(1). 'Appropriate minister' means, in relation to the Agency, either of the ministers and, in relation to an internal drainage board, the relevant minister: Land Drainage Act 1991 s 33(6) (as so amended). As to the meanings of 'relevant minister' and 'the ministers', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

Nothing in s 33 applies to any obligation imposed by s 25 (powers to require works for maintaining flow of watercourses: see PARAS 599-601): s 33(5).

11 As to the meaning of 'notice' see PARA 22 note 1.

12 See the Land Drainage Act 1991 s 33(2)(a) (as amended: see note 10); Water Resources Act 1991 s 107(4) (as amended: see note 7). See also PARA 574 note 4. The notice must state the terms on which the obligation is to be commuted and the period within which objection to the proposal may be made: Land Drainage Act 1991 s 33(2)(b), (c); Land Drainage (General) Regulations 1932, SR & O 1932/64, reg 1. As to service of such notice see reg 8; and PARA 587 note 13. See also the Land Drainage (River Authorities) General Regulations 1965, SI 1965/443, reg 4 (amended by virtue of the Environment Act 1995 Sch 22 para 233(1)).

13 As to the meaning of 'month' see PARA 23 note 10.

14 Land Drainage Act 1991 s 33(3) (as amended: see note 10); Water Resources Act 1991 s 107(4) (as amended: see note 7).

15 Land Drainage Act 1991 s 33(4); Water Resources Act 1991 s 107(4) (as amended: see note 7). As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

16 As to drainage rates see PARA 627.

17 Land Drainage Act 1991 s 34(1); Water Resources Act 1991 s 107(4) (as amended: see note 7). The sum to be paid in respect of the commutation of any obligation under the Land Drainage Act 1991 s 33 is such sum as the Agency or the internal drainage board may by order determine in accordance with the provisions of s 34(4) (see below), and (1) is payable either as a capital sum or as a terminable annuity for a period not exceeding 30 years at the option of the owner; (2) is to be charged on the land in respect of which the obligation existed; and (3) has priority over any other incumbrances (whenever created) charged on that land by the owner, other than charges (whenever created) under the Improvement of Land Act 1864 (see **AGRICULTURAL LAND** vol 1 (2008) PARA 619 et seq); Land Drainage Act 1991 s 34(2) (as amended: see note 10); Water Resources Act 1991 s 107(4) (as so amended). Any capital sum or terminable annuity fixed under these provisions is payable by the owner notwithstanding any contrary agreement between the owner and any lessee of the land: Land Drainage Act 1991 s 34(3); Water Resources Act 1991 s 107(4) (as so amended). An order so made may contain provision with respect to the persons by whom all or any of the expenses incurred by the appropriate minister or other persons in connection with the making or confirmation of the order are to be borne: Land Drainage Act 1991 s 34(8); Water Resources Act 1991 s 107(4) (as so amended).

For the purpose of determining the sum to be paid in respect of the commutation of any obligation, the Agency or internal drainage board must ascertain the amount which, in its opinion, fairly represents the probable average annual cost, taking one year with another, of carrying out and maintaining in a due state of efficiency the works which are required to be carried out and maintained by virtue of the obligation to be commuted, and must fix the capital sum or annuity accordingly: Land Drainage Act 1991 s 34(4); Water Resources Act 1991 s 107(4) (both as so amended). In fixing the capital sum or annuity, no account is to be taken of so much of the

probable annual average cost as in the Agency's or board's opinion is attributable to the fact that by reason of improvements effected since 1 January 1900 in the drainage of the land drained by a main river, or alterations effected since that date in the method of cultivation thereof, the volume of water which is discharged into a main river at any time is greater than it would have been if those alterations or improvements had not been effected: Land Drainage Act 1991 s 34(5); Water Resources Act 1991 s 107(4) (both as so amended). If any person is aggrieved by the determination of the Agency or board as regards the sum to be paid in respect of the commutation of any obligation he may, within three months after the date on which the Agency or board notifies him of the determination, require the matter to be referred to the arbitration of a single arbitrator to be appointed, in default of agreement, by the President of the Institution of Civil Engineers: Land Drainage Act 1991 s 34(6); Water Resources Act 1991 s 107(4) (both as so amended). The arbitrator may confirm, vary or set aside the determination as he thinks proper: Land Drainage Act 1991 s 34(7); Water Resources Act 1991 s 107(4) (both as so amended). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

A record of any charge created as a result of the commutation must be entered in a register kept for the purpose by an authorised officer of the Agency or of the internal drainage board, and a copy of this record purporting to be certified by such an officer as a true copy is receivable in evidence in all legal proceedings: Land Drainage Act 1991 s 34(9); Water Resources Act 1991 s 107(4) (both as so amended).

18 As to the meaning of 'flood defence provisions' see PARA 20 note 2.

19 See the Land Drainage Act 1991 s 72(6); Water Resources Act 1991 s 185(1).

20 Ie the commencement date of the Land Drainage Act 1991: see ss 21(1), 76(2).

21 As to the meaning of 'enactment' see PARA 14 note 31.

22 Land Drainage Act 1991 s 21(1); Water Resources Act 1991 s 107(2) (as amended: see note 7). Notwithstanding the Land Drainage Act 1991 s 21(3) (see the text to notes 24, 25), the powers of the Agency in relation to a main river include the powers which under that section are exercisable otherwise than in relation to a main river by the drainage board concerned; and the provisions of that section have effect accordingly: s 107(2) (as so amended).

23 See the Land Drainage Act 1991 s 21(2); Water Resources Act 1991 s 107(2) (as amended: see note 7).

24 See the Land Drainage Act 1991 s 21(3), (6)(a); Water Resources Act 1991 s 107(2) (as amended: see note 7). This provision is expressed to be subject to the Land Drainage Act 1991 s 8 (concurrent powers of the Agency): see s 21(6); and PARA 582.

25 See the Land Drainage Act 1991 s 21(3), (6)(b) (as amended: see note 10); Water Resources Act 1991 s 107(2) (as amended: see note 7).

26 As to the service of documents see PARA 22.

27 Land Drainage Act 1991 s 21(2); Water Resources Act 1991 s 107(2) (as amended: see note 7).

28 Land Drainage Act 1991 s 21(4); Water Resources Act 1991 s 107(2) (as amended: see note 7).

29 Land Drainage Act 1991 s 21(5); Water Resources Act 1991 s 107(2) (as amended: see note 7).

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### **593. Variation of awards.**

Where any award made under a public or local Act contains any provision which in any manner affects or relates to the drainage<sup>1</sup> of land<sup>2</sup> (including any provision affecting the powers or duties of any drainage body<sup>3</sup> or other person<sup>4</sup> with respect to the drainage of land), the Environment Agency<sup>5</sup> may submit to the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>6</sup> for confirmation<sup>7</sup> a scheme for revoking, varying or amending that provision<sup>8</sup>. Such a scheme may:

- 1277 (1) provide for commuting the obligation<sup>9</sup> of any person under the award to repair or maintain any drainage works<sup>10</sup>;
- 1278 (2) contain such incidental, consequential or supplemental provisions as are necessary or proper for the purposes of the scheme<sup>11</sup>; and
- 1279 (3) be revoked or varied by a subsequent scheme<sup>12</sup>.

The Agency must submit such a scheme if, on the application of any person who is under any obligation imposed by the award or by any internal drainage board<sup>13</sup>, the Secretary of State or, as appropriate, the Welsh Ministers direct the Agency to do so<sup>14</sup>. However, such an application must not be entertained unless the applicant has requested the Agency to submit such a scheme<sup>15</sup>, and the Agency has either refused to do so or failed to do so within six months<sup>16</sup> or has submitted a scheme different from that which was requested<sup>17</sup>.

1 As to the meaning of 'drainage' see PARA 573.

2 As to the meaning of 'land' see PARA 569 note 2.

3 As to the meaning of 'drainage body' see PARA 573 note 15.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the Environment Agency see PARA 17.

6 The statutory wording is 'to the appropriate minister': see the Land Drainage Act 1991 s 32(1). 'Appropriate minister' means, in relation to England, the minister, and, in relation to Wales, the Secretary of State: s 32(8). As to the meaning of 'the minister' and as to the abolition of the Ministry of Agriculture, Fisheries and Food see PARA 569 note 9. The functions of the Secretary of State under the Land Drainage Act 1991 s 32, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7 The Secretary of State or the Welsh Ministers may, by order made by statutory instrument, confirm a scheme with or without modifications: Land Drainage Act 1991 s 32(5). As to orders generally see PARA 583; and as to the making of orders under these provisions see PARAS 584-585. The order, unless made in relation to Wales, is subject to special parliamentary procedure if opposed (see s 32(6), Sch 3 para 5(2); and PARA 585); and may contain provisions with respect to the persons by whom all or any of the expenses incurred by the appropriate minister or other persons in connection with the making or confirmation of the order, or the making of the scheme, are to be borne (s 32(7)). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. As to the bringing of subordinate legislation made by the Welsh Ministers before the National

Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

8 Land Drainage Act 1991 s 32(1)(a) (s 32(1), (3) amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

9 le on the same basis on which obligations are to be commuted under the Land Drainage Act 1991 s 33: see PARA 592.

10 Land Drainage Act 1991 s 32(4)(a).

11 Land Drainage Act 1991 s 32(4)(b).

12 Land Drainage Act 1991 s 32(4)(c).

13 See the Land Drainage Act 1991 s 32(2). As to internal drainage boards see PARA 569.

14 Land Drainage Act 1991 s 32(1)(b) (as amended: see note 8).

15 Land Drainage Act 1991 s 32(3)(a) (as amended: see note 8).

16 As to the meaning of 'month' see PARA 23 note 10.

17 Land Drainage Act 1991 s 32(3)(b) (as amended: see note 8).

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#### **594. Powers to vary navigation rights.**

The Environment Agency<sup>1</sup> and (except where the application is made in connection with a main river<sup>2</sup>) the internal drainage board for every internal drainage district<sup>3</sup> within which any of the waters to which the application relates are situated, may apply to the Secretary of State or in relation to Wales, the Welsh Ministers<sup>4</sup> for an order varying navigation rights<sup>5</sup>. If, on such an application, it appears to the Secretary of State or, as appropriate, the Welsh Ministers that a navigation authority<sup>6</sup> is not exercising at all, or is not exercising to the necessary extent, the powers vested in it<sup>7</sup>, and that it is desirable to make an order with a view to securing the better drainage<sup>8</sup> of any land<sup>9</sup>, they may by order<sup>10</sup> revoke, vary or amend the provisions of any local Act relating to navigation rights over any canal, river or navigable waters or to the powers and duties of the navigation authority with respect to any canal, river or navigable waters<sup>11</sup>. Such an order may extinguish, vary or suspend, during such period as the Secretary of State or the Welsh Ministers think proper, any such rights, powers or duties<sup>12</sup>.

The power to make such an order is not exercisable in relation to any waters within the ebb and flow of the tide at ordinary spring tides except with the consent of the Secretary of State for Transport<sup>13</sup>; and, in relation to Wales, is exercisable only after consultation with the Secretary of State<sup>14</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'main river' see PARA 574.

3 As to internal drainage boards and internal drainage districts see PARA 569.

4 The statutory wording is 'to either of the ministers': see the Land Drainage Act 1991 s 35(1)(a). As to the meaning of 'the ministers', and as to the abolition of the Ministry of Agriculture, Fisheries and Food, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. The functions of a Minister of the Crown under the Land Drainage Act 1991 s 35, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, but the Secretary of State consent requirements under the Land Drainage Act 1991 s 35(3) (see the text to notes 13-14) continue in effect: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

5 See the Land Drainage Act 1991 s 35(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to rights of navigation generally see PARA 688 et seq.

6 As to the meaning of 'navigation authority' see PARA 189 note 1.

7 Land Drainage Act 1991 s 35(1)(a).

8 As to the meaning of 'drainage' see PARA 573.

9 Land Drainage Act 1991 s 35(1)(b). As to the meaning of 'land' see PARA 569 note 2.

10 The order must be made by statutory instrument (Land Drainage Act 1991 s 35(1)); and may contain such incidental, consequential or supplemental provisions as appear to the Secretary of State or, as the case may be, to the Welsh Ministers to be necessary or proper for its purposes (see s 35(4)). As to the making of such orders see s 35(5), Sch 3; and PARAS 584-585.

11 Land Drainage Act 1991 s 35(1).

12 Land Drainage Act 1991 s 35(2). This is without prejudice to the generality of the power conferred by s 35(1) (see the text to notes 6-11): s 35(2).

13 Land Drainage Act 1991 s 35(3)(b). See also note 4. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

14 Land Drainage Act 1991 s 35(3)(a); and see note 4.



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### **595. Schemes for drainage of small areas.**

Where:

1280 (1) the Environment Agency<sup>1</sup> is of the opinion that any land<sup>2</sup> is capable of improvement by drainage<sup>3</sup> works but that the constitution for that purpose of an internal drainage district<sup>4</sup> would not be practicable<sup>5</sup>; or

1281 (2) a local authority (other than a district council in England)<sup>6</sup> is of that opinion in relation to any land in their area<sup>7</sup>,

the Agency or, as the case may be, that local authority may, in accordance with the provisions of a scheme made by it, enter on the land and carry out such drainage works<sup>8</sup> as appear to it desirable<sup>9</sup>. Such a scheme must state: (a) the works proposed to be carried out<sup>10</sup>; (b) the area to be improved by the works<sup>11</sup>; (c) the estimated expenses (including administrative expenses) of the carrying out of the works<sup>12</sup>; (d) the maximum amount to be recoverable by the Agency or local authority in respect of those expenses<sup>13</sup>; and (e) the manner in which the expenses of carrying out the work are to be apportioned amongst the lands comprised in the area to be improved<sup>14</sup>.

Before making a scheme, a local authority must consult the Agency<sup>15</sup>; and the Agency or local authority must give notice<sup>16</sup> in the prescribed manner<sup>17</sup> to the owners and occupiers of land within the area to which the scheme relates and to any other persons<sup>18</sup> appearing to the Agency or the authority to be affected by the scheme<sup>19</sup>. Where any objections to the scheme are duly made and not withdrawn, the Agency or local authority must send a copy of the draft scheme, together with copies of the objections, to the Secretary of State or, as appropriate, the Welsh Ministers<sup>20</sup>, and the scheme must not be made unless the draft is confirmed by the Secretary of State or, as the case may be, the Welsh Ministers, with or without modifications<sup>21</sup>. Before a scheme is confirmed, the Secretary of State or the Welsh Ministers must either cause a public local inquiry to be held<sup>22</sup>, or give to the Agency or local authority and the persons by whom the objections are made an opportunity of being heard by a person appointed for the purpose<sup>23</sup>.

Where such a scheme is made by the Agency or a local authority, the Agency or that authority, as the case may be, must send copies of the scheme to the owners and occupiers of land in the area to which it relates<sup>24</sup>; and the Agency, where it makes such a scheme, must also notify the council of any county, county borough, district or London borough in whose area that land is situated<sup>25</sup>.

Any expenses incurred by the Agency or a local authority under these provisions in the carrying out of drainage works, to an amount not exceeding the maximum amount stated<sup>26</sup> in the scheme<sup>27</sup>, and any expenses incurred in maintaining the works<sup>28</sup>, are recoverable by the body incurring them from the several owners of the lands to which the scheme relates according to the apportionment provided for in the scheme<sup>29</sup>.

A local authority has certain powers, for the purpose of carrying out works in pursuance of such a scheme, to maintain, improve and construct other works<sup>30</sup> and to appropriate and dispose of spoil<sup>31</sup>.

- 1 As to the Environment Agency see PARA 17.
- 2 As to the meaning of 'land' see PARA 569 note 2.
- 3 As to the meaning of 'drainage' see PARA 573.
- 4 As to internal drainage districts see PARA 569. As to the constitution of such districts see PARA 577 et seq.
- 5 Land Drainage Act 1991 s 18(1)(a) (s 18(1), (3), (5), Sch 4 amended by the Environment Act 1995 s 120(1), Sch 22 para 191).
- 6 The Land Drainage Act 1991 s 18(1) has effect in relation to land in Wales with the omission of the words 'other than a district council': s 18(1A) (added by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(5)). As to the meaning of 'local authority' see PARA 573 note 14. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.
- 7 See the Land Drainage Act 1991 s 18(1)(b).
- 8 As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.
- 9 Land Drainage Act 1991 s 18(1) (as amended: see note 5). A scheme may require an environmental impact assessment under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783 (see PARA 649), and/or an appropriate assessment pursuant to the Habitats Directive (see PARA 11).
- 10 Land Drainage Act 1991 s 18(3)(a).
- 11 Land Drainage Act 1991 s 18(3)(b).
- 12 Land Drainage Act 1991 s 18(3)(c). Subject to s 18(6), (7), the amount so stated in a scheme must not exceed an amount equal to £50 for each hectare in the area to be improved: s 18(4). The Secretary of State or, in relation to Wales, the Welsh Ministers have power: (1) to exempt a scheme from this limit if it appears to them that the works proposed to be carried out are urgently required in the public interest (see s 18(6)); and (2) by order made by statutory instrument from time to time to vary such limit; but no such order made by the Secretary of State has effect unless it is approved by a resolution of each House of Parliament (see s 18(7)). Such orders, being of local effect, are not recorded in this work. Section 18(6), (7) and Sch 4 (see the text to notes 15-25) refer to 'the ministers'. As to the meaning of 'the ministers' and as to the abolition of the Ministry of Agriculture, Fisheries and Food see PARA 569 note 9. The functions of a Minister of the Crown under the Land Drainage Act 1991 s 18, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 13 Land Drainage Act 1991 s 18(3)(d).
- 14 Land Drainage Act 1991 s 18(3)(e).
- 15 Land Drainage Act 1991 Sch 4 para 1(1) (as amended: see note 5). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 16 The notice must state the intention of making the scheme (Land Drainage Act 1991 Sch 4 para 1(3)(a)), the place where a draft of it can be inspected (Sch 4 para 1(3)(b)), and the period, which must not be less than 30 days, within which objections may be made to the Agency or the local authority (Sch 4 para 1(3)(c) (as amended: see note 5)).
- 17 'Prescribed' means prescribed by regulations under the Land Drainage Act 1991 s 65 (see PARA 583): s 72(1). The notice must be in writing and a copy must also be published in a newspaper circulating in the district in which the area to which the scheme relates is situated: Drainage Schemes (Notices) Regulations 1965, SI 1965/445, reg 2. As to the meaning of 'writing' see PARA 22 note 1. As to the service of such notices see reg 3; and PARA 22. The Drainage Schemes (Notices) Regulations 1965, SI 1965/445, have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2) as if made under the Land Drainage Act 1991 Sch 4.

- 18 As to the meaning of 'person' see PARA 13 note 29.
- 19 Land Drainage Act 1991 Sch 4 para 1(2) (as amended: see note 5).
- 20 Land Drainage Act 1991 Sch 4 para 2(1)(a) (as amended: see note 5).
- 21 Land Drainage Act 1991 Sch 4 para 2(1)(b).
- 22 Land Drainage Act 1991 Sch 4 para 2(2)(a). As to local inquiries see PARA 657.
- 23 Land Drainage Act 1991 Sch 4 para 2(2)(b) (as amended: see note 5).
- 24 Land Drainage Act 1991 Sch 4 para 3(1) (as amended: see note 5). A scheme is a local land charge (s 18(8)) called a 'drainage scheme charge' and is registrable in Part 12 of the register (see the Local Land Charges Rules 1977, SI 1977/985, r 3; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 687).
- 25 Land Drainage Act 1991 Sch 4 para 3(2) (as amended: see note 5; and further amended by the Local Government (Wales) Act 1994 Sch 11 para 4(15)).
- 26 Ie in pursuance of the Land Drainage Act 1991 s 18(3)(d): see head (d) in the text.
- 27 Land Drainage Act 1991 s 18(5)(a) (as amended: see note 5).
- 28 See the Land Drainage Act 1991 s 18(5)(b) (as amended: see note 5).
- 29 Land Drainage Act 1991 s 18(5) (as amended: see note 5).
- 30 Ie under the Land Drainage Act 1991 s 14: see s 14(1)(b)(i); and PARA 589.
- 31 Ie under the Land Drainage Act 1991 s 15: see s 15(2)(a); and PARA 597.

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### 596. Flood warning systems.

The Environment Agency<sup>1</sup> has power to provide and operate flood warning systems<sup>2</sup>. 'Flood warning system' means any system whereby, for the purpose of providing warning of any danger of flooding, information with respect to:

- 1282 (1) rainfall<sup>3</sup>, as measured at a particular place within a particular period; or
- 1283 (2) the level or flow of any inland water<sup>4</sup>, or part of an inland water, at a particular time; or
- 1284 (3) other matters appearing to the Agency to be relevant for that purpose,

is obtained and transmitted, whether automatically or otherwise, with or without provision for carrying out calculations based on such information and for transmitting the results of those calculations<sup>5</sup>.

The power to provide and operate flood warning systems includes power: (a) to provide, install and maintain apparatus required for the purposes of such systems<sup>6</sup>; and (b) to carry out any other engineering or building operations<sup>7</sup> required for those purposes<sup>8</sup>.

1 As to the Environment Agency see PARA 17.

2 Water Resources Act 1991 s 166(1)(a). This power is without prejudice to the Agency's other powers under the Water Resources Act 1991 Pt IV (ss 105-113) (see PARAS 573 et seq, 599 et seq) and Pt VII (ss 154-186) (see PARA 453 et seq) or to its incidental general powers under the Environment Act 1995 s 37 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 73): Water Resources Act 1991 s 166(1) (amended by the Environment Act 1995 s 120(1), Sch 22 paras 128, 164). The Water Resources Act 1991 s 166(1) does not authorise any act or omission on the part of the Agency which would otherwise be actionable at the suit of any person on any grounds other than a limitation imposed by law on the capacity of the Agency by virtue of its constitution: s 166(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'person' see PARA 13 note 29.

It appears that local authorities but not the Environment Agency may be under a duty to ensure that effective and continuing flood warning provisions are in place and to ensure effective communication to endangered persons if a flood event is likely: *Robinson v Cardiff City Council* (16 October 1987, unreported), Cardiff Crown Court.

3 'Rainfall' includes any fall of snow, hail or sleet: Water Resources Act 1991 s 166(4) (substituted by the Water Act 2003 s 69(3)).

4 'Inland water' means any of the following in any part of Great Britain, that is to say: (1) any river, stream or other watercourse, whether natural or artificial and whether tidal or not; (2) any lake or pond, whether natural or artificial, and any reservoir or dock; and (3) any channel, creek, bay, estuary or arm of the sea: Water Resources Act 1991 s 166(4) (as substituted: see note 3). As to the meaning of 'Great Britain' see PARA 22 note 5. As to the meaning of 'watercourse' see PARA 187 note 2.

5 Water Resources Act 1991 s 166(4) (as substituted: see note 3).

6 Water Resources Act 1991 s 166(1)(b). See also note 2. The Agency may exercise powers under this head and s 166(1)(c) (see head (b) in the text) in an area in Scotland subject to certain conditions: see s 166(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 As to the meaning of 'engineering or building operations' see PARA 223 note 4.

8 Water Resources Act 1991 s 166(1)(c). See also notes 2, 6.



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### **597. Disposal of spoil.**

The Environment Agency<sup>1</sup>, an internal drainage board<sup>2</sup> or a local authority<sup>3</sup> may:

- 1285 (1) without making payment for it, appropriate and dispose of any matter removed in the course of the carrying out of any work for widening, deepening or dredging any watercourse<sup>4</sup>;
- 1286 (2) deposit any matter so removed on the banks<sup>5</sup> of the watercourse, or on such width of land<sup>6</sup> adjoining the watercourse as is sufficient to enable the matter to be removed and deposited by mechanical means in one operation<sup>7</sup>.

These provisions do not authorise the deposit of any matter if that matter would constitute<sup>8</sup> a statutory nuisance<sup>9</sup>. In the case of the powers so conferred on a local authority, they may be exercised only for the purpose of carrying out works in pursuance of a scheme<sup>10</sup> for the drainage of a small area<sup>11</sup>, or so far as may be necessary for the purpose of preventing flooding or mitigating any damage caused by flooding in its area<sup>12</sup>.

Where injury is sustained by any person<sup>13</sup> by reason of the exercise of the power under head (2) above to deposit matter, the body exercising such power may, if it thinks fit, pay to him such compensation as it may determine<sup>14</sup>, but, if the injury could have been avoided if that power had been exercised with reasonable care, the body is obliged<sup>15</sup> to make full compensation<sup>16</sup>.

The Agency, an internal drainage board or a local authority may enter into an agreement with the council of any district or London borough or of any Welsh county or county borough<sup>17</sup> for the disposal by the council of any matter removed as mentioned above<sup>18</sup> and for payment to the council, in respect of that disposal, of such sum as may be provided for by the agreement<sup>19</sup>.

1 As to the Environment Agency see PARA 17.

2 As to internal drainage boards see PARA 569. In the case of an internal drainage board or a local authority the power given by the Land Drainage Act 1991 s 15(1) is subject to s 15(2) and (3) (see the text to notes 8-12) and ss 16 and 17 (see PARA 589): s 15(1).

3 As to the meaning of 'local authority' see PARA 573 note 14. See also note 2.

4 See the Land Drainage Act 1991 s 15(1)(a); Water Resources Act 1991 s 167(1)(a) (s 167(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The Land Drainage Act 1991 s 15(1)(a) refers to 'ordinary watercourses'. As to the meaning of 'ordinary watercourse' see PARA 573 note 16. The Water Resources Act 1991 s 167(1)(a) refers to 'any watercourse'. As to the meaning of 'watercourse' see PARA 573 note 10: definition applied by s 167(4). As to the powers of the Agency, internal drainage boards and local authorities to do the work referred to see PARA 589.

5 As to the meaning of 'banks' see PARA 574 note 2: definition applied in the case of the Water Resources Act 1991 by s 167(4).

6 As to the meaning of 'land' in the Land Drainage Act 1991 see PARA 569 note 2. As to the meaning of 'land' generally see PARA 14 note 21.

7 See the Land Drainage Act 1991 s 15(1)(b); Water Resources Act 1991 s 167(1)(b). See *Stapleford v Severn Trent Water Authority* [1989] RVR 85, where the term 'one operation' was held to mean a single operation of one machine and not to embrace operations by other machines.

8 le within the meaning of the Environmental Protection Act 1990 Pt III (ss 79-84): see **NUISANCE** vol 78 (2010) PARA 155 et seq.

9 Land Drainage Act 1991 s 15(3); Water Resources Act 1991 s 167(2). The deposit of such materials must also now comply with the law relating to the disposal of controlled waste: see generally **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 620 et seq. It would appear that the mere removal of naturally occurring vegetation does not constitute dealing with controlled waste: see *Thanet District Council v Kent County Council* [1993] Crim LR 703, DC.

10 le a scheme under the Land Drainage Act 1991 s 18: see PARA 595.

11 Land Drainage Act 1991 s 15(2)(a).

12 Land Drainage Act 1991 s 15(2)(b).

13 As to the meaning of 'person' see PARA 13 note 29.

14 Land Drainage Act 1991 s 15(4)(a); Water Resources Act 1991 Sch 21 para 5(3)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

15 le the provisions of the Land Drainage Act 1991 s 14(5), (6) or, as the case may be, the Water Resources Act 1991 Sch 21 para 5(1), (2) apply: see PARA 591.

16 See the Land Drainage Act 1991 s 15(4)(b); Water Resources Act 1991 Sch 21 para 5(3)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Compensation payable in such circumstances carries interest at the rate for the time being prescribed under the Land Compensation Act 1961 s 32 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 641) from the date of the claim, and payments on account of such interest may be made: see the Planning and Compensation Act 1991 s 80(1)-(3), Sch 18 Pt I (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 58).

17 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

18 Land Drainage Act 1991 s 15(5)(a) (s 15(5) amended by the Local Government (Wales) Act 1994 Sch 11 para 4(3)); Water Resources Act 1991 s 167(3)(a) (s 167(3) amended by the Environment Act 1995 s 120(1), Sch 22 para 128; Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(4)).

19 Land Drainage Act 1991 s 15(5)(b); Water Resources Act 1991 s 167(3)(b) (both as amended: see note 18).

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### **598. Power to facilitate spray irrigation.**

Any internal drainage board<sup>1</sup> or local authority<sup>2</sup> may with the consent of the Environment Agency<sup>3</sup> operate any drainage<sup>4</sup> works under the control of the board or authority so as to manage the level of water in a watercourse<sup>5</sup> for the purpose of facilitating spray irrigation<sup>6</sup>. This power is without prejudice to the powers of a board or an authority in relation to drainage<sup>7</sup>; or to any requirement for any other consent of the Agency or any other person<sup>8</sup>, or any licence, approval, authorisation or other permission or registration<sup>9</sup>.

1 As to internal drainage boards see PARA 569.

2 As to the meaning of 'local authority' see PARA 573 note 14.

3 As to the Environment Agency see PARA 17.

4 As to the meaning of 'drainage' see PARA 573.

5 As to the meaning of 'watercourse' see PARA 573 note 10.

6 Land Drainage Act 1991 s 61F(1) (s 61F added by the Environment Act 1995 s 120(1), Sch 22 para 193). 'Spray irrigation' is not defined in the Land Drainage Act 1991. As to the meaning of that term in the Water Resources Act 1991 see PARA 262.

7 Land Drainage Act 1991 s 61F(2)(a) (as added see note 6).

8 Land Drainage Act 1991 s 61F(2)(b)(i) (as added see note 6). As to the meaning of 'person' see PARA 13 note 29.

9 Land Drainage Act 1991 s 61F(2)(b)(ii) (as added see note 6). As to licences for spray irrigation purposes see PARA 262.



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## ***B. CONTROL OF OBSTRUCTIONS AND STRUCTURES***

### **599. Maintenance of flow of watercourses.**

Where any ordinary watercourse<sup>1</sup> is in such a condition that the proper flow of water is impeded, then, unless the condition is attributable to subsidence due to mining operations<sup>2</sup> (including brine pumping), the drainage board or local authority concerned<sup>3</sup> or, in relation to a main river, the Environment Agency<sup>4</sup> may, by notice served<sup>5</sup> on a specified person<sup>6</sup>, require that person to remedy that condition<sup>7</sup>. Before exercising this power in relation to a watercourse or part of a watercourse, a local authority must, according to whether or not the watercourse or part is within an internal drainage district, notify either the internal drainage board for that district or the Agency<sup>8</sup>.

The specified persons are:

- 1287 (1) any person having control of the part of the watercourse where any impediment occurs<sup>9</sup>; or
- 1288 (2) any person owning or occupying land adjoining that part<sup>10</sup>; or
- 1289 (3) any person to whose act or default the condition of the watercourse is due<sup>11</sup>;

but no such notice requiring any person to carry out any work on land not owned or occupied by him may be served without the consent of the owner and the occupier of the land, except in a case where it is not practicable, after reasonable inquiry, to ascertain the name or address of the owner or occupier<sup>12</sup>. The notice must indicate the nature of the works to be carried out and the period within which they are to be carried out<sup>13</sup>, and the right of appeal against the notice to a magistrates' court and the period within which such an appeal may be brought<sup>14</sup>.

Where a local authority has other powers<sup>15</sup> for securing the appropriate flow of water in any watercourse under its jurisdiction which is not a watercourse forming part of a main river<sup>16</sup>, the Agency or an internal drainage board may not exercise its powers under these provisions except (a) by agreement with the local authority<sup>17</sup>; or (b) where, after reasonable notice from the Agency or internal drainage board, the local authority either fails to exercise its powers or exercises them improperly<sup>18</sup>. Where any watercourse, other than a main river<sup>19</sup>, is under the jurisdiction of a board of conservators, conservancy authority<sup>20</sup>, harbour authority<sup>21</sup> or navigation authority<sup>22</sup> which is exercising its powers, these provisions do not apply to that watercourse except with the consent of that board or authority<sup>23</sup>.

The statutory provisions relating to the commutation of obligations<sup>24</sup> do not apply to obligations imposed by the provisions set out above<sup>25</sup>.

1 As to the meaning of 'ordinary watercourse' see PARA 573 note 16. The powers of the Environment Agency in relation to a main river include the powers which under the Land Drainage Act 1991 s 25 are exercisable in relation to an ordinary watercourse by the drainage board concerned; and the provisions of that section and s 27 (see PARA 600) have effect accordingly: Water Resources Act 1991 s 107(3) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the Environment Agency see PARA 17. As to the meaning of 'main river' see PARA 574.

2 'Mining operations' is not defined for these purposes. As to the duty of the responsible person to carry out remedial measures if a drainage system is affected by mining subsidence see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 243 et seq.

3 In relation to any ordinary watercourse: (1) the drainage board concerned is the drainage board for the internal drainage district in which the watercourse is situated; and (2) the local authority concerned is the local authority for the area where the land as respects which the powers are exercisable is situated; but references to the drainage board concerned must, in relation to a watercourse which is not in an internal drainage district, be construed as references to the Environment Agency: Land Drainage Act 1991 s 25(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to internal drainage boards and internal drainage districts see PARA 569. As to the meaning of 'local authority' see PARA 573 note 14. As to the meaning of 'land' see PARA 569 note 2.

4 See note 1.

5 As to the service of documents see PARA 22.

6 As to the meaning of 'person' see PARA 13 note 29.

7 Land Drainage Act 1991 s 25(1); Water Resources Act 1991 s 107(3). Nothing in these provisions affects the right of an owner or occupier to recover from the other under the terms of any lease or other contract the amount of any expenses incurred by him under these provisions: Land Drainage Act 1991 s 25(8). As to the position where there is a failure to comply with such a notice see PARA 601.

8 Land Drainage Act 1991 s 26(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

9 Land Drainage Act 1991 s 25(3)(a).

10 Land Drainage Act 1991 s 25(3)(b).

11 Land Drainage Act 1991 s 25(3)(c).

12 Land Drainage Act 1991 s 25(4).

13 Land Drainage Act 1991 s 25(5)(a).

14 Land Drainage Act 1991 s 25(5)(b). As to the right of appeal see s 27; and PARA 600. It would appear that a failure to indicate this right renders the notice invalid: see *Rayner v Stepney Corp* [1911] 2 Ch 312, 80 LJ Ch 678.

15 The powers conferred otherwise than under the Land Drainage Act 1991 s 25: s 26(2).

16 See the Land Drainage Act 1991 s 26(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

17 Land Drainage Act 1991 s 26(2)(a).

18 Land Drainage Act 1991 s 26(2)(b).

19 See the Land Drainage Act 1991 s 26(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

20 As to the meaning of 'conservancy authority' see PARA 189 note 3.

21 As to the meaning of 'harbour authority' see PARA 189 note 2.

22 As to the meaning of 'navigation authority' see PARA 189 note 1.

23 Land Drainage Act 1991 s 26(3).

24 The provisions of the Land Drainage Act 1991 s 33, and those provisions as applied in respect of main river by the Water Resources Act 1991 s 107(4).

25 See the Land Drainage Act 1991 s 33(5); Water Resources Act 1991 s 107(4); and PARA 592.

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### **600. Appeal against notice to remedy condition of watercourse.**

A person<sup>1</sup> served with a notice to remedy the condition of a watercourse<sup>2</sup> may appeal to a magistrates' court<sup>3</sup> within 21 days from the date on which the notice is served on him on any of the following grounds<sup>4</sup>:

- 1290 (1) that the notice or requirement is not justified by the statutory provisions<sup>5</sup>;
- 1291 (2) that there has been some informality, defect or error in, or in connection with, the notice<sup>6</sup>;
- 1292 (3) that the body that served the notice<sup>7</sup> has refused unreasonably to approve the carrying out of alternative works, or that the works required by the notice are otherwise unreasonable in character or extent, or are unnecessary<sup>8</sup>;
- 1293 (4) that the period within which the works are to be carried out is not reasonably sufficient for the purpose<sup>9</sup>;
- 1294 (5) that the notice might lawfully and should equitably have been served on another person<sup>10</sup>;
- 1295 (6) that some other person ought to contribute towards the expenses of carrying out any works required by the notice<sup>11</sup>.

On the hearing of the appeal the court may make such order as it thinks fit with respect to the person by whom any work is to be carried out and the contribution to be made by any other person towards the cost of the work<sup>12</sup>, or as to the proportions in which any expenses which may become recoverable by the body that served the notice are to be borne by the appellant and that other person<sup>13</sup>. The court must have regard to the degree of benefit to be derived by the different persons concerned<sup>14</sup> and, as between an owner and an occupier, to the terms and conditions, whether contractual or statutory, of the tenancy and to the nature of the works required<sup>15</sup>.

A person aggrieved by an order, determination or other decision of the magistrates' court may appeal to the Crown Court<sup>16</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 I.e. a notice under Land Drainage Act 1991 s 25 (see PARA 599), or that provision as applied in relation to a main river by the Water Resources Act 1991 s 107(3) (see PARA 599 note 1).

3 The procedure on such an appeal is by way of complaint for an order and in accordance with the Magistrates' Courts Act 1980: Land Drainage Act 1991 s 27(2). The appellant may serve a copy of his notice of appeal on any other person having an estate or interest in the part of the watercourse where the impediment occurs or land adjoining that part: Land Drainage Act 1991 s 27(5)(a). As to the meaning of 'land' see PARA 569 note 2. As to magistrates' courts see **MAGISTRATES** vol 29(2) (Reissue) PARA 583 et seq.

4 Land Drainage Act 1991 s 27(1). For the purposes of the time limit for bringing such an appeal, the making of the complaint is treated as the bringing of the appeal: s 27(3).

5 Land Drainage Act 1991 s 27(1)(a). The statutory provisions referred to are those of s 25 (see PARA 599), and those provisions as applied by the Water Resources Act 1991 s 107(3) (see PARA 599 note 1).

6 Land Drainage Act 1991 s 27(1)(b). In so far as the appeal is based on this ground, the court must dismiss it if satisfied that the informality, defect or error was not a material one: s 27(4).

7 As to the bodies with power to serve such a notice see PARA 599.

8 Land Drainage Act 1991 s 27(1)(c).

9 Land Drainage Act 1991 s 27(1)(d).

10 Land Drainage Act 1991 s 27(1)(e). Where the appeal is brought on this ground or on the ground set out in head (6) in the text, the appellant must serve a copy of the complaint on each other person referred to: s 27(5)(b).

11 Land Drainage Act 1991 s 27(1)(f). See also note 10.

12 Land Drainage Act 1991 s 27(6)(a). Where on an appeal the court varies or reverses the decision of the body that served the notice, it is the duty of that body to give effect to the order of the court: s 27(9).

13 Land Drainage Act 1991 s 27(6)(b). See also note 12.

14 Land Drainage Act 1991 s 27(7)(b).

15 Land Drainage Act 1991 s 27(7)(a).

16 Land Drainage Act 1991 s 27(8). As to an appeal to the Crown Court see **MAGISTRATES** vol 29(2) (Reissue) PARA 883.

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### **601. Failure to comply with the notice.**

Subject to the right of appeal<sup>1</sup>, if the person<sup>2</sup> upon whom a notice is served requiring him to carry out works to remedy the condition of a watercourse<sup>3</sup> fails to carry out the works indicated by the notice within the period so indicated, the body that served the notice<sup>4</sup> may itself carry out the works and recover from that person the expenses reasonably incurred by it in doing so<sup>5</sup>. In proceedings for the recovery of these expenses it is not open to the defendant to raise any question which he could<sup>6</sup> have raised on an appeal to the magistrates' court<sup>7</sup>.

Without prejudice to the right of the body concerned to exercise this power to execute works and recover its expenses, a person who fails to comply with a notice served on him is guilty of an offence<sup>8</sup>.

1    le the right of appeal under the Land Drainage Act 1991 s 27: see PARA 600.

2    As to the meaning of 'person' see PARA 13 note 29.

3    le a notice under Land Drainage Act 1991 s 25 (see PARA 599), or that provision as applied in relation to a main river by the Water Resources Act 1991 s 107(3) (see PARA 599 note 1).

4    As to the bodies with power to serve such a notice see PARA 599.

5    Land Drainage Act 1991 s 25(6)(a). Nothing in these provisions affects the right of an owner or occupier to recover from the other under the terms of any lease or other contract the amount of any expenses recovered from him by the body concerned: s 25(8).

6    The statutory wording is 'could not'; but it is submitted that the inclusion here of the word 'not' is a drafting error. That word is omitted from the Public Health Act 1936 s 290(7) which applied before the consolidation of the flood defence/land drainage legislation, but appeared in and has been brought through from the Land Drainage Act 1976 s 18(6) (repealed). The clear intention must be, however, that a person should not raise in recovery proceedings matters which he might have raised on an appeal.

7    Land Drainage Act 1991 s 25(7).

8    Land Drainage Act 1991 s 25(6)(b). The penalty for such an offence is, on summary conviction, a fine not exceeding level 4 on the standard scale: s 25(6)(b). As to the standard scale see PARA 141 note 18.

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## **602. Obstructions in ordinary watercourses.**

No person<sup>1</sup> may, without the written<sup>2</sup> consent of the drainage board concerned<sup>3</sup>: (1) erect any mill dam, weir or other like obstruction to the flow of any ordinary watercourse<sup>4</sup> or raise or otherwise alter any such obstruction<sup>5</sup>; or (2) erect any culvert that would be likely to affect the flow of any such watercourse or alter any culvert in a manner that would be likely to affect any such flow<sup>6</sup>. Where an application is made to the drainage board concerned for its consent the consent must not be unreasonably withheld<sup>7</sup>; but the board may require an applicant for such consent to pay a fee on the making of an application<sup>8</sup>. If the drainage board concerned fails to notify a decision in writing to the applicant within two months<sup>9</sup> of the relevant day<sup>10</sup>, it is deemed to have consented to that application<sup>11</sup>. However, nothing in these provisions applies to: (a) any works under the control of a navigation authority<sup>12</sup>, harbour authority<sup>13</sup> or conservancy authority<sup>14</sup>; or (b) any works carried out or maintained under or in pursuance of any Act or any order having the force of an Act<sup>15</sup>.

If any obstruction is erected, or is raised or otherwise altered, or any culvert is erected or altered, in contravention of the above provisions, it constitutes a nuisance in respect of which the drainage board concerned may serve a notice<sup>16</sup> requiring the abatement of the nuisance within a specified period<sup>17</sup>. The notice may be served on the person by whom the obstruction has been erected or raised or otherwise altered, if that person has at the time when the notice is served power to remove the obstruction<sup>18</sup>. In any other case, the notice may be served on any person having power to remove the obstruction<sup>19</sup>.

If any person acts in contravention of, or fails to comply with, any such notice, he is guilty of an offence<sup>20</sup>; and if the contravention or failure is continued after conviction, he is liable to a further fine<sup>21</sup>. In addition, and without prejudice to such court proceedings, the drainage board concerned may take such action as may be necessary to remedy the effect of the contravention or failure<sup>22</sup>, and recover from the person in default the reasonable expenses of doing so<sup>23</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'written' see PARA 22 note 1.

3 Land Drainage Act 1991 s 23(1). 'Drainage board concerned' means: (1) in relation to a watercourse in an internal drainage district, the internal drainage board for that district (s 23(8)(a)); and (2) in relation to any other watercourse, the Environment Agency (s 23(8)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191)). As to internal drainage districts and boards see PARA 569. As to the Environment Agency see PARA 17.

Under the Land Drainage Act 1991 s 8 the powers of an internal drainage board under s 23 are exercisable concurrently with the Environment Agency: see PARA 582. For other powers of control over culverts by local authorities see the Public Health Act 1936 ss 262-265; and PARA 98 et seq. However, these public health powers may not be exercised with respect to any stream, watercourse, ditch or culvert within the jurisdiction of a land drainage authority except after consultation with that authority: s 266(1)(i).

4 As to the meaning of 'ordinary watercourse' see PARA 573 note 16. For similar provisions applicable to main rivers see PARA 603.

5 Land Drainage Act 1991 s 23(1)(a).

6 Land Drainage Act 1991 s 23(1)(b).

7 Land Drainage Act 1991 s 23(3)(a). Any question whether consent has been unreasonably withheld is to be referred to a single arbitrator to be agreed between the parties or, failing such agreement, to be appointed on the application of either party by the President of the Institution of Civil Engineers: s 23(5). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

8 Land Drainage Act 1991 s 23(2). The amount of the fee is to be £50 or such other sum as may be prescribed: s 23(2) (amended by the Environment Act 1995 Sch 22 para 192(1)). For these purposes, 'prescribed' means specified in, or determined in accordance with, an order made by the Secretary of State or, in relation to Wales, the Welsh Ministers, and any such order may make different provision for different cases, including different provision in relation to different persons, circumstances or localities: see the Land Drainage Act 1991 s 23(7A) (added by the Environment Act 1995 Sch 22 para 192(2)). The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Land Drainage Act 1991 s 23(7). At the date at which this title states the law, no such order had been made. The statutory wording in s 23(7A) above is 'an order made by the ministers'. As to the meaning of 'the ministers', and as to the abolition of the Ministry of Agriculture, Fisheries and Food, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. The functions of a Minister of the Crown under the Land Drainage Act 1991 s 23, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

9 As to the meaning of 'month' see PARA 23 note 10.

10 'Relevant day', in relation to an application for a consent, means whichever is the later of: (1) the day on which the application is made (Land Drainage Act 1991 s 23(4)(a)); and (2) if at the time when the application is made an application fee is required to be paid, the day on which the liability to pay that fee is discharged (s 23(4)(b)).

11 Land Drainage Act 1991 s 23(3)(b).

12 As to the meaning of 'navigation authority' see PARA 189 note 1.

13 As to the meaning of 'harbour authority' see PARA 189 note 2.

14 Land Drainage Act 1991 s 23(6)(a). As to the meaning of 'conservancy authority' see PARA 189 note 3.

15 Land Drainage Act 1991 s 23(6)(b).

16 As to the service of documents see PARA 22.

17 Land Drainage Act 1991 s 24(1).

18 Land Drainage Act 1991 s 24(2)(a).

19 Land Drainage Act 1991 s 24(2)(b).

20 Land Drainage Act 1991 s 24(3)(a). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: s 24(3)(a). As to the standard scale see PARA 141 note 18.

21 Land Drainage Act 1991 s 24(3)(b). Such further fine is of an amount not exceeding £40 per day for every day on which the contravention or failure is so continued: s 24(3)(b).

22 Land Drainage Act 1991 s 24(4)(a).

23 Land Drainage Act 1991 s 24(4)(b).

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### **603. Erection of structures in, over or under a main river.**

No person<sup>1</sup> may erect any structure in, over or under a watercourse<sup>2</sup> which is part of a main river<sup>3</sup> except with the consent of, and in accordance with plans and sections approved by, the Environment Agency<sup>4</sup>. Nor may a person, without such consent, carry out any work of alteration or repair on any structure in, over or under such a watercourse if the work is likely to affect the flow of water in the watercourse or to impede any drainage work<sup>5</sup>. These prohibitions do not, however, apply to any work carried out in an emergency<sup>6</sup>.

Similarly, a person must not erect or alter any structure designed to contain or divert the floodwaters of any part of a main river except with the consent of and in accordance with plans and sections approved by the Agency<sup>7</sup>.

A consent or approval under the above provisions must not be unreasonably withheld<sup>8</sup>; but the Agency may require the payment of an application fee by a person who applies to it for such consent<sup>9</sup>. Consent may be given subject to any reasonable condition as to the time at which and manner in which any work is to be carried out<sup>10</sup>. If consent or approval is neither given nor refused within the relevant period<sup>11</sup> it is deemed to have been given<sup>12</sup>. If any question arises whether any consent or approval is unreasonably withheld or whether any condition imposed is reasonable and the parties agree to arbitration, the question is to be referred to a single arbitrator appointed by agreement between the parties or, in default of agreement, by the President of the Institution of Civil Engineers<sup>13</sup>. If the parties do not agree to arbitration, the question is to be referred to and determined by the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>14</sup>.

If any person carries out any work in contravention<sup>15</sup> of these provisions, the Agency may remove, alter or pull down the work<sup>16</sup>, and recover the expenses incurred in doing so from that person<sup>17</sup>.

Nothing in the above provisions affects any enactment<sup>18</sup> requiring the consent of any government department for the erection of a bridge or any powers exercisable by any government department in relation to a bridge<sup>19</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'watercourse' see PARA 573 note 10.

3 As to the meaning of 'main river' see PARA 574.

4 Water Resources Act 1991 s 109(1) (ss 109, 110(1) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the Environment Agency see PARA 17. As to the similar provisions in respect of obstructions on ordinary watercourses see PARA 602. As to the powers of local authorities in relation to culverts see PARA 98 et seq.

5 See the Water Resources Act 1991 s 109(2) (as amended: see note 4). As to the meaning of 'drainage' see PARA 573.

6 Water Resources Act 1991 s 109(5). A person carrying out any work under this exception must, however, inform the Agency in writing as soon as practicable of the carrying out of the work, and of the circumstances in which it was carried out: s 109(5)(a), (b) (as amended: see note 4). As to the meaning of 'writing' see PARA 22 note 1.



7 Water Resources Act 1991 s 109(3) (as amended: see note 4). No exception is made in this case for work carried out in an emergency.

8 Water Resources Act 1991 s 110(2)(a). It is always open to the Agency, when it has concerns over the validity of an application under s 109, to refuse consent on a without prejudice basis, and then to seek the determination of the court as to the validity of the application; if a court declares an application valid, there is no question of it being valid as from the date of that decision, but it will be declared to have been valid at all times: see *R (on the application of Amberley House Investments Ltd) v Environment Agency* [2004] EWHC 2394 (Admin), [2004] 43 EG 143 (CS), [2004] All ER (D) 110 (Oct).

9 Water Resources Act 1991 s 110(1) (as amended: see note 4). The amount of the fee is to be £50 or such other sum as may be prescribed: s 110(1) (amended by the Environment Act 1995 Sch 22 para 147(1)). For these purposes, 'prescribed' means specified in, or determined in accordance with, an order made by the Secretary of State or, in relation to Wales, the Welsh Ministers; and any such order may make different provision for different cases, including different provision in relation to different persons, circumstances or localities: see the Water Resources Act 1991 s 110(6) (added by the Environment Act 1995 Sch 22 para 147(3)). The power to make such orders is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Water Resources Act 1991 s 110(5). At the date at which this title states the law, no such order had been made. The functions of the Secretary of State under the Water Resources Act 1991 s 110, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

10 Water Resources Act 1991 s 110(2)(c).

11 The 'relevant period' is: (1) in the case of a consent, the period of two months after whichever is the later of the day on which application for the consent is made and, if at the time when that application is made an application fee is required to be paid, the day on which the liability to pay that fee is discharged (Water Resources Act 1991 s 110(3)(a)); and (2) in the case of an approval, the period of two months after application for the approval is made (s 110(3)(b)). As to the meaning of 'month' see PARA 23 note 10.

12 Water Resources Act 1991 s 110(2)(b). See *R (on the application of Amberley House Investments Ltd) v Environment Agency* [2004] EWHC 2394 (Admin), [2004] 43 EG 143 (CS), [2004] All ER (D) 110 (Oct).

13 Water Resources Act 1991 s 110(4)(a). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

14 See the Water Resources Act 1991 s 110(4)(b) (amended by the Environment Act 1995 Sch 22 para 147(2)).

15 As to the meaning of 'contravention' see PARA 20 note 5.

16 Water Resources Act 1991 s 109(4)(a) (as amended: see note 4).

17 Water Resources Act 1991 s 109(4)(b) (as amended: see note 4). The summary power under s 109(4) is, as a matter of good public administration, subject to the Agency's own enforcement policy, which requires the Agency's officers to consider, inter alia, whether a consent would have been issued. Further, if a structure has been erected over a watercourse in contravention of s 109, the Agency's enforcement powers under s 109(4) are not taken away by another application to erect a similar structure over the watercourse: see *R (on the application of Amberley House Investments Ltd) v Environment Agency* [2004] EWHC 2394 (Admin), [2004] 43 EG 143 (CS), [2004] All ER (D) 110 (Oct).

18 As to the meaning of 'enactment' see PARA 14 note 31.

19 Water Resources Act 1991 s 109(6). The provisions of the Water Resources Act 1991 which protect the undertakings of certain undertakers do not exempt such undertakers from the need to apply for consent under s 109 for their own works: see Sch 22 para 2(2); and PARA 490. Nor does anything in the British Waterways Act 1995 s 21 relieve any person of the obligation to obtain consent under these provisions: see s 21(9); and PARA 794. The Water Resources Act 1991 s 109 does not, however, apply to any structure constructed under any of the powers conferred by the Cardiff Bay Barrage Act 1993 s 1: see s 25(1).

## UPDATE

**603 Erection of structures in, over or under a main river**

TEXT AND NOTES--Water Resources Act 1991 s 109 further amended: Marine and Coastal Access Act 2009 s 82 (not yet in force).

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#### **604. Diversion of watercourses by other authorities.**

Where any watercourses<sup>1</sup> under the control of the Environment Agency<sup>2</sup> or an internal drainage board<sup>3</sup> pass under or interfere with, or with the improvement or alteration of, any river, canal, dock, harbour, basin or other work (including any towing path adjacent to it) which belongs to or is under the jurisdiction of any navigation authority<sup>4</sup>, harbour authority<sup>5</sup> or conservancy authority<sup>6</sup>, that authority may, at its own expense, and on substituting for those watercourses other equally effective watercourses, take up, divert or alter the level of those watercourses<sup>7</sup>, and do all such matters and things as may be necessary in connection with the works authorised to be done by it<sup>8</sup>. If any question arises whether any watercourses substituted or proposed to be substituted are as effective as the existing watercourses, that question is to be referred to a single arbitrator appointed by agreement between the parties or, failing agreement, by the President of the Institution of Civil Engineers on the application of either party<sup>9</sup>.

Similar powers are conferred on the Agency and internal drainage boards in respect of sewers, drains, pipes, and culverts vested in a sewerage undertaker which pass under or interfere with, or with the improvement of or alteration of, any watercourses under their jurisdiction<sup>10</sup>.

1 As to the meaning of 'watercourse' see PARA 573 note 10: definition applied, in the case of the Water Resources Act 1991, by s 180(3).

2 As to the Environment Agency see PARA 17.

3 As to internal drainage boards see PARA 569.

4 As to the meaning of 'navigation authority' see PARA 189 note 1.

5 As to the meaning of 'harbour authority' see PARA 189 note 2.

6 As to the meaning of 'conservancy authority' see PARA 189 note 3.

7 Land Drainage Act 1991 s 68(1)(a), (3); Water Resources Act 1991 s 180(1)(a), (3) (s 180(1), (2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

8 Land Drainage Act 1991 s 68(1)(b); Water Resources Act 1991 s 180(1)(b) (as amended: see note 7).

9 Land Drainage Act 1991 s 68(2); Water Resources Act 1991 s 180(2) (as amended: see note 7). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) para 1209.

10 See the Water Industry Act 1991 s 184; and PARA 589.

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## **C. BYELAWS**

### **605. Power to make byelaws.**

The Environment Agency<sup>1</sup>, an internal drainage board<sup>2</sup> or a local authority<sup>3</sup> may make such byelaws as it considers necessary<sup>4</sup>: (1) for securing the efficient working of any drainage system<sup>5</sup>; or (2) for regulating the effects of any drainage system on the environment<sup>7</sup>. Without prejudice to the generality of the above provisions, the Agency, board or local authority<sup>8</sup> may, in particular, make byelaws for any of the following purposes:

- 1296 (1) regulating the use and preventing the improper use of any watercourses<sup>9</sup>, banks<sup>10</sup> or works vested in it or under its control or for preserving any such watercourses, banks or works from damage or destruction<sup>11</sup>;
- 1297 (2) regulating the opening of sluices and flood gates in connection with any of the works mentioned in head (1) above<sup>12</sup>;
- 1298 (3) preventing the obstruction of any watercourse vested in it or under its control by the discharge into the watercourse of any liquid or solid matter or by reason of any such matter being allowed to flow or fall into it<sup>13</sup>; and
- 1299 (4) compelling the persons<sup>14</sup> having control of any watercourse vested in it or under its control, or of any watercourse flowing into any such watercourse, to cut the vegetable growths in or on the banks and, when cut, to remove such growths<sup>15</sup>.

An internal drainage board may not, however, make byelaws in connection with a main river<sup>16</sup> or its banks or any drainage works in connection with a main river<sup>17</sup>; and a local authority may make byelaws only as far as necessary for the purpose of preventing flooding or remedying or mitigating damage caused by flooding<sup>18</sup>.

No byelaw made under these powers may conflict with or interfere with the operation of any byelaw made by a navigation authority<sup>19</sup>, harbour authority<sup>20</sup> or conservancy authority<sup>21</sup>.

Byelaws made under these provisions are not valid until they are confirmed<sup>22</sup>.

1 As to the Environment Agency see PARA 17.

2 As to internal drainage boards see PARA 569.

3 I.e. except (subject to the Land Drainage Act 1991 s 66(8)) an English county council: s 66(1) (s 66(1), (2) amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(11)). The exercise of the powers under the Land Drainage Act 1991 s 66 by a local authority is subject to s 16(1), (3) (see PARA 589) as those provisions apply in relation to the powers conferred by s 14: see s 66(8)(a). An English county council may therefore make byelaws only in the circumstances permitted by s 16(1), (3). As to the meaning of 'local authority' see PARA 573 note 14.

4 See the Land Drainage Act 1991 s 66(1); Water Resources Act 1991 Sch 25 para 5(1) (Sch 25 paras 2, 5 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the possible relationship between the exercise of control under a byelaw and being in occupation under the Occupiers' Liability Acts 1957 and 1984 see *Collier v Anglian Water Authority* (1983) Times, 26 March, CA.

5 As to the meaning of 'drainage' see PARA 573.

6 See the Land Drainage Act 1991 s 66(1)(a) (s 66(1)(a), (b) substituted by the Natural Environment and Rural Communities Act 2006 s 100(3)); Water Resources Act 1991 Sch 25 para 5(1)(a) (Sch 25 para 5(1)(a), (b) substituted by the Natural Environment and Rural Communities Act 2006 s 100(1)). In the case of an internal drainage board or local authority the drainage system must be in its district or area: see the Land Drainage Act 1991 s 66(1)(a) (as so substituted). As to internal drainage districts see PARA 569.

7 See the Land Drainage Act 1991 s 66(1)(b); Water Resources Act 1991 Sch 25 para 5(1)(b) (both as substituted: see note 6). In the case of an internal drainage board or local authority the drainage system must be in its district or area: see the Land Drainage Act 1991 s 66(1)(b) (as so substituted).

8 Land Drainage Act 1991 s 66(2) (as amended: see note 3); Water Resources Act 1991 Sch 25 para 2 (as amended: see note 4). The Environment Agency also has byelaw powers which may affect watercourses in relation to navigation (see PARA 709), pollution prevention (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 333), fisheries (see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 847 et seq), and the protection of land and waterways (see PARA 685). The power of local authorities and parish councils under the Public Health Act 1961 s 54 to provide boating pools is subject to consultation with the Environment Agency or any internal drainage board if the existence of a boating pool is likely to interfere with any water flowing directly or indirectly out of or into any watercourse vested in or controlled by the Agency or that board: see s 54(4) (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2(1), Sch 1 para 11(a); and SI 1996/593); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 559. Nothing in the Public Health Act 1961 s 54 authorises any contravention of byelaws made under the Land Drainage Act 1991 s 66 or the Water Resources Act 1991 Sch 25 para 5: see the Public Health Act 1961 s 54(10) (amended by the Water Consolidation (Consequential Provisions) Act 1991 s 2(1), Sch 1 para 11(b)).

9 As to the meaning of 'watercourse' see PARA 573 note 10: definition applied in the case of the Water Resources Act 1991 by Sch 25 para 5(5).

10 As to the meaning of 'banks' see PARA 574 note 2: definition applied in the case of the Water Resources Act 1991 by Sch 25 para 5(5). When a byelaw prohibited the construction of any structure on the bank of a river and tanks filled with earth and hardcore were placed along a river bank, the tanks were held to be a structure within the meaning of the byelaw: *Hobday v Nicol* [1944] 1 All ER 302, DC.

11 Land Drainage Act 1991 s 66(2)(a); Water Resources Act 1991 Sch 25 para 5(2)(a) (as amended: see note 4). No byelaw for these purposes is valid if it would prevent reasonable facilities being afforded for enabling a watercourse to be used by stock for drinking purposes: Land Drainage Act 1991 s 66(4); Water Resources Act 1991 Sch 25 para 5(3).

12 Land Drainage Act 1991 s 66(2)(b); Water Resources Act 1991 Sch 25 para 5(2)(b).

13 Land Drainage Act 1991 s 66(2)(c); Water Resources Act 1991 Sch 25 para 5(2)(c) (as amended: see note 4). Byelaws under this head are for securing the efficient working of the drainage system and in particular for preventing the obstruction of a watercourse by a discharge flowing or falling into it; they are not therefore aimed at pollution prevention. As to water pollution see further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270 et seq.

14 As to the meaning of 'person' see PARA 13 note 29.

15 Land Drainage Act 1991 s 66(2)(d); Water Resources Act 1991 Sch 25 para 5(2)(d) (as amended: see note 4). As to other statutory provisions restricting the cutting of vegetation in or on a watercourse and the removal of vegetation when cut see the Water Resources Act 1991 s 90(2); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 293.

16 As to the meaning of 'main river' see PARA 574.

17 Land Drainage Act 1991 s 66(3)(a).

18 Land Drainage Act 1991 s 66(3)(b).

19 As to the meaning of 'navigation authority' see PARA 189 note 1.

20 As to the meaning of 'harbour authority' see PARA 189 note 2.

21 Land Drainage Act 1991 s 66(9); Water Resources Act 1991 Sch 25 para 5(4). As to the meaning of 'conservancy authority' see PARA 189 note 3.

22 See the Land Drainage Act 1991 s 66(5); Water Resources Act 1991 Sch 26 para 1(1); and PARA 606. As to the enforcement of byelaws see PARA 607.

**UPDATE**

**605 Power to make byelaws**

NOTE 11--See further Water Resources Act 1991 Sch 25 para 5(3A), (3B) (added by Marine and Coastal Access Act 2009 s 84) (not yet in force).

NOTE 21--Water Resources Act 1991 Sch 25 para 5(4) amended: Marine and Coastal Access Act 2009 Sch 11 para 3 (partly in force).

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## **606. Confirmation and revocation of byelaws.**

A byelaw<sup>1</sup> made by the Environment Agency<sup>2</sup> or an internal drainage board<sup>3</sup> is not valid until confirmed by the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>4</sup>, who may, with or without a local inquiry<sup>5</sup>, refuse to confirm any byelaw or confirm it either without or, if the Agency or board consents, with modifications<sup>6</sup>. The relevant minister may fix the date on which any confirmed byelaw is to come into force; and if no date is fixed, a byelaw comes into force at the end of one month from the date of confirmation<sup>7</sup>.

A byelaw made by a local authority<sup>8</sup> also requires ministerial confirmation before it is valid<sup>9</sup>, and the procedure to be followed is that of the Local Government Act 1972<sup>10</sup>.

If it appears to the relevant minister that the revocation of a byelaw made by the Agency or an internal drainage board is necessary or expedient, he may revoke the byelaw<sup>11</sup>. Before revoking such a byelaw he must, however, give notice to the Agency or, as the case may be, to the board that made the byelaw, and consider any objections raised by it<sup>12</sup>; and if the Agency or board so requires, he must hold a local inquiry before revoking the byelaw<sup>13</sup>.

The production of a printed copy of a byelaw purporting to be made by the Agency or an internal drainage board upon which is indorsed a certificate, purporting to be signed on its behalf, stating that the byelaw was made by the Agency or, as the case may be, that board, that the copy is a true copy of the byelaw, that on a specified date the byelaw was confirmed, and the date (if any) fixed for the coming into force of the byelaw, is prima facie evidence of the facts stated in the certificate and without proof of the handwriting or official position of any person purporting to sign the certificate<sup>14</sup>.

1 As to the power to make byelaws relating to drainage see PARA 605. The procedure for the confirmation of byelaws also applies to byelaws made by the Environment Agency in relation to navigation (see PARA 709), and the protection of land and waterways (see PARA 685).

2 As to the Environment Agency see PARA 17.

3 As to internal drainage boards see PARA 569.

4 Land Drainage Act 1991 s 66(5)(a); Water Resources Act 1991 Sch 26 para 1(1) (Sch 26 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'relevant minister' in the Land Drainage Act 1991, and as to the transfer of functions under that Act to the Welsh Ministers, see PARA 569 note 9. For the purposes of byelaws made by virtue of the Water Resources Act 1991 Sch 25 para 5 (see PARA 605) and which have effect in the area of a regional flood defence committee the whole or the greater part of whose area is in England, the 'relevant minister' means the minister (as to the meaning of which see PARA 15 note 1) (see Sch 26 para 7(a)); and in relation to other such byelaws (and other byelaws made by the Agency under Sch 25: see PARA 605) the 'relevant minister' means the Secretary of State (Sch 26 para 7(c)). The functions of any Minister of the Crown under the Water Resources Act 1991 Sch 26 (except that of the Minister of Agriculture, Fisheries and Food under Sch 26 para 7(a)), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State, and as to the abolition of the Ministry of Agriculture, Fisheries and Food, see PARA 15 note 1. As to the meaning of 'England' see PARA 19 note 8. As to regional flood defence committees see PARA 559. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

At least one month before application is made for a byelaw to be confirmed, the Agency or, as the case may be, the board must cause a notice of its intention to be published in the London Gazette and in such other manner as it thinks appropriate or best adapted for informing persons affected and serve notice on any persons carrying out functions under any enactment, or any public authorities, that appear to be concerned: see the Land Drainage Act 1991 Sch 5 para 1(1); Water Resources Act 1991 Sch 26 para 1(2) (as so amended). As to the meaning of 'month' see PARA 23 note 10. As to the meaning of 'person' see PARA 13 note 29. As to the service of documents see PARA 22. A copy of the proposed byelaw must be deposited at one or more of the offices of the Agency or, as appropriate, the offices of the board where reasonable facilities for its inspection must be afforded free of charge; and on application to the Agency or board any person is entitled to be furnished free of charge with a printed copy of the byelaw: Land Drainage Act 1991 Sch 5 para 1(2)-(3); Water Resources Act 1991 Sch 26 para 1(3)-(5) (as so amended).

5 As to local inquiries under the Land Drainage Act 1991 see PARA 657.

6 Land Drainage Act 1991 Sch 5 para 2(1); Water Resources Act 1991 Sch 26 para 2(1) (as amended: see note 4). If so directed by the Secretary of State or, as appropriate, the Welsh Ministers, the Agency or board must cause notice of any proposed modifications to be given in accordance with such directions: Land Drainage Act 1991 Sch 5 para 2(2); Water Resources Act 1991 Sch 26 para 2(2) (as so amended). As to the meaning of 'modifications' in the Water Resources Act 1991 see PARA 141 note 20.

7 Land Drainage Act 1991 Sch 5 para 3; Water Resources Act 1991 Sch 26 para 3. Upon confirmation the byelaw must be printed and deposited at one or more offices of the Agency (including, if there is one, an office in the area to which it applies) or at the office of the internal drainage board that made the byelaw, and copies of it must be available at those offices at all reasonable times for inspection by the public free of charge: see the Land Drainage Act 1991 Sch 5 paras 4(1), 7; Water Resources Act 1991 Sch 26 para 4(1) (as amended: see note 4). On application to the Agency or board, and on payment of a reasonable sum determined by it, any person is entitled to be furnished with a copy of a byelaw which has been so deposited: see the Land Drainage Act 1991 Sch 5 para 4(2); Water Resources Act 1991 Sch 26 para 4(2) (as so amended).

8 As to the meaning of 'local authority' see PARA 573 note 14. As to such byelaws see PARA 605.

9 Such confirmation is given by the Secretary of State in relation to any area of England, and by the Welsh Ministers in relation to any area of Wales: see the Land Drainage Act 1991 s 66(5)(b), (c).

10 The Local Government Act 1972 s 236 (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 556-557) has effect for these purposes: Land Drainage Act 1991 s 66(5).

11 Land Drainage Act 1991 Sch 5 para 5; Water Resources Act 1991 Sch 26 para 5 (as amended: see note 4).

12 Land Drainage Act 1991 Sch 5 paras 5(a), 7; Water Resources Act 1991 Sch 26 para 5(a) (as amended: see note 4).

13 Land Drainage Act 1991 Sch 5 para 5(b); Water Resources Act 1991 Sch 26 para 5(b) (as amended: see note 4).

14 See the Land Drainage Act 1991 Sch 5 para 6; Water Resources Act 1991 Sch 26 para 6 (as amended: see note 4).



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### **607. Enforcement of byelaws.**

If any person<sup>1</sup> acts in contravention<sup>2</sup> of, or fails to comply with, any drainage byelaw<sup>3</sup> made by the Environment Agency<sup>4</sup>, an internal drainage board<sup>5</sup>, or a local authority<sup>6</sup>, he is guilty of an offence<sup>7</sup>; and if the contravention or failure is continued after conviction he is liable to a continuing penalty<sup>8</sup>. Without prejudice to any such proceedings, the Agency, internal drainage board or local authority which made the byelaw may take such action as may be necessary to remedy the effect of the contravention or failure<sup>9</sup>, and may recover the expenses reasonably incurred by it in doing so from the person in default<sup>10</sup>. Where, however, a local authority acts in default to remedy a contravention and this remedial action involves the carrying out of drainage works<sup>11</sup>, it must obtain the prior approval of, and comply with any reasonable conditions imposed by, the Agency<sup>12</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'contravention' in the Water Resources Act 1991 see PARA 20 note 5.

3 Ie any byelaw made under the Land Drainage Act 1991 s 66 or the Water Resources Act 1991 Sch 25 para 5: see PARAS 605-606.

4 As to the Environment Agency see PARA 17.

5 As to internal drainage boards see PARA 569.

6 As to the meaning of 'local authority' see PARA 573 note 14.

7 Land Drainage Act 1991 s 66(6); Water Resources Act 1991 s 211(4). The penalty for such an offence is, on summary conviction, a fine not exceeding level 5 on the standard scale: Land Drainage Act 1991 s 66(6)(a); Water Resources Act 1991 s 211(4)(a). As to the standard scale see PARA 141 note 18. As to offences by bodies corporate under the Water Resources Act 1991 see PARA 185.

8 If the contravention or failure is continued after conviction, the person is liable to a further fine not exceeding £40 for every day on which the contravention or failure is so continued: Land Drainage Act 1991 s 66(6)(b); Water Resources Act 1991 s 211(4)(b).

9 Land Drainage Act 1991 s 66(7)(a); Water Resources Act 1991 s 211(5)(b) (s 211(5) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to powers of entry for these purposes see PARA 608.

10 Land Drainage Act 1991 s 66(7)(b); Water Resources Act 1991 s 211(5)(c) (as amended: see note 9). However, nothing in the Land Drainage Act 1991 s 66 authorises the carrying out of any works by an internal drainage board or local authority in connection with a main river: see s 66(8). As to the meaning of 'main river' see PARA 574.

11 As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.

12 Ie the Land Drainage Act 1991 s 17 (see PARA 589) applies in relation to the carrying out by a local authority of any drainage works authorised by s 66(7) (see the text to note 9) as it applies in relation to the carrying out of any drainage works authorised by s 14(1): s 66(8)(b).

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## **D. POWERS OVER LAND**

### **608. Powers of entry.**

Any person<sup>1</sup> designated in writing for the purpose in question by the Environment Agency<sup>2</sup> may enter any premises or vessel for enforcement or certain other purposes<sup>3</sup>.

Any person authorised by an internal drainage board<sup>4</sup> or a local authority<sup>5</sup>, after producing, if so required, a duly authenticated document showing his authority, may at all reasonable times:

- 1300 (1) enter any land<sup>6</sup> for the purpose of exercising any function of the board, or any function of the local authority under the Land Drainage Act 1991<sup>7</sup>;
- 1301 (2) without prejudice to head (1) above, enter and survey any land (including the interior of any mill through which water passes or in connection with which water is impounded) and take levels of the land and inspect the condition of any drainage<sup>8</sup> work on it<sup>9</sup>; and
- 1302 (3) inspect and take copies of any Acts of Parliament, awards or other documents in the possession of any internal drainage board, local authority or navigation authority<sup>10</sup> which relate to the drainage of land and confer any powers or impose any duties on that board or authority<sup>11</sup>.

Except in an emergency, admission to any land may not be so demanded as of right unless written<sup>12</sup> notice of the intended entry has been given to the occupier<sup>13</sup>; and, if the land is used for residential purposes or the demand is for admission to any land with heavy equipment, notice must be given not less than seven days before the demand for entry is made<sup>14</sup>. A person so authorised to enter any land may take with him such other persons and such equipment as may be necessary<sup>15</sup>; and if the land is unoccupied he must, on leaving it, leave it as effectually secured against trespassers as he found it<sup>16</sup>.

Where injury is sustained by any person by reason of the exercise of any of these powers by an internal drainage board or local authority, the board or authority is liable to make full compensation to the injured person<sup>17</sup>. In case of dispute, the amount of compensation payable must be determined by the Lands Tribunal<sup>18</sup>.

Any person who intentionally obstructs or impedes any person authorised by an internal drainage board or a local authority exercising a power conferred by the above provisions is guilty of an offence<sup>19</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the Environment Agency see PARA 17.

3 See the Water Resources Act 1991 s 169 (powers of entry for enforcement purposes: see PARA 476) and s 172 (powers of entry for other purposes: see PARA 479).

4 As to internal drainage boards see PARA 569.

5 As to the meaning of 'local authority' see PARA 573 note 14.

6 As to the meaning of 'land' see PARA 569 note 2.

7 Land Drainage Act 1991 s 64(1)(a). The powers of entry conferred by s 64 do not apply in relation to land belonging to Her Majesty in right of the Crown or the Duchy of Lancaster, in relation to land belonging to the Duchy of Cornwall or in relation to land belonging to a government department: s 64(7). Section 64 is without prejudice to any other enactment conferring powers of entry: s 64(8). As to the general powers of internal drainage boards and local authorities to carry out works see PARA 589. In *R (on the application of MWH & H Ward Estates Ltd) v Monmouthshire County Council* [2002] 45 EG 154 (CS), [2002] All ER (D) 463 (Oct), CA it was held, in relation to an entry onto land to construct a new drainage channel, that the independent right of entry under the Land Drainage Act s 64 without the owner's consent was not a breach of the right to the peaceful enjoyment of property under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Protocol I art 1, now incorporated into domestic law by the Human Rights Act 1998 Sch 1 Pt II art 1 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 165).

8 As to the meaning of 'drainage' see PARA 573.

9 Land Drainage Act 1991 s 64(1)(b).

10 As to the meaning of 'navigation authority' see PARA 189 note 1.

11 Land Drainage Act 1991 s 64(1)(c).

12 As to the meaning of 'written' see PARA 22 note 1.

13 Land Drainage Act 1991 s 64(3)(a). No period of notice is specified in this case but see the text to note 14. As to the service of documents see PARA 22.

14 Land Drainage Act 1991 s 64(3)(b).

15 Land Drainage Act 1991 s 64(2)(a).

16 Land Drainage Act 1991 s 64(2)(b).

17 Land Drainage Act 1991 s 64(4).

18 Land Drainage Act 1991 s 64(5). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

For a case which confirmed that properly exercised powers of entry give rise to a claim in compensation and not to damages for trespass or nuisance, and confirming the width of the powers of entry provisions see *Pattinson v Finningley Internal Drainage Board* [1970] 2 QB 33, [1970] 1 All ER 790.

19 Land Drainage Act 1991 s 64(6). The penalty for such an offence is, on summary conviction, a fine not exceeding level 4 on the standard scale: s 64(6). As to the standard scale see PARA 141 note 18.

## UPDATE

### 608 Powers of entry

TEXT AND NOTE 18--Reference to the Lands Tribunal is now to the Upper Tribunal: Land Drainage Act 1991 s 64(5) (amended by SI 2009/1307).

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### **609. Acquisition and disposal of land.**

For any purposes in connection with the performance of any of its functions, the Environment Agency<sup>1</sup> may acquire any land<sup>2</sup> by agreement<sup>3</sup>; and may be authorised<sup>4</sup> to purchase compulsorily any land anywhere in England<sup>5</sup> and Wales which is required by the Agency for the purposes of, or in connection with, the carrying out of its functions<sup>6</sup>. Likewise, an internal drainage board<sup>7</sup> may, for any purpose in connection with the performance of any of its functions, acquire land<sup>8</sup> inside or outside its district by agreement<sup>9</sup> or, if authorised<sup>10</sup>, acquire any such land compulsorily<sup>11</sup>. An internal drainage board may exercise such powers so as to acquire interests in or rights over land by way of securing the creation of new interests or rights in its favour (as well as by acquiring interests or rights already in existence)<sup>12</sup>.

The Agency or an internal drainage board may generally dispose of land held by that Agency or board in any manner that it wishes<sup>13</sup>; but certain restrictions on this right are imposed in the case of land which has been compulsorily acquired<sup>14</sup>. Except with the consent of the relevant minister, an internal drainage board must not dispose of land, otherwise than by way of a short tenancy<sup>15</sup>: (1) for a consideration less than the best that can reasonably be obtained<sup>16</sup>; or (2) which has been acquired by it compulsorily, or by agreement at a time when it was authorised to acquire that land compulsorily<sup>17</sup>.

The exercise of the powers conferred on local authorities by the Land Drainage Act 1991<sup>18</sup> is included in the purposes for which the council of any district or London borough or Welsh county or county borough or the Common Council of the City of London<sup>19</sup> may be authorised by the Secretary of State or, as the case may be, the Welsh Ministers to purchase land compulsorily<sup>20</sup>.

1 As to the Environment Agency see PARA 17. As to the functions of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.

2 As to the meaning of 'land' generally see PARA 14 note 21.

3 See the Environment Act 1995 s 37(1)(b); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 73.

4 By the Secretary of State or, in relation to Wales, the Welsh Ministers: see the Water Resources Act 1991 s 154(1). The power of the Secretary of State or the Welsh Ministers includes power: (1) to authorise the acquisition of interests in, and rights over, land by the creation of new interests and rights (s 154(2)(a)); and (2) by authorising the acquisition by the Agency of any rights over land which is to be or has been acquired by the Agency, to provide for the extinguishment of those rights (s 154(2)(b) (s 154 amended by the Environment Act 1995 s 120(1), Sch 22 para 128)). Enactments relating to compensation and the provisions of the Compulsory Purchase Act 1965 are modified in their application in relation to the compulsory acquisition under the Water Resources Act 1991 s 154(1) of a right over land by the creation of a new right: see s 154(5), Sch 18. As to the meaning of 'enactment' see PARA 14 note 31.

The functions of any Minister of the Crown under the Water Resources Act 1991 s 154, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

- 5 As to the meaning of 'England' see PARA 19 note 8.
- 6 Water Resources Act 1991 s 154(1) (as amended: see note 4). As to compulsory acquisition by the Agency see further PARA 453.
- 7 As to internal drainage boards and their districts see PARA 569. As to their general functions see PARA 573.
- 8 As to the meaning of 'land' in the Land Drainage Act 1991 see PARA 569 note 2.
- 9 Land Drainage Act 1991 s 62(1)(a). Where an internal drainage board proposes to acquire by agreement any land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor and Council of that Duchy may sell the land to the board; and the land may be granted to the board, and the proceeds of sale must be paid and dealt with, as if the land had been sold under the authority of the Duchy of Lancaster Lands Act 1855: Land Drainage Act 1991 s 62(6). As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq.
- 10 le by the relevant minister: Land Drainage Act 1991 s 62(1)(b). As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9.
- 11 Land Drainage Act 1991 s 62(1)(b). The Acquisition of Land Act 1981 (see **COMPULSORY ACQUISITION OF LAND**) applies to any such compulsory acquisition: s 62(3).
- 12 Land Drainage Act 1991 s 62(4). Where an internal drainage board exercises its powers so as to acquire compulsorily an interest in or right over land by way of securing compulsorily the creation in its favour of a new interest or right: (1) the enactments relating to compensation for the compulsory purchase of land, in their application to such acquisition, have effect with the necessary modifications (s 62(5)(a)); and (2) the Acquisition of Land Act 1981 and the Compulsory Purchase Act 1965 (see **COMPULSORY ACQUISITION OF LAND**), in their application to such compulsory acquisition, have effect with such modifications as may be prescribed (Land Drainage Act 1991 s 62(5)(b)). 'Prescribed' means prescribed by regulations under s 65 (see PARA 583): s 72(1). As to the provision made see the Internal Drainage Boards (Acquisition of New Interests and Rights) Regulations 1977, SI 1977/84, which continue to have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1.
- 13 See the Environment Act 1995 s 37(1)(b); Land Drainage Act 1991 s 63(1).
- 14 As to the restrictions on the disposal of land by the Agency see PARA 454.
- 15 For these purposes, a disposal of land is a disposal by way of a short tenancy if it consists of the grant of a term not exceeding seven years or the assignment of a term which at the date of the assignment has not more than seven years to run: Land Drainage Act 1991 s 63(4).
- 16 Land Drainage Act 1991 s 63(2).
- 17 Land Drainage Act 1991 s 63(3).
- 18 le by the Land Drainage Act 1991 ss 14-17 (see PARAS 589, 591, 597) and s 66 (see PARAS 605-607).
- 19 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.
- 20 Land Drainage Act 1991 s 62(2) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(10)). The provisions of the Land Drainage Act 1991 s 16(1) and (3) (exercise by county council of non-metropolitan district council powers) (see PARA 589) apply in relation to the powers conferred by this provision as they apply in relation to the powers conferred by s 14: s 62(2).

## UPDATE

### 609 Acquisition and disposal of land

NOTE 12--SI 1977/84 amended: SI 2009/1307.

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### **610. Accretion of land.**

If the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> certify that, as the result of:

- 1303 (1) any drainage<sup>3</sup> works carried out or improved or proposed to be carried out or improved by the Environment Agency<sup>4</sup> in connection with the tidal waters of a main river<sup>5</sup>; or
- 1304 (2) any drainage works transferred<sup>6</sup> from a drainage body<sup>7</sup> to the Agency<sup>8</sup>,

there has been or is likely to be any accretion of land<sup>9</sup>, the powers of the Agency<sup>10</sup>, for the purpose of carrying out its functions, to acquire land or any interest in or right over land by agreement or compulsorily include power so to acquire<sup>11</sup>:

- 1305 (a) the accretion of land or the land to which the accretion will, if it takes place, be added, together with any right to reclaim or embank the accretion<sup>12</sup>; and
- 1306 (b) such other land as is reasonably required for the purpose of reclamation of the accretion or for the enjoyment of it when reclaimed<sup>13</sup>.

Where the value of any land or right is increased by the carrying out or proposed carrying out of drainage works by the Agency, the amount of the increase is not to be taken into account in assessing the compensation in respect of its compulsory acquisition<sup>14</sup>.

Where, by reason of a certificate having been given by the Secretary of State or the Welsh Ministers under these provisions in relation to any drainage works, the Agency acquires any land or right and a grant has been made out of public money for defraying the cost or part of the cost of the carrying out of the works, the Agency must, on being so required by the Crown Estate Commissioners<sup>15</sup>, transfer the land or right to the Commissioners or to any person<sup>16</sup> nominated by them<sup>17</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 s 155, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the meaning of 'drainage' see PARA 573.

4 As to the Environment Agency see PARA 17.

5 Water Resources Act 1991 s 155(1)(a) (s 155 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the meaning of 'main river' see PARA 574.

6 Ie in pursuance of the Water Resources Act 1991 or the Land Drainage Act 1991.

- 7 As to the meaning of 'drainage body' see PARA 575 note 4: definition applied by the Water Resources Act 1991 s 155(7).
- 8 Water Resources Act 1991 s 155(1)(b) (as amended: see note 5).
- 9 As to the meaning of 'land' see PARA 14 note 21. As to accretion see PARA 39.
- 10 le by virtue of the Water Resources Act 1991. As to the powers concerned see PARAS 453, 609.
- 11 Water Resources Act 1991 s 155(1) (as amended: see note 5). An agreement or order with respect to the acquisition of any land or rights by virtue of s 155 may provide for the transfer to the Agency of any liability for the upkeep, maintenance and repair of any bank or drainage work or of any other like liability: s 155(3) (as so amended). As to the meaning of 'banks' see PARA 574 note 2: definition applied by s 155(7).
- 12 Water Resources Act 1991 s 155(2)(a).
- 13 Water Resources Act 1991 s 155(2)(b).
- 14 Water Resources Act 1991 s 155(4) (as amended: see note 5).
- 15 Water Resources Act 1991 s 155(5)(a). As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 280 et seq.
- 16 As to the meaning of 'person' see PARA 13 note 29.
- 17 Water Resources Act 1991 s 155(5) (as amended: see note 5). The Commissioners must pay to the Agency the sum paid by the Agency in respect of the acquisition of the land or right, together with the amount of any costs incurred by the Agency in connection with the acquisition: s 155(5)(b) (as so amended). If the Agency fails to transfer the land on being so required, the Secretary of State or, as appropriate, the Welsh Ministers may by a vesting order transfer the land or right to the Commissioners or to a person nominated by them: s 155(6) (as so amended). For this purpose, the Secretary of State or Welsh Ministers are a competent authority within the meaning of the Law of Property Act 1925 s 9 (see **REAL PROPERTY** vol 39(2) (Reissue) PARA 246): Water Resources Act 1991 s 155(6). As to grants to the Environment Agency see the Environment Act 1995 s 47; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 93.

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#### **(iv) Finance and Revenue**

##### **A. IN GENERAL**

##### **611. Financing of flood defence and land drainage expenditure.**

Whereas the other functions of the Environment Agency are mainly financed by direct charges<sup>1</sup>, the main source of finance for flood defence works is by way of levy on local authorities<sup>2</sup> and central government grants<sup>3</sup>. The Agency may also require contributions from internal drainage boards<sup>4</sup> and receive contributions from local authorities<sup>5</sup> or payments from other bodies in connection with arrangements for the carrying out of the Agency's flood defence functions<sup>6</sup>.

The Agency also has powers to raise a general drainage charge for the area of a local flood defence district<sup>7</sup> and a special drainage charge in respect of areas defined in a scheme for the carrying out of particular drainage works in the interest of agriculture<sup>8</sup>. It may recover expenses from owners of land in respect of schemes for the drainage of defined small areas<sup>9</sup> and receive central government grants for, inter alia, the improvement of existing works or the construction of new flood defence works<sup>10</sup>. Except for: (1) amounts set aside towards research or related activities or towards meeting the Agency's administrative expenses<sup>11</sup>; or (2) amounts to be paid by way of contribution towards expenses incurred by the Agency or any regional flood defence committee<sup>12</sup>, revenue raised by the Agency for flood defence purposes<sup>13</sup> in a local flood defence district must be spent only in the carrying out of the Agency's flood defence functions<sup>14</sup> in or for the benefit of the local flood defence district in which it was raised<sup>15</sup>. For this purpose, so much of the area of a regional flood defence committee as is in an area in relation to which no local flood defence scheme<sup>16</sup> is in force is to be treated as a single local flood defence district<sup>17</sup>.

On the other hand the expenses of internal drainage boards are met by drainage rates on agricultural hereditaments<sup>18</sup>, levies on local billing authorities<sup>19</sup> and contributions from the Agency<sup>20</sup>. An internal drainage board may receive grant-in-aid from central government towards expenditure incurred in carrying out drainage schemes<sup>21</sup>. A local authority and any other drainage body may receive a grant in the same way as an internal drainage board<sup>22</sup>. The land drainage expenses<sup>23</sup> of the council of a metropolitan district or London borough<sup>24</sup> are defrayed as general expenses, or, if and so far as the council thinks fit, as special expenses chargeable on such parts of the metropolitan district or borough as it thinks fit<sup>25</sup>.

1 As to the Environment Agency see PARA 17. As to the power of the Agency to impose charges see PARA 273 et seq. See also **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 97.

2 As to levies on local authorities for flood defence expenditure see PARA 612.

3 As to grants to the Environment Agency see the Environment Act 1995 s 47; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 93. In relation to Wales, the power to make such grants is exercisable by the Welsh Ministers free from the requirement for Treasury approval, but concurrently with any other Minister of the Crown by whom the power is exercisable: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4 As to internal drainage boards see PARA 569. As to contributions from and precepts on such boards see PARA 613.



5 As to contributions from local authorities see PARA 656. These contributions are at the discretion of the local authority and are not demanded by the Agency as a levy. Payments may also be made by a local authority on a transfer of liabilities from a local authority to the Agency: see PARA 575.

6 As to such payments see PARA 590. As part of its general powers to borrow money, the Environment Agency may borrow money required to meet its flood defence functions: see the Environment Act 1995 s 48; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 94.

7 As to such charges see PARA 614. As to local flood defence districts see PARA 559 et seq.

8 As to such charges see PARA 615 et seq.

9 As to such expenses see PARA 595.

10 As to the carrying out, and the meaning, of maintenance and improvement works see PARA 589.

11 Water Resources Act 1991 s 118(3)(a) (s 118 amended by the Environment Act 1995 s 120(1), Sch 22 paras 128, 150).

12 Water Resources Act 1991 s 118(3)(b) (as amended: see note 11). The contribution referred to is a contribution under arrangements made for the purposes of s 106(1)(b) (see PARA 573): s 118(3)(b) (as so amended). As to regional flood defence committees see PARA 559.

13 The revenue raised by the Agency in a local flood defence district: (1) by virtue of any regulations under the Local Government Finance Act 1988 s 74 (power to issue levies: see PARA 612); (2) by general drainage charges under the Water Resources Act 1991 ss 134, 135 (see PARA 614); (3) by special drainage charges under ss 137, 138 (see PARAS 615, 618); or (4) by contributions required under s 139(1) (see PARA 613): s 118(2) (as amended: see note 11). Any amount specified in a resolution under the Land Drainage Act 1991 s 58(1)(b) (see PARA 613) in relation to any local flood defence district (allocation of revenue in lieu of contributions) is treated for these purposes as if it were revenue actually raised by contributions required under the Water Resources Act 1991 s 139(1) (see PARA 613): s 118(4). Additionally, the following sums, ie: (a) any sums held by the Agency by virtue of any transfer of property, rights or liabilities from a water authority in accordance with a scheme under the Water Act 1989 s 4(1)(b), Sch 2 (see PARA 108), in so far as those sums represent amounts which the water authority was required by virtue of the Water Act 1973 Sch 3 para 31 (repealed) to spend only in the discharge of its land drainage functions in or for the benefit of a particular local land drainage district; and (b) any sums raised by the Agency in a flood defence district by virtue of a precept issued under the Land Drainage Act 1976 s 46 (repealed), are treated as revenue raised by the Agency as mentioned in heads (1)-(4) above in the corresponding local flood defence district or, as the case may be, in that local flood defence district: Water Resources Act 1991 s 118(5) (as so amended).

14 As to the meaning of 'flood defence functions' see PARA 573 note 18.

15 Water Resources Act 1991 s 118(1)(a) (as amended: see note 11). Such revenue is disregarded in determining the amount of any surplus for the purposes of the Environment Act 1995 s 44(4) (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 90): Water Resources Act 1991 s 118(1)(b) (as so amended).

16 As to local flood defence schemes see PARA 563 et seq.

17 Water Resources Act 1991 s 118(6).

18 As to drainage rates see PARA 627 et seq.

19 As to such levies see PARA 633.

20 As to these contributions see PARA 613.

21 As to these grants see PARA 639.

22 See PARA 639.

23 The expenses of the council under the Land Drainage Act 1991 or under the flood defence provisions of the Water Resources Act 1991: see the Land Drainage Act 1991 s 61(1). As to the meaning of 'flood defence provisions' see PARA 20 note 2: definition applied by s 61(2).

24 As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq.

25 Land Drainage Act 1991 s 61(1). This provision is expressed to be subject to any express provision to the contrary contained in the Land Drainage Act 1991 or in the Water Resources Act 1991 Pt VI Ch II (ss 125-145): Land Drainage Act 1991 s 61(1). As to financing the expenditure of local authorities see further PARA 641.

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## **612. Levies on local authorities.**

For the purposes of its flood defence functions<sup>1</sup>, the Environment Agency<sup>2</sup> is a levying body<sup>3</sup> within the meaning of the Local Government Finance Act 1988<sup>4</sup>. In order to meet its expenses<sup>5</sup> in respect of a local flood defence district<sup>6</sup>, the Agency may issue a levy to a local council<sup>7</sup> in respect of any financial year<sup>8</sup>. A levy must be issued before 15 February in the financial year preceding that in respect of which it is issued, but is not invalid merely because it is issued on or after that date<sup>9</sup>. A levy is subject to a prescribed maximum amount<sup>10</sup>.

The Agency must secure that such of its expenses in respect of a flood defence district as are to be met by levies so issued are borne by the local councils, if more than one, in a proportion to be determined by reference to the council tax base<sup>11</sup> for the financial year in question for the area of each local council or part which falls within that district<sup>12</sup>. The qualifying expenses to be apportioned among the relevant local authorities in respect of a local flood defence district for any financial year are ascertained by deducting from the relevant expenditure<sup>13</sup> any amount defrayed out of any reserve fund, replacement fund or sinking fund and any amount of income not derived from the levies issued to those authorities and adding any amount required by way of new working capital<sup>14</sup>.

If the Agency has issued a levy in respect of a flood defence district for a financial year it may issue a levy in substitution, provided that the amount of the new levy is not greater than the amount of the levy for which it is substituted<sup>15</sup>. Where, however, the old levy has been quashed because of a failure to fulfil the apportionment requirements<sup>16</sup>, the amount of the new levy may be greater than the amount of the old to the extent that is necessary to enable those requirements to be fulfilled<sup>17</sup>. If the amount of the old levy exceeds that of the new levy, the amount in excess must be repaid if the local council by which it was paid so requires<sup>18</sup>. In any other case, the amount in excess must either be repaid or credited against any subsequent liability of the local council in respect of any levy issued by the Agency<sup>19</sup>.

A local council to which a levy is issued in respect of a financial year must pay the amount of that levy<sup>20</sup> to the Agency in that financial year at such time and in such instalments (if any) as may be agreed between the Agency and the council or, in default of such agreement, at the prescribed<sup>21</sup> times<sup>22</sup>.

A local council which is a billing authority<sup>23</sup> or a county or county borough council may, in making calculations<sup>24</sup> for a financial year, anticipate a levy to be issued to it for the year by the Agency in any case where such a levy has not been issued by the Agency to that authority at the time the calculations are made, and the Agency issued a levy for the preceding financial year<sup>25</sup>.

1 As to the meaning of 'flood defence functions' see PARA 573 note 18.

2 As to the Environment Agency see PARA 17. As to other sources of income for these functions see PARA 611.

3 Ie within the meaning of the Local Government Finance Act 1988 s 74 (power to make regulations authorising a levying body to issue a levy: see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 530); and s 74 has effect accordingly: Water Resources Act 1991 s 133.

4 Water Resources Act 1991 s 133 (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The Environment Agency (Levies) Regulations 1993, SI 1993/61, have been made: see the text to notes 5-25. See

also the Water Authority Expenses (Limitation of Precepts) Order 1980, SI 1980/2017 (amended by the Water Act 1989 s 136(2), Sch 15 para 1(1), 18; and by the Environment Act 1995 Sch 22 para 233(1)) which are preserved for the purpose of, or in connection with, what are now the Environment Agency (Levies) Regulations 1993, SI 1993/61, by the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 2(5).

5 'Expenses' of the Environment Agency for a financial year means qualifying expenses ascertained in accordance with the Land Drainage Act 1976 s 45(2) (repealed with savings: see note 10), the reference in that section to sums received otherwise than by virtue of s 46 being taken as a reference to sums received otherwise than by virtue of any levy issued under the Environment Agency (Levies) Regulations 1993, SI 1993/61: reg 1(2) (the Environment Agency (Levies) Regulations 1993, SI 1993/61, amended in their entirety by the Environment Act 1995 s 120, Sch 22 para 233(1)). The Environment Agency (Levies) Regulations 1993, SI 1993/61, apply in relation to any expenses of the Environment Agency or levy in respect of any financial year beginning on or after 1 April 1993: reg 2 (as so amended).

6 le a local flood defence district created by a scheme under what is now the Environment Act 1995 s 17 (see PARA 563) or which is treated as such by virtue of the Water Resources Act 1991 s 134(3) (see PARA 614) or continues to be so treated under the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 14(1): Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 1(2); Interpretation Act 1978 s 17(2)(a).

7 'Local council', in relation to a local flood defence district, means the council of any county, county borough, metropolitan district or London borough any part of whose area is comprised in that district and, if any part of the City of London is comprised in that district, the Common Council of the City of London: Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 1(2) (definition amended by virtue of the Local Government (Wales) Act 1994 ss 1-3). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

8 See the Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 3(1) (as amended: see note 5). When issuing such a levy to a local council, the Agency must notify the council whether the levy or any portion of it relates to part only of the council's area and, if it does, which part: reg 3(2) (as so amended).

9 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 4(1), (2). This does not apply to a substituted levy issued in accordance with reg 8 (see the text to notes 15-19): reg 4(3).

10 A levy so issued is subject to the provisions of the Land Drainage Act 1976 s 46(5)-(7) (ss 45-47, 89, 110 repealed with savings by the Water Consolidation (Consequential Provisions) Act 1991 ss 2(2), 3(1), Sch 2 para 2(5), Sch 3 Pt I): see the Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 5(1) (as amended: see note 5). The aggregate amount for which levies may be issued for any one financial year to a local authority may not, unless special consent has been obtained, exceed the amount for the financial year determined for the relevant area in accordance with the prescribed provisions: see reg 5(1), (3) (as so amended); Land Drainage Act 1976 s 46(5), (6) (as so repealed). As to the prescribed provisions see the Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 5(2), (4) (reg 5(2) as so amended). 'Special consent' means a consent given (1) in the case of a local flood defence district with a local flood defence committee, by a majority of the whole number of the local authority members of that committee; and (2) in the case of any other local flood defence district, by a majority of the whole number of those of the local authority members of the regional flood defence committee who were appointed to that committee by or on behalf of constituent councils any part of whose area is in the district: s 46(7) (as so repealed; amended by virtue of the Water Act 1989 s 136(2), Sch 15 para 1(1)(d) (repealed)). The Agency is under a duty to prepare a statement of the purposes to which the amount demanded by any levy is intended to be applied, and for the basis on which it is calculated; and a local authority is not liable to pay the amount demanded by any such precept until it has received such a statement: see the Land Drainage Act 1976 s 46(8) (as so repealed; amended by virtue of the Environment Act 1995 ss 1-3; and by virtue of SI 1993/61).

11 The council tax base is, where the levy is issued in respect of: (1) the whole of the area of a billing authority which is a local council, the amount calculated by that authority as its council tax base for the year in accordance with the rules for the time being effective as regards that year under regulations made under the Local Government Finance Act 1992 s 33(5); (2) the whole of the area of a county or county borough council, the aggregate of the amounts calculated by the billing authorities to which that council has power to issue precepts as their council tax bases for the year for their areas in accordance with the rules for the time being effective as regards that year under regulations made under s 44(5); (3) part of the area of a billing authority which is a local council, the amount calculated by that authority as its council tax base for the year for that part of its area in accordance with the rules for the time being effective as regards that year under regulations made under s 34(4); or (4) part of the area of a county council, the aggregate of the amounts calculated by the billing authorities to which the county council has power to issue precepts as their council tax bases for the year for their areas, or, as the case may require, for the parts of their areas falling within the part of the area of the county council to which the levy relates, in accordance with the rules for the time being effective as regards that year under regulations made under s 45(4): Environment Agency (Levies) Regulations 1993, SI 1993/61,

reg 6(3). Where, however, a billing authority has calculated and, where required, notified to a county council within the prescribed period its council tax base for certain purposes set out in the Local Government Finance Act 1992 s 33(1), 44(1), 34(3) or 45(3), the council tax base is the amount so calculated: see the Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 6(4). See further **LOCAL GOVERNMENT** vol 69 (2009) PARA 1 et seq; **RATING AND COUNCIL TAX**.

12 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 6(1), (2) (reg 6(1) as amended: see note 5). A billing authority which is a local council, or to which a county or county borough council which is a local council for these purposes has power to issue a precept, must, within the period beginning on 1 December and ending on 31 January in each financial year, inform the Agency of its council tax base for its area or the part or parts of its area in respect of which a levy will be issued or it anticipates that a levy will be issued in the immediately following financial year: reg 7(1)-(3) (reg 7(1), (3) as so amended).

13 'Relevant expenditure' in relation to any local flood defence district, means expenditure by the Agency in the performance of its flood defence functions in or for the benefit of that district, including an appropriate proportion of the Agency's administrative expenses and of the expenses of its research and related activities: Land Drainage Act 1976 s 45(3) (as repealed with savings and amended: see note 10).

14 See the Land Drainage Act 1976 s 45(2) (as repealed with savings and amended: see note 10). The Agency's other income may include income from drainage charges and contributions from internal drainage boards: see PARA 613 et seq.

15 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 8(1), (2) (reg 8(1) as amended: see note 5).

16 Ie the requirements of the Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 6: see the text to notes 11-12.

17 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 8(3). Where the Agency issues a new levy, anything paid to it by reference to the old levy is treated as paid by reference to the new levy: reg 8(4) (as amended: see note 5).

18 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 8(5)(a).

19 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 8(5)(b) (as amended: see note 5).

20 For these purposes, references to payment of a levy are references to the payment of a levy after the deduction of any amount credited against the liability of the local council in respect of that levy in accordance with the Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 8(5)(b) (see the text to note 19): reg 9(2).

21 Ie by four equal instalments due on 1 May, 1 July, 1 October and 1 January in the financial year or, if the levy is issued after 30 April in the financial year, by equal instalments or by a single payment due on as many of those dates as remain after the date of issue of the levy or, if none so remain, by a single payment due 30 days after that date of issue: Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 9(1)(b)(i), (ii).

22 Environment Agency (Levies) Regulations 1993, SI 1993/61, reg 9(1)(a), (b) (as amended: see note 5).

23 As to local billing authorities see the Local Government Finance Act 1992 s 1; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 5.

24 Ie in accordance with the Local Government Finance Act 1992 s 32 or s 43, as the case may be: see further **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 262.

25 See the Environment Agency (Levies) Regulations 1993, SI 1993/61, regs 10, 11 (both as amended: see note 5).

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### **613. Contributions by and to internal drainage boards.**

The Environment Agency<sup>1</sup> must by resolution require every internal drainage board<sup>2</sup> to make towards the Agency's expenses such contribution as the Agency considers to be fair<sup>3</sup>. Unlike the calculation of levies on relevant local authorities<sup>4</sup>, the legislation does not provide any statutory formula for the calculation of such contributions; but where an internal drainage district<sup>5</sup> (the 'main internal drainage district') comprises two or more other internal drainage districts ('minor internal drainage districts'), the Agency must not require the board of the main internal drainage district to contribute, except in respect of such part of the district as is not situated within any minor internal drainage district<sup>6</sup>. The Agency may, however, require the board of the main internal drainage district to pay direct to it an amount equal to the aggregate of the contributions which the Agency has determined should be made by the boards of the minor districts<sup>7</sup>, in which case the board of the main district must raise the amount so paid to the Agency by means of drainage rates<sup>8</sup> levied by that board within, or special levies issued in respect of, the main district or such part of it as is situated within a minor district<sup>9</sup>. A resolution may be acted upon by the Agency forthwith, notwithstanding that the time for bringing an appeal<sup>10</sup> has not expired or that an appeal so brought is pending<sup>11</sup>.

Where, on the other hand, it appears to an internal drainage board that, by reason of the quantity of water which its district receives from lands at a higher level<sup>12</sup>, or by reason of the period that will elapse before its district obtains any relief from the operations of the Agency on a main river<sup>13</sup>, it is fair that a contribution towards its expenses should be made by the Agency, it may apply to the Agency for a contribution<sup>14</sup>, and the Agency may resolve to make to the board such contribution, if any, as may be specified in the resolution<sup>15</sup>. Such a resolution may be acted upon by the Agency forthwith, notwithstanding that the period for bringing an appeal<sup>16</sup> has not expired or that an appeal so brought is pending<sup>17</sup>.

If an internal drainage board is aggrieved by a resolution of the Agency determining the amount of a contribution<sup>18</sup> or refusing to make a contribution<sup>19</sup>, or if a county, county borough or London borough council is aggrieved by such a resolution on the ground that the amount of a contribution required from a board is inadequate<sup>20</sup> or that a contribution to be made to the board by the Agency is excessive<sup>21</sup>, the board or council may appeal to the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>22</sup>. On such an appeal the relevant minister may, after considering any objections made to him and, if he thinks fit, holding a public local inquiry<sup>23</sup>, make such an order in the matter as he thinks just<sup>24</sup>. Where the Agency has acted on a resolution<sup>25</sup> and an appeal is brought in respect of the resolution, the relevant minister must by his order direct such adjustment to be made in respect of any sums recovered or paid in pursuance of the resolution as may be necessary for giving effect to his decision<sup>26</sup>.

The Agency may issue precepts to internal drainage boards requiring payment of any amount required to be contributed<sup>27</sup> by those boards<sup>28</sup>, and a board must pay any amount so demanded<sup>29</sup>. The Agency must prepare in a prescribed form<sup>30</sup> a statement of the purposes to which the amount demanded is intended to be applied<sup>31</sup> and of the basis on which it is calculated<sup>32</sup>, and the board is not liable to pay the amount until it has received such statement<sup>33</sup>.

Where the Agency is the drainage board for an internal drainage district by virtue of a scheme for reorganisation of districts<sup>34</sup> or of an order for transfer of functions<sup>35</sup>, the Agency may by

resolution specify the amount of any contribution which, if it were not the internal drainage board, it would make to<sup>36</sup> or require from<sup>37</sup> that board under the above provisions<sup>38</sup>. Where an amount is so specified then, according to whether it is specified in respect of a contribution to or from a board, expenses incurred by the Agency as the drainage board for the internal drainage district in question must, to the extent of that amount, be defrayed out of revenue received by the Agency otherwise than as that board<sup>39</sup>, or expenses incurred by the Agency as such must be defrayed out of sums received by it as that board<sup>40</sup>. Where a sufficient number of qualified persons<sup>41</sup> or the council of any county, county borough or London borough is aggrieved by such a resolution<sup>42</sup>, by the amount specified in such a resolution<sup>43</sup>, or by the failure to pass such a resolution<sup>44</sup>, they or it may appeal to the relevant minister<sup>45</sup> who may, after considering any objections made to him, make such order in the matter as he thinks just<sup>46</sup>.

1 As to the Environment Agency see PARA 17.

2 As to internal drainage boards see PARA 569.

3 Water Resources Act 1991 s 139(1) (ss 139-141 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

4 See PARA 612.

5 As to internal drainage districts see PARA 569 et seq.

6 Water Resources Act 1991 s 139(2) (as amended: see note 3).

7 See the Water Resources Act 1991 s 139(3) (as amended: see note 3).

8 As to drainage rates see PARA 626 et seq.

9 Water Resources Act 1991 s 139(4) (as amended: see note 3). As to special levies see PARA 633.

10 Ie under the Water Resources Act 1991 s 140: see the text to notes 18-26.

11 Water Resources Act 1991 s 139(5) (as amended: see note 3). This provision is expressed to be without prejudice to s 140(3) (see the text to notes 25-26): s 139(5) (as so amended).

12 Land Drainage Act 1991 s 57(1)(a).

13 Land Drainage Act 1991 s 57(1)(b) (ss 57, 58 amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to the meaning of 'main river' see PARA 574.

14 Land Drainage Act 1991 s 57(1) (as amended: see note 13).

15 Land Drainage Act 1991 s 57(2) (as amended: see note 13).

16 Ie under the Land Drainage Act 1991 s 57(4): see the text to note 22.

17 Land Drainage Act 1991 s 57(3) (as amended: see note 13).

18 See the Land Drainage Act 1991 s 57(4)(a) (as amended: see note 13); Water Resources Act 1991 s 140(1)(a) (as amended: see note 3). The contribution referred to is one under the Land Drainage Act 1991 s 57 (see the text to notes 12-14) or, as the case may be, the Water Resources Act 1991 s 139 (see the text to notes 1-11).

19 Ie under the Land Drainage Act 1991 s 57 (see the text to notes 12-14): s 57(4)(a).

20 Water Resources Act 1991 s 140(1)(b) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(3)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq.

21 Land Drainage Act 1991 s 57(4)(b) (amended by the Local Government (Wales) Act 1994 Sch 11 para 4(8)).

22 Land Drainage Act 1991 s 57(4) (as amended: see note 13); Water Resources Act 1991 s 140(1) (as amended: see note 3). As to the meaning of 'relevant minister' for the purposes of the Land Drainage Act 1991, and as to the transfer of functions under that Act to the Welsh Ministers, see PARA 569 note 9. For the purposes of the Water Resources Act 1991 ss 140, 141 the 'relevant minister' means: (1) in relation to an internal drainage district wholly in Wales or the drainage board for such a district, the Secretary of State; (2) in relation to an internal drainage district partly in Wales or the drainage board for such a district, the ministers; and (3) in any other case, the minister: ss 140(5), 141(5). As to 'the minister' and 'the ministers', and as to the meaning of the Secretary of State, see PARA 15 note 1. The functions of a Minister of the Crown under the Water Resources Act 1991 ss 140, 141 (except any function of the Minister of Agriculture, Fisheries and Food (see PARA 15 note 1) as the 'relevant minister'), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

The appeal must be made within six weeks of the Agency's notice of its resolution to the board: Water Resources Act 1991 s 140(1) (as so amended); Land Drainage Act 1991 s 57(4) (as so amended).

23 As to local inquiries under the Land Drainage Act 1991 see PARA 657.

24 Land Drainage Act 1991 s 57(5); Water Resources Act 1991 s 140(2). Where the Secretary of State makes such an order, he must lay before Parliament particulars of the matter in respect of which the appeal was made and of the reasons for his order: Land Drainage Act 1991 s 57(7); Water Resources Act 1991 s 140(4). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. In the case of an order made by the Welsh Ministers it must be laid before the National Assembly for Wales: see the Government of Wales Act 2006 s 86; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

Compliance with the order may be enforced by a mandatory order: Land Drainage Act 1991 s 57(8); Water Resources Act 1991 s 140(5) (both amended by virtue of the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, art 3). As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

25 Ie by virtue of the Land Drainage Act 1991 s 57(3) (see the text to notes 16-17) or the Water Resources Act 1991 s 139(5) (see the text to notes 10-11).

26 Land Drainage Act 1991 s 57(6) (as amended: see note 13); Water Resources Act 1991 s 140(3) (as amended: see note 3).

27 Ie under the Water Resources Act 1991 s 139: see the text to notes 1-11.

28 Water Resources Act 1991 s 141(1) (as amended: see note 3).

29 See the Water Resources Act 1991 s 141(2). Compliance with any precept so issued by the Agency may be enforced by a mandatory order: s 141(4) (as amended: see note 3; and further amended by virtue of the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, art 3).

30 Ie in such form as the relevant minister may direct: Water Resources Act 1991 s 141(3). For the prescribed form see the Water Authorities (Precepts to Internal Drainage Boards) Regulations 1974, SI 1974/375, which have effect under the Water Resources Act 1991 s 112 (see PARA 583) by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(3); and of the Environment Act 1995 s 120(1), Sch 22 para 233.

31 Water Resources Act 1991 s 141(3)(a) (as amended: see note 3).

32 Water Resources Act 1991 s 141(3)(b) (as amended: see note 3).

33 Water Resources Act 1991 s 141(3) (as amended: see note 3).

34 Ie a scheme under Land Drainage Act 1991 s 3: see PARA 578.

35 Ie an order under the Land Drainage Act 1991 s 4: see PARA 579.

36 Ie under the Land Drainage Act 1991 s 57: see the text to notes 12-15.

37 Ie under the Water Resources Act 1991 s 139: see the text to notes 1-11.



38 Land Drainage Act 1991 s 58(1) (as amended: see note 13). The Agency must publish any such resolution in one or more newspapers circulating in the internal drainage district in question: s 58(3) (as so amended).

39 Land Drainage Act 1991 s 58(2)(a) (as amended: see note 13).

40 Land Drainage Act 1991 s 58(2)(b) (as amended: see note 13).

41 As to the meaning of 'qualified persons' see PARA 577 note 3.

42 Land Drainage Act 1991 s 58(4)(a) (as amended: see note 13).

43 le whether on the ground that it is too small or on the ground that it is too large: Land Drainage Act 1991 s 58(4)(b). The county, county borough or London borough council could be liable to meet a greater amount by way of levy if the amount is too low; as to levies see PARA 612.

44 Land Drainage Act 1991 s 58(4)(c).

45 Land Drainage Act 1991 s 58(4) (amended by the Local Government (Wales) Act 1994 Sch 11 para 4(9)). Such an appeal, other than an appeal on the ground that the Agency has failed to pass a resolution, must be made within six weeks after the date on which the Agency published the resolution in respect of which it is made: Land Drainage Act 1991 s 58(5) (as amended: see note 13).

46 Land Drainage Act 1991 s 58(6). The relevant minister's order must be treated as an order on an appeal under s 57(5) or, as the case may require, under the Water Resources Act 1991 s 140: Land Drainage Act 1991 s 58(7). It is thus enforceable by a mandatory order: see note 24.

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#### **614. Raising of general drainage charge.**

The Environment Agency<sup>1</sup> may raise and levy<sup>2</sup> on occupiers of chargeable land in a local flood defence district<sup>3</sup> a charge to be known as a general drainage charge at an amount per hectare of that land<sup>4</sup>. 'Chargeable land' means the agricultural land<sup>5</sup> and agricultural buildings<sup>6</sup> in so much of the area of a regional flood defence committee<sup>7</sup> as does not fall within an internal drainage district<sup>8</sup>, excluding rough grazing land<sup>9</sup> and woodlands other than commercial woodlands<sup>10</sup>. The Agency may not, however, raise a general drainage charge in respect of any local flood defence district unless the regional flood defence committee for the area in which that district is situated has recommended that such a charge should be raised<sup>11</sup>, and where no local flood defence scheme<sup>12</sup> is in force in the area of a regional flood defence committee, that area is to be treated as a single local flood defence district<sup>13</sup>.

A general drainage charge raised by the Agency for a local flood defence district for any year must be at a uniform amount per hectare<sup>14</sup> of chargeable land in that district<sup>15</sup>, and is ascertained by multiplying the relevant quotient<sup>16</sup> by one penny and by such number as may be specified by order made by either the Secretary of State or, in relation to Wales, the Welsh Ministers for that purpose<sup>17</sup>.

1 As to the Environment Agency see PARA 17.

2 Ie in accordance with the Water Resources Act 1991 s 135: see the text to notes 14-17.

3 As to local flood defence districts see PARA 559 et seq.

4 Water Resources Act 1991 s 134(1), Sch 15 para 3(1)(a) (ss 134, 135, Sch 15 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

5 'Agricultural land' means: (1) land used as arable, meadow or pasture ground only; (2) land used for a plantation or a wood or for the growth of saleable underwood; and (3) land exceeding 0.10 hectare used for the purpose of poultry farming, market gardens, nursery grounds, orchards or allotments, including allotment gardens within the meaning of the Allotments Act 1922 (see s 22(1); and **AGRICULTURAL LAND** vol 1 (2008) PARA 510), but does not include land occupied together with a house as a park, gardens (other than as mentioned above) or pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse: Water Resources Act 1991 s 145. A broiler house is not agricultural land: *Gilmore (Valuation Officer) v Baker-Carr* [1962] 3 All ER 230, [1962] 1 WLR 1165, CA.

6 The Water Resources Act 1991 s 145 applies the definition of 'agricultural buildings' contained in the General Rate Act 1967 s 26(4) (repealed). As to agricultural buildings for the purposes of non-domestic rating under the Local Government Finance Act 1988 see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 45 et seq. Cf, however, the Land Drainage Act 1991 s 72(1); and PARA 627 note 6. A broiler house is not an agricultural building: *Gilmore (Valuation Officer) v Baker-Carr* [1962] 3 All ER 230, [1962] 1 WLR 1165, CA.

7 As to regional flood defence committees see PARA 559.

8 As to internal drainage districts see PARA 569.

9 'Rough grazing land' means land of either of the following descriptions, ie: (1) land used as pasture ground on which the vegetation consists solely or mainly of one or more of bracken, gorse, heather, rushes and sedge; or (2) land so used which is unsuitable for mowing by machine and on which the vegetation consists solely or mainly of grass of poor feeding value: Water Resources Act 1991 s 145.

10 Water Resources Act 1991 s 145. 'Commercial woodlands' means woodlands managed on a commercial basis with a view to the realisation of profits: s 145.

11 Water Resources Act 1991 s 134(2) (as amended: see note 4).

12 As to local flood defence schemes see PARA 563.

13 Water Resources Act 1991 s 134(3). Any parts of such an area in relation to which no local flood defence scheme is in force are treated as included in a single such district: s 134(3).

14 Where the area of chargeable land in respect of which a sum is payable by any person by way of a drainage charge consists of or includes a fraction of a hectare, then for the purpose of calculating that sum the fraction is disregarded if it is less than one-half and treated as one hectare in any other case: Water Resources Act 1991 Sch 15 para 7(2). The sum payable by way of a drainage charge in respect of chargeable land consisting of commercial woodlands is calculated as if the area of the land were one-fifth of its actual area (Sch 15 para 8(1)); and in the application of Sch 15 para 7(2) to such land, the area so ascertained, and not the area of which it is one-fifth, is treated as the area in relation to which Sch 15 para 7(2) has effect (Sch 15 para 8(2)). As to the meaning of 'person' see PARA 13 note 29.

15 Water Resources Act 1991 s 135(1) (as amended: see note 4).

16 'Relevant quotient' means a quotient determined for the year concerned in accordance with rules contained in regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers: s 135(7) (added by the Local Government Finance Act 1992 s 117(1), Sch 13 para 96(3)). As to the making of regulations see PARA 21. As to the regulations made see the General Drainage Charges (Relevant Quotient) Regulations 1993, SI 1993/165. The functions of the Secretary of State under the Water Resources Act 1991 s 135, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

17 Water Resources Act 1991 s 135(2) (amended by the Local Government Finance Act 1992 s 117(2), Sch 13 para 96(1), Sch 14). The number specified in such an order for these purposes, apart from any adjustment made to it to take account of rough grazing land, must be such as the Secretary of State or, as the case may be, the Welsh Ministers consider will secure that, so far as reasonably practicable, the aggregate amount produced by any charge levied by reference to a relevant quotient will be equal to the aggregate amount which, if the chargeable land in the local flood defence district had been liable to be rated in the financial year beginning in 1989, would have been produced by a rate levied on the land at an amount in the pound (of rateable value) equal to that quotient multiplied by one penny: see the Water Resources Act 1991 s 135(3) (amended by the Local Government Finance Act 1992 Sch 13 para 96(2), Sch 14). An order may be made so as to apply either to all general drainage charges or to the general drainage charges proposed to be raised in any one or more specified local flood defence districts, and any such order applying to more than one local flood defence district may make different provision as respects the different districts to which it applies: Water Resources Act 1991 s 135(4). The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 135(6). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. At the date at which this title states the law, no such order of general application had been made. Orders of local application only are not recorded in this work. As to the raising and levying of the charges see PARAS 619-620.

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### **615. Power to make scheme for raising a special drainage charge.**

Where it appears to the Environment Agency<sup>1</sup> that the interests of agriculture<sup>2</sup> require the carrying out, improvement or maintenance of drainage<sup>3</sup> works in connection with any watercourses<sup>4</sup> in the area of any regional flood defence committee<sup>5</sup>, the Agency may submit a scheme with respect to those watercourses to the Secretary of State<sup>6</sup> or, in relation to Wales, the Welsh Ministers<sup>7</sup> for confirmation<sup>8</sup>. Such a scheme with respect to any watercourses is a scheme: (1) designating those watercourses and any watercourses connected with them<sup>9</sup>; and (2) making provision for the raising<sup>10</sup> of a charge, known as a 'special drainage charge', for the purpose of meeting the expenses of drainage works<sup>11</sup> in connection with the designated watercourses and any expenses arising from such works<sup>12</sup>.

A scheme must designate so much of the area of the regional flood defence committee as consists of land which, in the Agency's opinion, is agricultural land that would benefit from drainage works in connection with the designated watercourses<sup>13</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'agriculture' see PARA 209 note 20. Cf, however, the statutory definition of 'agricultural land' in s 145: see PARA 614 note 5.

3 As to the meaning of 'drainage' see PARA 573. As to the carrying out, maintenance or improvement of drainage works see PARA 589.

4 As to the meaning of 'watercourse' see PARA 573 note 10: definition applied by the Water Resources Act 1991 s 137(8).

5 As to regional flood defence committees see PARA 559.

6 As to the Secretary of State see PARA 15 note 1.

7 The functions of the Secretary of State under the Water Resources Act 1991 s 137, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

8 Water Resources Act 1991 s 137(1) (s 137(1), (3) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). Such a scheme may provide for any of the matters referred to in the Water Resources Act 1991 s 108(1), (2) (see PARA 575) (s 137(5)(a)); and may provide for the revocation or amendment of, and for the retransfer of property rights, powers, duties, obligations and liabilities transferred by, any previous such scheme (s 137(5)(b)). As to submission of the scheme see PARA 616; and as to confirmation of the scheme, and the right to challenge the making of the scheme, see PARA 617.

9 Water Resources Act 1991 s 137(2)(a).

10 In accordance with the Water Resources Act 1991 s 138: see PARA 618.

11 For these purposes, the reference to expenses of drainage works is a reference to expenses incurred in the construction, improvement or maintenance of drainage works: Water Resources Act 1991 s 137(7)(a). The expenses of any drainage works which may be necessary in consequence of other drainage works, and so much

of any contribution made to an internal drainage board under the Land Drainage Act 1991 s 57 (see PARA 613) as is fairly attributable to such expenses, are deemed to be expenses arising from these other drainage works: Water Resources Act 1991 s 137(7)(b). The expenses of any drainage works are taken, without prejudice to s 221(5) (see PARA 131 note 6), to include a proper proportion of the cost of the officers and buildings and establishment of the body carrying them out: s 137(7)(c).

12 Water Resources Act 1991 s 137(2)(b).

13 Water Resources Act 1991 s 137(3) (as amended: see note 8).

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#### **616. Submission of special charges scheme.**

Before submitting a special charges scheme<sup>1</sup> to either the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup>, the Environment Agency<sup>4</sup> must consult<sup>5</sup> organisations appearing to it to represent the interests of persons<sup>6</sup> engaged in agriculture<sup>7</sup> in the area designated in the scheme<sup>8</sup>. As soon as any special charges scheme has been so submitted, the Agency must send copies of the scheme to the council of any county, county borough, district or London borough wholly or partly within the relevant area<sup>9</sup>, the drainage board for any internal drainage district<sup>10</sup> within the relevant area<sup>11</sup>, and every organisation appearing to the Agency to represent the interests of persons engaged in agriculture in that area<sup>12</sup>. The Agency must also publish, in one or more newspapers circulating in the area affected by the scheme, a notice stating that the scheme has been so submitted<sup>13</sup>, that a copy of it is open to inspection at a specified place<sup>14</sup>, and that representations with respect to the scheme may be made to the Secretary of State or, as the case may be, the Welsh Ministers at any time within one month<sup>15</sup> after the publication of the notice<sup>16</sup>.

Where the Agency submits a special charges scheme which designates any watercourse<sup>17</sup> wholly or partly within an internal drainage district, then, unless the Agency is the drainage board for that district<sup>18</sup>, the scheme must be accompanied either by a statement of the drainage board for that district that it has consented to the designation<sup>19</sup>, or by a statement that it has not consented and a further statement setting out the reasons why the watercourse should nevertheless be designated for the purposes of such a scheme<sup>20</sup>.

1 'Special charges scheme' means a scheme under the Water Resources Act 1991 s 137 (see PARA 615): Sch 16 para 10(1).

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 s 137, Sch 16, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 As to the Environment Agency see PARA 17.

5 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

6 As to the meaning of 'person' see PARA 13 note 29.

7 As to the meaning of 'agriculture' see PARA 209 note 20.

8 Water Resources Act 1991 Sch 16 para 1(1) (Sch 16 para 1 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

9 Water Resources Act 1991 Sch 16 para 1(2)(a)(i) (as amended: see note 8; further amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(10)(a)). The 'relevant area' is the area designated in the scheme: Water Resources Act 1991 Sch 16 para 1(4). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq.

- 10 As to internal drainage boards and internal drainage districts see PARA 569.
- 11 Water Resources Act 1991 Sch 16 para 1(2)(a)(ii).
- 12 Water Resources Act 1991 Sch 16 para 1(2)(a)(iii) (as amended: see note 8).
- 13 Water Resources Act 1991 Sch 16 para 1(2)(b)(i).
- 14 Water Resources Act 1991 Sch 16 para 1(2)(b)(ii).
- 15 As to the meaning of 'month' see PARA 23 note 10.
- 16 Water Resources Act 1991 Sch 16 para 1(2)(b)(iii).
- 17 As to the meaning of 'watercourse' see PARA 573 note 10: definition applied by the Water Resources Act 1991 Sch 16 para 10(2).
- 18 As to the Environment Agency as a drainage board see PARA 579.
- 19 Water Resources Act 1991 Sch 16 para 1(3)(a) (Sch 16 para 1(3) as amended: see note 8).
- 20 Water Resources Act 1991 Sch 16 para 1(3)(b).

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### **617. Confirmation of special charges scheme.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> to whom a special charges scheme<sup>3</sup> has been submitted<sup>4</sup> may by order<sup>5</sup> confirm the scheme either with or without modifications<sup>6</sup>. However, neither the Secretary of State nor the Welsh Ministers may confirm a scheme unless satisfied that it is reasonable and financially sound, having regard to all the circumstances, particularly to any contributions from local authorities<sup>7</sup> and internal drainage boards<sup>8</sup> which are likely to be available to the Environment Agency<sup>9</sup> if the scheme is confirmed, in addition to the special drainage charge authorised by the scheme<sup>10</sup>.

Before either the Secretary of State or the Welsh Ministers makes an order confirming a special charges scheme they must cause notice of the intention to make it<sup>11</sup> to be published in the London Gazette and in such other manner as they think best adapted for informing persons affected<sup>12</sup>. The notice must also be sent to certain specified bodies<sup>13</sup>. Before making an order confirming the scheme, the Secretary of State or the Welsh Ministers must consider any objections duly made to the draft order<sup>14</sup>, and may, in any case, cause a public local inquiry to be held in any case with respect to any objections to the draft order<sup>15</sup>. In making a confirming order each of them has power to make such modifications in the terms of the draft as appear to them to be desirable<sup>16</sup>.

After either the Secretary of State or the Welsh Ministers have made an order confirming a special charges scheme, the order must be published (together with a notice that the order has been made<sup>17</sup>), in such manner as they think best adapted for informing the persons affected<sup>18</sup>.

As soon as may be after an unconfirmed order<sup>19</sup> has effect, the Secretary of State or, as appropriate, the Welsh Ministers must publish<sup>20</sup> a notice stating that it has come into force<sup>21</sup> and naming a place where a copy of it may be seen at all reasonable hours<sup>22</sup>. If any person aggrieved<sup>23</sup> by an unconfirmed order desires to question its validity on the grounds that it is not within the powers of the Water Resources Act 1991<sup>24</sup>, or that any requirement of the Act has not been complied with<sup>25</sup>, he may make application to the High Court<sup>26</sup>. If the court is satisfied that the order is not within the statutory powers or that the applicant's interests have been substantially prejudiced by any statutory requirements not having been complied with, the court may quash the order either generally or in so far as it affects the applicant<sup>27</sup>. Subject to these provisions, such an order may not at any time be questioned in any legal proceedings whatsoever<sup>28</sup>.

The Secretary of State or the Welsh Ministers may make regulations in relation to the publication of notices under the above provisions, the holding of public local inquiries thereunder and procedure at those inquiries, and any other matters of procedure respecting the making of orders confirming a special charges scheme<sup>29</sup>.

If the scheme is confirmed, the watercourses<sup>30</sup> designated in it are treated<sup>31</sup> as part of a main river<sup>32</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Resources Act 1991 Sch 16, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see



PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 As to the meaning of 'special charges scheme' see PARA 616 note 1.

4 As to submission of the scheme see PARA 616.

5 An order must be made by statutory instrument: see Water Resources Act 1991 Sch 16 para 2(1).

6 Water Resources Act 1991 Sch 16 para 2(1). As to the meaning of 'modifications' see PARA 141 note 20.

7 As to the meaning of 'local authority' see PARA 187 note 2.

8 As to internal drainage boards see PARA 569.

9 As to the Environment Agency see PARA 17.

10 Water Resources Act 1991 Sch 16 para 2(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). An order confirming a special charges scheme may contain provisions with respect to the persons by whom all or any of the expenses incurred by either the Secretary of State or the Welsh Ministers or by other persons in connection with the making or confirmation of the order, or the making of the scheme, are to be borne: Water Resources Act 1991 Sch 16 para 2(3). As to the meaning of 'person' see PARA 13 note 29.

11 Water Resources Act 1991 Sch 16 para 3(1)(a). The notice must state the place where copies of the draft order may be inspected and obtained (Sch 16 para 3(1)(b)) and the period within which, and the manner in which, objections to the draft order may be made (Sch 16 para 3(1)(c)).

12 Water Resources Act 1991 Sch 16 para 3(1).

13 Water Resources Act 1991 Sch 16 para 3(1). The specified bodies are: (1) every county council, county borough council or London borough council in whose area any part of the area proposed to be affected by the order is situated and, if any part of that area is situated in the City of London, the Common Council of the City of London (Sch 16 para 3(2)(a) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(10) (b)); and (2) the Agency and every drainage body and navigation, harbour or conservancy authority known to the Secretary of State or, as the case may be, the Welsh Ministers to be exercising jurisdiction within the area proposed to be affected by the order (Water Resources Act 1991 Sch 16 para 3(2)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to the meaning of 'drainage body' see PARA 573 note 15: definition applied by the Water Resources Act 1991 Sch 16 para 3(3). As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

14 Water Resources Act 1991 Sch 16 para 4(1)(a).

15 Water Resources Act 1991 Sch 16 para 4(1)(b).

16 Water Resources Act 1991 Sch 16 para 4(2). Orders made under these provisions, being of local effect, are not recorded in this work.

17 Water Resources Act 1991 Sch 16 para 5(2)(a). The notice must also state that the order will become final and have effect unless, in respect of an order made by the Secretary of State, within such period of not less than 30 days as may be specified in the notice, a request that the order be subject to special parliamentary procedure is presented to him by a person who is affected by the order and has such interest as may be prescribed by regulations made by the Secretary of State as being sufficient for the purpose: see Sch 16 para 5(2)(b). As to the making of regulations see PARA 21. As to the regulations made see the Land Drainage (River Authorities) General Regulations 1965, SI 1965/443, reg 6 (amended by virtue of the Environment Act 1995 Sch 22 para 233(1)) which regulations have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. As to Parliamentary procedures in relation to orders made by the Welsh Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

18 Water Resources Act 1991 Sch 16 para 5(1). If no request that the order be subject to special parliamentary procedure has been made within the specified period in respect of any order confirming a special charges scheme, or every such request has been withdrawn, the Secretary of State must confirm the order and it thereupon has effect: see Sch 16 para 6(1). If such a request has been made in respect of such an order and

has not been withdrawn, the order is subject to special parliamentary procedure: see Sch 16 para 6(2). An order confirming a special charges scheme must in any event be subject to special parliamentary procedure if the Secretary of State so directs: see Sch 16 para 6(3). Where the Secretary of State makes an order confirming a special charges scheme, he may, at any time before it has been laid before Parliament, revoke, either wholly or partially, any order that is subject to special parliamentary procedure: see Sch 16 para 6(4).

19 'Unconfirmed order' means an order confirming a special charges scheme, other than one which is itself confirmed under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARA 926): Water Resources Act 1991 Sch 16 para 10(1).

20 In the London Gazette and in such other manner as the Secretary of State or the Welsh Ministers think best adapted for informing persons affected: see the Water Resources Act 1991 Sch 16 para 7.

21 Water Resources Act 1991 Sch 16 para 7(a).

22 Water Resources Act 1991 Sch 16 para 7(b).

23 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664. See also *Cook v Southend Borough Council* [1990] 2 QB 1, [1990] 1 All ER 243, CA.

24 Water Resources Act 1991 Sch 16 para 8(1)(a).

25 Water Resources Act 1991 Sch 16 para 8(1)(b).

26 Water Resources Act 1991 Sch 16 para 8(1). The application must be made within six weeks of the relevant date: Sch 16 para 8(1). The 'relevant date', in relation to an order, means: (1) where the order is subject to special parliamentary procedure, the date on which the order becomes operative under the Statutory Orders (Special Procedure) Act 1945; (2) where the order is not subject to special parliamentary procedure, the date of the publication of the notice mentioned in Sch 16 para 7 (see the text to notes 19-22): Sch 16 para 8(5). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

27 Water Resources Act 1991 Sch 16 para 8(2). Except by leave of the Court of Appeal, no appeal lies to the House of Lords from a decision of the Court of Appeal in such proceedings: Sch 16 para 8(3). As from a day to be appointed this provision is amended to read: Except by leave of the Court of Appeal, no appeal lies to the Supreme Court from a decision of the Court of Appeal in such proceedings: Sch 16 para 8(3) (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 55). At the date at which this volume states the law no such day had been appointed.

28 Water Resources Act 1991 Sch 16 para 8(4). As to judicial review of decisions expressed in this way to be immune from challenge see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

29 Water Resources Act 1991 Sch 16 para 9. At the date at which this volume states the law no such regulations had been made.

30 As to the meaning of 'watercourse' see PARA 573 note 10: definition applied by the Water Resources Act 1991 s 137(8).

31 In for the purposes of the Water Resources Act 1991 and of the Land Drainage Act 1991.

32 Water Resources Act 1991 s 137(4). As to the meaning of 'main river' see PARA 574. As to powers to do work on a main river see PARA 589. On confirmation of the scheme, the Secretary of State or the Welsh Ministers must take action with regard to the amendment of the main river map: see s 194(3)(b); and PARA 574.

## UPDATE

### 617 Confirmation of special charges scheme

NOTE 27--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/9. FLOOD DEFENCE, LAND DRAINAGE, AND DAMAGE BY WATER/(2) FLOOD DEFENCE AND LAND DRAINAGE/(iv) Finance and Revenue/A. IN GENERAL/618. Levying and amount of special drainage charge.

### **618. Levying and amount of special drainage charge.**

A special drainage charge<sup>1</sup> must be levied by the Environment Agency<sup>2</sup> on the occupiers of chargeable land<sup>3</sup> included in the area designated for the purposes of the charge by the scheme authorising it<sup>4</sup>.

The special drainage charge raised for any year must be at a uniform amount per hectare<sup>5</sup> of the relevant chargeable land<sup>6</sup> as determined by the regional flood defence committee<sup>7</sup> for the area, but must not exceed the amount specified in the scheme as the maximum amount of the charge or any greater amount authorised by an order for the purposes of the scheme made by the Secretary of State<sup>8</sup> or, in relation to Wales, the Welsh Ministers<sup>9</sup> on the application of the Agency<sup>10</sup>. In addition the amount of the charge is subject to a general limit of 25 pence per hectare or such other amount as may be substituted by an order duly made<sup>11</sup>.

1 As to special drainage charges see PARA 614.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'chargeable land' see PARA 614.

4 Water Resources Act 1991 s 138(1) (s 138(1), (3) amended by the Environment Act 1995 Sch 22 para 128). This land is referred to as the 'relevant chargeable land': Water Resources Act 1991 s 138(1).

5 As to the treatment of fractions of a hectare and the assessment of the area of commercial woodlands see PARA 614 note 14.

6 Water Resources Act 1991 s 138(2).

7 As to regional flood defence committees see PARA 559.

8 As to the Secretary of State see PARA 15 note 1.

9 The functions of the Secretary of State under the Water Resources Act 1991 s 138, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

10 Water Resources Act 1991 s 138(3)(a) (as amended: see note 4). Before making such an order, the Secretary of State or, as the case may be, the Welsh Ministers: (1) must consult with such of the associations and persons concerned as the Secretary of State or the Welsh Ministers consider appropriate (s 138(4)(a)); (2) must cause a notice of the intention to make the order and of the time, which must not be less than 30 days, within which objections to the proposed order may be made, to be published in such manner as the Secretary of State or the Welsh Ministers think best adapted for informing persons affected (s 138(4)(b)); (3) if the Secretary of State or the Welsh Ministers consider it necessary, may afford persons affected an opportunity of being heard by a person appointed for the purpose (s 138(4)(c)); and (4) must consider the report of the person so appointed and any objections duly made (s 138(4)(d)). See also note 11. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. As to the meaning of 'person' see PARA 13 note 29. Such orders, being of local effect, are not recorded in this work.

11 See the Water Resources Act 1991 s 138(3)(b). The order must be made by the Secretary of State or, as appropriate the Welsh Ministers; and if made by the Secretary of State, it is subject to approval by a resolution of the House of Commons: s 138(3)(b). Such an order may be made so as to apply: (1) to special drainage

charges in general (s 138(5)(a)); or (2) to those proposed to be raised in respect of specified areas of regional flood defence committees (s 138(5)(b)); or (3) to those proposed to be raised in pursuance of one or more specified schemes made under s 137 (see PARAS 615-617) (s 138(5)(c)). Any such order applying to the charges proposed to be raised in respect of more than one area of a regional flood defence committee, or authorised by more than one such scheme, may make different provision for the charges in respect of different areas or the charges authorised by the different schemes, as the case may be: s 138(5). The power of the Secretary of State or the Welsh Ministers to make such an order is exercisable by statutory instrument; and the Interpretation Act 1978 s 14 (power to revoke or amend orders made by statutory instrument: see **STATUTES** vol 44(1) (Reissue) PARA 1526) applies to the power to make orders under the Water Resources Act 1991 s 138(3)(a) (see note 10) as it applies, by virtue of this provision, to the power to make orders under s 138(3)(b): see s 138(6). At the date at which this volume states the law no such orders of general application had been made. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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### **619. Raising and publication of drainage charges.**

A drainage charge<sup>1</sup> is raised by the Environment Agency<sup>2</sup> in writing<sup>3</sup> under the Agency's common seal<sup>4</sup>, and is deemed to be raised on the date on which the resolution authorising the fixing of the common seal is passed<sup>5</sup>. The charge is for a year ending on 31 March and must be raised before or during the year for which it is raised<sup>6</sup>. The charge is not valid unless notice of it is given, within ten days of the date on which it is raised<sup>7</sup>, in one or more newspapers circulating in the area in respect of which the charge was raised stating its amount and the date on which it was raised<sup>8</sup>.

1 'Drainage charge' means a general drainage charge (see PARA 614) or a special drainage charge (see PARA 615): Water Resources Act 1991 s 145.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'writing' see PARA 22 note 1.

4 Water Resources Act 1991 Sch 15 para 1(1)(a) (Sch 15 para 1 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

5 Water Resources Act 1991 Sch 15 para 1(1)(b) (as amended: see note 4). As to liability for drainage charges and provisions relating to the payment and recovery of such charges see PARAS 620-625.

6 See the Water Resources Act 1991 Sch 15 para 1(2). Without prejudice to their powers by virtue of s 112 (flood defence regulations: see PARA 583), the Secretary of State or, in relation to Wales, the Welsh Ministers each have power by regulations to prescribe the forms of drainage charges and of demands for drainage charges: see Sch 15 para 1(3). As to the making of regulations see PARA 21. By virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2), the General Drainage Charges (Forms) Regulations 1990, SI 1990/564, have effect as if so made. For the prescribed form of general drainage charge see the General Drainage Charges (Forms) Regulations 1990, SI 1990/564, reg 2, Schedule, Form 1 (amended by the Environment Act 1995 s 120, Sch 22 para 233(1)); and for the prescribed form of demand for such a charge see reg 3, Schedule, Form 2 (as so amended). No form is currently prescribed for special drainage charges.

The functions of the Secretary of State under the Water Resources Act 1991 Sch 15, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

7 Water Resources Act 1991 Sch 15 para 2(1).

8 See the Water Resources Act 1991 Sch 15 para 2(2).

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## **620. Incidence and demand of drainage charges.**

A drainage charge<sup>1</sup> is assessed on the person<sup>2</sup> who at the date of the raising of the charge<sup>3</sup> is the occupier of the relevant land<sup>4</sup>, and the full amount of the charge may be recovered by the Environment Agency from any person who is the occupier<sup>5</sup> of that land at any time during the period for which the charge is raised<sup>6</sup>. A person who is in occupation of the land for part only of that period is liable to bear a proportionate part only of the charge<sup>7</sup>; and if he is required to pay the full amount of the charge, he may (subject to any agreement to the contrary) recover from any other person who has been in occupation of the land for part of that period the amount which that other person is liable to bear<sup>8</sup>. Where the land is chargeable land<sup>9</sup> during part only of the year for which a drainage charge is raised, a proportionate part only of the charge is payable in respect of that land and any amount overpaid must be repaid<sup>10</sup>. During any period when the land is unoccupied, the owner is deemed to be the occupier and is liable accordingly<sup>11</sup>.

In any case where the amount of a drainage charge is insufficient to justify the expense of collection, the Agency is not required to demand or enforce payment<sup>12</sup>.

The Agency may make such amendments in any demand or other documents relating to a drainage charge raised by it for the current or preceding year as appear to it to be necessary in order to make the raising, levying and collection of the charge conform with the Water Resources Act 1991<sup>13</sup>. A notice of any such amendment must be served<sup>14</sup> by the Agency on the occupier of all land affected by the amendment<sup>15</sup>.

1 As to the meaning of 'drainage charge' see PARA 619 note 1.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the date of raising the charge see PARA 619. Where the name of any person liable to be assessed to any drainage charge is not known to the Environment Agency, it is sufficient to assess him to the charge by the description of the 'occupier' of the named premises in respect of which the assessment is made, without further name or description: Water Resources Act 1991 Sch 15 para 4(4) (Sch 15 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to the Environment Agency see PARA 17.

4 Water Resources Act 1991 Sch 15 para 3(1)(b), (2).

5 As to the owner's duty to state the name and address of any occupier see PARA 623.

6 Water Resources Act 1991 Sch 15 para 3(1)(b), (3) (as amended: see note 3). As to the period for the raising of drainage charges see PARA 619. As to the recovery of arrears of charges see PARA 621. As to appeals against demands for drainage charges see PARA 625.

7 Water Resources Act 1991 Sch 15 para 3(1)(b), (3).

8 Water Resources Act 1991 Sch 15 para 3(1)(b), (4).

9 As to the meaning of 'chargeable land' see PARA 614.

10 Water Resources Act 1991 Sch 15 para 7(1).

11 Water Resources Act 1991 Sch 15 para 4(5). As to the meaning of 'owner' see PARA 22 note 9.

12 Water Resources Act 1991 Sch 15 para 12(4) (as amended: see note 3).

13 Water Resources Act 1991 Sch 15 para 10(1) (as amended: see note 3). In particular, the Agency may: (1) correct any clerical or arithmetical error; (2) correct any erroneous insertions or omissions or any misdescriptions; and (3) make such additions or corrections on a change of occupation or on any property ceasing to be chargeable land as appear to the Agency to be necessary: Sch 15 para 10(2)(a)-(c) (as so amended). Where an amendment is made in pursuance of these provisions, any amount overpaid must be repaid and any amount underpaid may be recovered as if it were arrears of the charge: Sch 15 para 10(4).

14 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

15 See the Water Resources Act 1991 Sch 15 para 10(3) (as amended: see note 3).

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## **621. Recovery of drainage charges.**

Arrears of any drainage charge<sup>1</sup> may be recovered by the Environment Agency<sup>2</sup> in the same manner in which arrears of a non-domestic rate may be recovered under the Local Government Finance Act 1988 by a billing authority<sup>3</sup>. In proceedings for the recovery of arrears of a drainage charge the defendant is not entitled to raise by way of defence any matter which might have been raised on an appeal<sup>4</sup> against the demand<sup>5</sup>.

1 As to the meaning of 'drainage charge' see PARA 619 note 1.

2 As to the Environment Agency see PARA 17.

3 Water Resources Act 1991 Sch 15 para 12(1) (amended by the Local Government Finance Act 1992 s 117(1), Sch 13 para 98; Environment Act 1995 s 120(1), Sch 22 para 128). The procedure referred to is that under the Local Government Finance Act 1988: see generally **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 170 et seq.

Without prejudice to its powers under the Environment Act 1995 s 37 and Sch 1 para 6 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 69), the Environment Agency may by resolution authorise any member or officer of the Agency, either generally or in respect of particular proceedings, to institute or defend on its behalf any proceedings in relation to a drainage charge or to appear on its behalf, notwithstanding that he is not qualified to act as a solicitor, in any proceedings before a magistrates' court for the issue of a warrant of distress for failure to pay a drainage charge: Water Resources Act 1991 Sch 15 para 12(2) (amended by the Environment Act 1995 Sch 22 paras 128, 187(2)). As from a day to be appointed this provision is amended so as to refer to a 'warrant of control' in place of a 'warrant of distress': Water Resources Act 1991 Sch 15 para 12(2) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 para 99). At the date at which this volume states the law no such day had been appointed. The resolution must be passed before the proceedings are begun: *Bowyer, Philpott and Payne Ltd v Mather* [1919] 1 KB 419, DC. As to possible ratification of proceedings issued by a local authority's duly constituted solicitors cf *Warwick RDC v Miller-Mead* [1962] Ch 441 at 451, [1962] 1 All ER 212 at 215, CA.

4 ie on an appeal under the Water Resources Act 1991 Sch 15 para 11: see PARA 625.

5 Water Resources Act 1991 Sch 15 para 12(3).



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## **622. Agreements for assessment and recovery of drainage charges.**

The Environment Agency<sup>1</sup> and any relevant authority<sup>2</sup> may enter into agreements for the doing by that authority, as agent of the Agency, of anything required for the purpose of the assessment to and recovery of a drainage charge<sup>3</sup> in respect of any relevant land<sup>4</sup>; and for the making of payments by the Agency to that authority in respect of anything so done<sup>5</sup>.

1 As to the Environment Agency see PARA 17.

2 'Relevant authority' means the council of any district or London borough or Welsh county or county borough, or any internal drainage board: Water Resources Act 1991 Sch 15 para 13(4) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 3(9)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to internal drainage boards see PARA 569.

3 As to the meaning of 'drainage charge' see PARA 619 note 1. As to the assessment of drainage charges see PARA 620. As to the recovery of such charges see PARA 621.

4 Water Resources Act 1991 Sch 15 para 13(1)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128). 'Relevant land', in relation to an agreement with any relevant authority, means: (1) where the relevant authority is a district or London borough or Welsh county or county borough council, the chargeable land within the council's area; and (2) where the relevant authority is an internal drainage board, such land as may be specified in the agreement: Water Resources Act 1991 Sch 15 para 13(4) (as amended: see note 2). As to the meaning of 'chargeable land' see PARA 614.

5 Water Resources Act 1991 Sch 15 para 13(1)(b) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

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### **623. Information.**

The Environment Agency<sup>1</sup> may serve on the owner<sup>2</sup> of any land<sup>3</sup> a notice<sup>4</sup> requiring him to state in writing<sup>5</sup> the name and address of any person<sup>6</sup> known to him as being the occupier<sup>7</sup> of that land<sup>8</sup>. The Agency may also serve on any person appearing to it to be the occupier of any land a notice requiring him to furnish, within 28 days beginning with the date of service of the notice on him, a return<sup>9</sup> in writing, and in such form as specified in the notice, containing particulars reasonably required for determining how much, if any, of the land occupied by him is chargeable land<sup>10</sup> and how much, if any, consists of commercial woodlands<sup>11</sup>.

Any person who: (1) fails without reasonable excuse to comply with the requirements of any such notice<sup>12</sup>; or (2) makes any statement in response to such a notice which he knows to be false in a material particular<sup>13</sup>; or (3) recklessly makes any statement in response to such a notice which is false in a material particular<sup>14</sup>, is guilty of an offence<sup>15</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'owner' see PARA 22 note 9.

3 As to the meaning of 'land' see PARA 14 note 21.

4 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

5 As to the meaning of 'writing' see PARA 22 note 1.

6 As to the meaning of 'person' see PARA 13 note 29.

7 For the purposes of the Water Resources Act 1991 Sch 15 the owner of any land is deemed to be its occupier during any period during which it is unoccupied: Sch 15 para 4(5).

8 Water Resources Act 1991 Sch 15 para 4(1) (Sch 15 paras 4, 9, 13 amended by the Environment Act 1995 s 120(1), Sch 22 para 128). The provisions of the Water Resources Act 1991 Sch 15 para 4(1)-(3) are without prejudice to the provisions of Pt VIII (ss 188-206) (information provisions: see PARA 178 et seq): Sch 15 para 4(6).

9 Water Resources Act 1991 Sch 15 para 9(1) (as amended: see note 8). The provisions of Sch 15 para 9 are without prejudice to the provisions of Pt VIII (ss 188-206) (information provisions: see PARA 178 et seq): Sch 15 para 9(5).

10 See the Water Resources Act 1991 Sch 15 para 9(2)(a). As to the meaning of 'chargeable land' see PARA 614.

11 Water Resources Act 1991 Sch 15 para 9(2)(b) (Sch 15 para 9(2) as amended: see note 8). As to the meaning of 'commercial woodlands' see PARA 614 note 10. The Agency may make arrangements with the Secretary of State or, in relation to Wales, the Welsh Ministers for the exercise by them of these powers: see Sch 15 para 13(2) (as so amended). Any such arrangements must contain provision for the reimbursement by the Agency of any expenses incurred by the Secretary of State or the Welsh Ministers in pursuance of the arrangements: see Sch 15 para 13(3) (as so amended). The functions of the Secretary of State under the Water Resources Act 1991 Sch 15, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

- 12 See the Water Resources Act 1991 Sch 15 paras 4(2)(a), 9(3)(a).
- 13 See the Water Resources Act 1991 Sch 15 paras 4(2)(b), 9(3)(b).
- 14 See the Water Resources Act 1991 Sch 15 paras 4(2)(c), 9(3)(c).
- 15 See the Water Resources Act 1991 Sch 15 paras 4(2), 9(3). The penalty for any such offence is, on summary conviction, a fine not exceeding level 4 on the standard scale: Sch 15 paras 4(3), 9(4). A person convicted by virtue of head (1) in the text is liable to a further conviction by virtue of that head if, after conviction, he continues without reasonable excuse to fail to comply with the notice in question: see Sch 15 paras 4(3), 9(4) (both amended by the Environment Act 1995 Sch 22 para 187(1)).

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#### **624. Arrangements for payment of drainage charges by owners.**

The Environment Agency<sup>1</sup> may make arrangements with the owner<sup>2</sup> of any chargeable land<sup>3</sup> for any drainage charges<sup>4</sup> which may be raised by the Agency for any period in respect of the land to be levied on the owner instead of on the occupier of the land<sup>5</sup>.

The Agency must make an allowance<sup>6</sup> of 10 per cent of the full amount of the charge to an owner who pays drainage charges in pursuance of any such arrangements, if the payment is made either within two months<sup>7</sup> beginning with the date of the service on him of the demand for the charges<sup>8</sup> or before the expiration of one-half of the period for which the charges are raised<sup>9</sup>. The owner who is a party to any such arrangements in respect of the land may recover from the occupier of the land a sum equal to the amount of any drainage charges in respect of the land which, apart from the arrangements, would be payable by the occupier<sup>10</sup>.

The Agency must give notice<sup>11</sup> of any arrangements forthwith after they are made to the occupier of the land affected by them<sup>12</sup>. The occupier of any chargeable land may, by notice<sup>13</sup> given to the Agency, determine (1) that no arrangements under the above provisions must be made in respect of the land<sup>14</sup>; and (2) that any such arrangements previously made must cease to have effect so far as they relate to the land and any drainage charge to be raised for a period beginning after the date on which the notice takes effect<sup>15</sup>. The occupier may also, by a notice so given, revoke any such determination so far as it prohibits the making of any such arrangements in respect of the land<sup>16</sup>. Where any such notice making or revoking a determination<sup>17</sup> is given to the Agency, it is the duty of the Agency to send a copy of the notice to the owner of the land to which it relates<sup>18</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the meaning of 'owner' see PARA 22 note 9.

3 As to the meaning of 'chargeable land' see PARA 614.

4 As to the meaning of 'drainage charge' see PARA 619 note 1. As to the raising of drainage charges see PARA 619.

5 Water Resources Act 1991 Sch 15 para 5(1) (Sch 15 paras 5, 6 amended by the Environment Act 1995 Sch 22 para 128). Where such arrangements are made, the charges in question must be levied on the owner, instead of on the occupier (Water Resources Act 1991 Sch 15 para 5(2)(a)); and any reference to an occupier in Sch 15 (except in Sch 15 paras 5, 6) is to be construed as a reference to the owner (Sch 15 para 5(2)(b)). As to the meaning of 'occupier' generally see PARA 339 note 8.

6 No such allowance may be made in respect of charges which are otherwise payable for any period by the owner in pursuance of the Water Resources Act 1991 Sch 15 para 4(5) (see PARA 620): Sch 15 para 5(4).

7 As to the meaning of 'month' see PARA 23 note 10.

8 See the Water Resources Act 1991 Sch 15 para 5(3)(a) (as amended: see note 5).

9 See the Water Resources Act 1991 Sch 15 para 5(3)(b) (as amended: see note 5).

10 Water Resources Act 1991 Sch 15 para 5(6). The owner can thus recover the full amount from the occupier and has the benefit of the 10% allowance.

11 As to the meaning of 'notice' see PARA 22 note 1. As to the service of documents see PARA 22.

- 12     Water Resources Act 1991 Sch 15 para 5(5) (as amended: see note 5).
- 13     A notice under the Water Resources Act 1991 Sch 15 para 6(1) takes effect on the day following that on which it is given to the Agency: Sch 15 para 6(2) (as amended: see note 5).
- 14     Water Resources Act 1991 Sch 15 para 6(1)(a) (as amended: see note 5).
- 15     Water Resources Act 1991 Sch 15 para 6(1)(b) (as amended: see note 5).
- 16     Water Resources Act 1991 Sch 15 para 6(1) (as amended: see note 5). See also note 13.
- 17     In any notice under the Water Resources Act 1991 Sch 15 para 6(1): see the text to notes 13-16.
- 18     Water Resources Act 1991 Sch 15 para 6(3) (as amended: see note 5).

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## **625. Appeals against demands for drainage charges.**

If any person is aggrieved<sup>1</sup> by a demand for a drainage charge<sup>2</sup> made on him as the occupier<sup>3</sup> of chargeable land<sup>4</sup>, or an amendment of such a demand<sup>5</sup>, he may appeal to the county court for the area in which the land or any part of it is situated<sup>6</sup>. On such an appeal, the court may confirm the demand or annul or modify it, as it thinks just<sup>7</sup>.

1 As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664. See also *Cook v Southend Borough Council* [1990] 2 QB 1, [1990] 1 All ER 243, CA.

2 As to the meaning of 'drainage charge' see PARA 619 note 1. As to demands for drainage charges see PARA 620.

3 As to the meaning of 'occupier' see PARA 339 note 8. See also PARA 624 note 5.

4 Water Resources Act 1991 Sch 15 para 11(1)(a). As to the meaning of 'chargeable land' see PARA 614.

5 Water Resources Act 1991 Sch 15 para 11(1)(b). As to the amendment of demands see PARA 620.

6 Water Resources Act 1991 Sch 15 para 11(1). Notice of appeal, specifying the grounds of appeal, must be given within 28 days after the date on which the demand is made or notice of the amendment is served on the appellant, to the court, the Environment Agency, and also, if the appeal relates to land not in the occupation of the appellant, to the occupier of the land: Sch 15 para 11(2), (3) (Sch 15 para 11(2) amended by the Environment Act 1995 s 120(1), Sch 22 para 128). As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq. As to the Environment Agency see PARA 17.

7 Water Resources Act 1991 Sch 15 para 11(4).

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## ***B. FINANCES OF INTERNAL DRAINAGE BOARDS***

### **626. Register of drainage hereditaments.**

It is the duty of an internal drainage board<sup>1</sup> for each internal drainage district<sup>2</sup> to prepare in the prescribed form<sup>3</sup> and within the prescribed period<sup>4</sup>, or such longer period as the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>5</sup> may allow in any particular case, a register containing the prescribed information<sup>6</sup> in respect of the drainage hereditaments in that district<sup>7</sup>, and a map showing the prescribed particulars<sup>8</sup> of those hereditaments of a prescribed description<sup>9</sup>.

It is also the duty of an internal drainage board for each internal drainage district to maintain the register and map so prepared<sup>10</sup>, and to alter either of them in prescribed circumstances<sup>11</sup> within the prescribed period and in the prescribed manner<sup>12</sup>. The board must keep the register and map maintained by it in pursuance of these provisions open to inspection at prescribed places<sup>13</sup> by members of the public at all reasonable times<sup>14</sup>.

1 As to internal drainage boards see PARA 569.

2 As to internal drainage districts see PARA 569.

3 'Prescribed' means prescribed by regulations under the Land Drainage Act 1991 s 65 (see PARA 583): s 72(1). As to the prescribed form of the register see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, reg 5(1), (2). The Registers of Drainage Boards Regulations 1968, SI 1968/1672, continue to have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2).

4 The register and map must be prepared in the shortest period which is reasonably practicable: see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, reg 3.

5 As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

6 For the prescribed information see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, reg 5(3)-(8), Schedule.

7 Land Drainage Act 1991 s 52(1)(a). There is no statutory definition of 'hereditament' for these purposes; for its meaning for the purposes of non-domestic rating see the Local Government Finance Act 1988 s 64: and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 33.

8 For the prescribed form of map and the particulars to be included see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, reg 6.

9 Land Drainage Act 1991 s 52(1)(b). As to the divisions of the register and the particulars of properties to be included in each part see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, reg 4.

10 Land Drainage Act 1991 s 52(2)(a).

11 These circumstances include the alteration of the boundaries of an internal drainage district, decisions and adjustments relating to valuation, lodging of appeals and other changes: see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, regs 8-15.

12 See the Land Drainage Act 1991 s 52(2)(b). As to the manner of making alterations see the Registers of Drainage Boards Regulations 1968, SI 1968/1672, regs 16-18.

13 The register and map must be kept open to inspection at the office of the internal drainage board, the address of which is shown on demands for drainage rates sent by the board: Registers of Drainage Boards Regulations 1968, SI 1968/1672, reg 7. As to the raising of drainage rates see PARA 627 et seq.

14 Land Drainage Act 1991 s 52(3).

## **UPDATE**

### **626 Register of drainage hereditaments**

NOTE 11--SI 1968/1672 reg 13 amended: SI 2009/1307.



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## **627. Raising of drainage rates.**

In so far as the expenses<sup>1</sup> of an internal drainage board<sup>2</sup> for an internal drainage district<sup>3</sup> are not met by contributions from the Environment Agency<sup>4</sup>, they are raised by means of drainage rates on agricultural land<sup>5</sup> and agricultural buildings<sup>6</sup>, or special levies issued by the board under and in accordance with regulations made under the Local Government Finance Act 1988<sup>7</sup>.

The proportion of the expenses of an internal drainage board to be raised from the proceeds of drainage rates must be equal to the agricultural proportion of land values<sup>8</sup> in the internal drainage district determined for the financial year in question in accordance with the following provisions<sup>9</sup>. The proportion of the expenses of the board to be raised from the proceeds of special levies must be such as to raise the balance of the expenses of the board remaining after deduction of the amount to be raised for that year from the proceeds of drainage rates<sup>10</sup>. In order to determine these proportions every internal drainage board for an internal drainage district must, before 15 February in each year, determine in respect of the financial year beginning on the following 1 April:

- 1307 (1) the aggregate annual value of the chargeable properties<sup>11</sup> in the internal drainage district; and
- 1308 (2) the aggregate value of all other land<sup>12</sup> in that district,

and the agricultural proportion for any financial year of land values in that district is the amount determined for that year under head (1) above divided by the sum of that amount and the amount determined for that year under head (2) above<sup>13</sup>. Such a determination must be made as at 31 December preceding the financial year in question<sup>14</sup>. The rate is made by the internal drainage board in writing<sup>15</sup> under its common seal<sup>16</sup> in respect of a financial year and, except in certain prescribed circumstances<sup>17</sup>, only one rate may be made in respect of a financial year<sup>18</sup>. The rate must be made before 15 February in the financial year preceding that in respect of which it is made but is not invalid merely because it is made on or after that date<sup>19</sup>.

Drainage rates are now levied on occupiers of agricultural properties<sup>20</sup>, and charges in respect of all non-agricultural properties are comprised in the special levy issued to local billing authorities<sup>21</sup>.

A drainage rate made by a drainage board is not valid unless the board gives notice of it within ten days of its being made<sup>22</sup> stating the amount of the rate<sup>23</sup>, the amounts of the board's expenses to be raised by means of drainage rates and special levies respectively<sup>24</sup>, and the date on which the rate was made<sup>25</sup>. The notice may be given by affixing it in one or more public or conspicuous places in the drainage district<sup>26</sup>, or by publication in one or more newspapers circulating in that district, as the board thinks fit<sup>27</sup>. Every drainage rate must be in the prescribed form<sup>28</sup>.

The board may at any time make such amendments in either the current or last preceding drainage rate as appear to the board to be necessary to make the rate conform with the statutory provisions<sup>29</sup>. It must serve notice of any such amendment on the occupier of any hereditament affected<sup>30</sup>. Where such an amendment is made, any amount overpaid must be

repaid or allowed and any amount underpaid may be recovered as if it were arrears of the rate<sup>31</sup>.

1 le under the Land Drainage Act 1991 or any other Act, including any contribution made towards the expenses of the Environment Agency: Land Drainage Act 1991 s 36(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to such contributions see PARA 613. As to the Environment Agency see PARA 17.

2 As to internal drainage boards see PARA 569.

3 As to internal drainage districts see PARA 569.

4 As to contributions from the Agency see PARA 613.

5 'Agricultural land' is: (1) land used as arable, meadow or pasture ground only; (2) land used for a plantation or a wood or for the growth of saleable underwood; (3) land exceeding 0.10 hectare used for the purpose of poultry farming; (4) anything which consists of a market garden, nursery ground, orchard or allotment, including an allotment garden within the meaning of the Allotments Act 1922 (see s 22(1); and **AGRICULTURAL LAND** vol 1 (2008) PARA 510); or (5) land occupied with, and used solely in connection with the use of, a building which, or buildings each of which, is an agricultural building (see note 6); but does not include land occupied together with a house as a park, gardens (other than market gardens) or pleasure grounds, or land used mainly or exclusively for purposes of sport or recreation, or land used as a racecourse: Local Government Finance Act 1988 s 51, Sch 5 para 2 (applied by the Land Drainage Act 1991 s 72(1)). A broiler house is not agricultural land: *Gilmore (Valuation Officer) v Baker-Carr* [1962] 3 All ER 230, [1962] 1 WLR 1165, CA. Cf the Water Resources Act 1991 s 145; and PARA 614 note 5.

6 A building is an 'agricultural building' if: (1) it is not a dwelling and it is occupied together with agricultural land and is used solely in connection with agricultural operations on the land, or it is or forms part of a market garden and is used solely in connection with agricultural operations as a market garden; (2) it is used solely in connection with agricultural operations carried on on agricultural land and is occupied either (a) by the occupiers of all the land concerned; or (b) by individuals each of whom is appointed by the occupiers of the land concerned to manage the use of the building and is an occupier of some of the land concerned or a member of the board of directors or other governing body of a person who is both a body corporate and an occupier of the land concerned, and in each case the number of occupiers of the land concerned is less than 25; (3) it (a) is used for the keeping or breeding of livestock; or (b) is not a dwelling, is occupied together with a building or buildings used for the keeping or breeding of livestock and is used in connection with the operations carried on in that building or those buildings; (4) it is not a dwelling, it is occupied by a person keeping bees and is used solely in connection with the keeping of those bees; (5) it is not a dwelling and it is used in connection with agricultural operations carried on on agricultural land and it is occupied by a body corporate any of whose members are, or are together with the body, the occupiers of the land, and the members who are occupiers of the land together have control of the body; or (6) it is not a dwelling and it is used in connection with the operations carried on in a building which, or buildings each of which, is used for the keeping or breeding of livestock and is an agricultural building by virtue of head (3) above and the Local Government Finance Act 1988 Sch 5 para 7(3)-(5) (see head (i), (ii) and (iii) below) apply as regards the building first mentioned in this head ('the building in question'): Sch 5 paras 4, 5(1), 6(1), 7(1), (2) (Sch 5 para 7 amended by the Housing and Local Government Act 1989 s 139, Sch 5 paras 1, 37(1), (2), 79(3); and by the Local Government Act 2003 s 67(1), (3)); the Local Government Finance Act 1988 Sch 5 paras 4-7 (as so amended) applied by the Land Drainage Act 1991 s 72(1). In connection with head (6) above: (i) the Local Government Finance Act 1988 Sch 5 para 7(3) (substituted by the Local Government Act 2003 s 67(1), (4)) applies if the building in question is occupied by a body corporate any of whose members are, or are together with the body, the occupiers of the building or buildings mentioned in head (5) above and the members who are occupiers of the land together have control of the body; (ii) the Local Government Finance Act 1988 Sch 5 para 7(4) applies if the building in question, and the building or buildings so used, are occupied by the same persons; and (iii) Sch 5 para 7(5) applies if the building in question is occupied by individuals each of whom is appointed by the occupiers of the building or buildings so used to manage the use of the building in question and is either an occupier of part of the building, or of part of one of the buildings, so used or is a member of the board of directors or other governing body of a person who is both a body corporate and an occupier of the building or buildings so used: Sch 5 para 7(3)-(5) (as so amended and applied). As to the meaning of 'person' see PARA 13 note 29. Heads (ii) and (iii) above do not apply unless the number of occupiers of the building or buildings used for the breeding or keeping of livestock is less than 25: Sch 5 para 7(8) (as so applied). For these purposes, 'control' is to be construed in accordance with the Income and Corporation Taxes Act 1988 s 416(2)-(6) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1299); Local Government Finance Act 1988 Sch 5 para 7(9) (added by the Local Government Act 2003 s 67(1), (5); and as so applied).

Head (3)(a) above does not apply unless the building is used solely as there mentioned or it is occupied together with agricultural land and used also in connection with agricultural operations on that land, and that other use, together with the use mentioned in that head, is its sole use: Sch 5 para 5(2) (as so applied). Head (3)(b) above does not apply unless the building is used solely as there mentioned or the building is occupied

also together with agricultural land and used also in connection with agricultural operations on that land, and that other use together with the use mentioned in that head is its sole use: Sch 5 para 5(3) (as so applied). A building ('the building in question') is not an agricultural building by virtue of head (3)(a) or (b) above unless it is surrounded by or contiguous to an area of agricultural land which amounts to not less than 2 hectares; and in deciding for these purposes whether an area is agricultural land and what is its size, the following are to be disregarded: (A) any road, watercourse or railway, including the former site of a railway from which railway lines have been removed; (B) any agricultural building other than the building in question; (C) any building occupied together with the building in question; and these provisions also apply for the purposes of head (4) above: Sch 5 paras 5(4), (5), 6(2) (as so applied). Head (5) above does not apply unless the use there mentioned, or that use together with the use mentioned in head (6), is its sole use; and head (6) does not apply unless the use there mentioned, or that use together with the use mentioned in head (5), is its sole use: Sch 5 para 7(6), (7) (as so applied). For the purposes of heads (1), (5), (6) above, 'agricultural land' is to be construed in accordance with Sch 5 para 2 (see note 5); and for the purposes of head (B) above, 'agricultural building' is to be construed in accordance with the above provisions: Sch 5 para 8 (as so applied).

7 See the Land Drainage Act 1991 s 36(1). Drainage rates must be made under and in accordance with Pt IV Ch II (ss 40-54) or, in relation to any time before 1 April 1993, might be made by the provisions saved by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 15: Land Drainage Act 1991 s 36(1)(a). In relation to special levies, the regulations must be made under the Local Government Finance Act 1988 s 75 (see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 530): Land Drainage Act 1991 s 36(1)(b). As to the regulations made see the Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079; and PARA 633. The expenses of a drainage board which are raised by means of drainage rates in respect of the financial year beginning in 1993 and subsequent financial years must be defrayed out of those rates without regard to the purpose for which any such expenses were incurred: Land Drainage Act 1991 s 36(2). 'Financial year' means the 12 months ending with 31 March: s 72(1).

8 As to land values see PARA 629. As to the meaning of 'land' see PARA 569 note 2.

9 Land Drainage Act 1991 s 37(1)(a).

10 Land Drainage Act 1991 s 37(1)(b).

11 'Chargeable property' means a hereditament comprising agricultural land or agricultural buildings in respect of which drainage rates may be assessed under the Land Drainage Act 1991 Pt IV Ch II (ss 40-54): s 72(1). The annual value of a chargeable property is its annual value for the purposes of Pt IV Ch II (see PARA 629): s 37(4). As to the meaning of 'hereditament' see PARA 626 note 7.

12 For these purposes, the value of other land in an internal drainage district is taken to be: (1) in the case of a hereditament shown in the local non-domestic rating list of a billing authority on 1 April 1990, one third of the relevant proportion of the rateable value shown for it in respect of that date in that list on 31 December 1992; (2) in the case of domestic property shown in a valuation list on 31 March 1990, one third of the relevant proportion of the rateable value shown for it in the list on that date multiplied by a factor of 6.73; (3) in the case of a hereditament to which neither head (1) nor head (2) applies but which was shown on 31 March 1990 in the register maintained for the drainage board for that district in accordance with the Registers of Drainage Boards Regulations 1968, SI 1968/1672 (see PARA 626), one third of the annual value shown for that hereditament in that register on that date multiplied by a factor of 8.02; (4) in the case of any land which at 31 March 1990 was in the internal drainage district and to which none of heads (1)-(3) applies and which did not then comprise agricultural land or buildings, a nil value; (5) in the case of any land to which none of heads (1)-(4) applies, the amount calculated by multiplying the area of that land, expressed in hectares and parts of a hectare, by such a unit value per hectare as represents the average value per hectare of all the land to which those heads do apply if the average is calculated by reference to the values determined in accordance with those heads: Land Drainage Act 1991 s 37(5) (amended by SI 1992/3079; and by virtue of the Local Government Finance Act 1992 s 1(2)). 'Relevant proportion', in relation to the rateable value of any hereditament, means the proportion of that value which the area of the part of the hereditament lying within the internal drainage district in question bears to the total area of that hereditament; and 'valuation list' means a valuation list maintained under the General Rate Act 1967 Pt V (ss 67-95) (repealed with savings): Land Drainage Act 1991 s 37(6). As to rating lists for the purposes of non-domestic rating under the Local Government Finance Act 1988 see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 118 et seq.

13 Land Drainage Act 1991 s 37(2).

14 Land Drainage Act 1991 s 37(3).

15 As to the meaning of 'writing' see PARA 22 note 1.

16 Land Drainage Act 1991 s 48(1)(a). The rate is treated as being made on the date on which a resolution is passed authorising the seal to be affixed: s 48(1)(b).

17 le as provided by the Land Drainage Act 1991 s 50 (see the text to notes 29-31) or any corresponding provision of any local Act: Land Drainage Act 1991 s 40(3).

18 Land Drainage Act 1991 s 40(3).

19 Land Drainage Act 1991 s 40(4).

20 See PARA 628. Under previous legislation, drainage rates might be levied on either owners or occupiers: see the Land Drainage Act 1976 s 63 (repealed).

21 See PARAS 611, 633. Under previous legislation, drainage rates might be levied on non-agricultural properties, although voluntary arrangements were often made with the district council in which the property was situated by which that council met the rates otherwise leviable on such properties: see the Land Drainage Act 1976 ss 63, 81 (repealed).

22 Land Drainage Act 1991 s 48(2).

23 Land Drainage Act 1991 s 48(2)(a).

24 Land Drainage Act 1991 s 48(2)(b).

25 Land Drainage Act 1991 s 48(2)(c).

26 Land Drainage Act 1991 s 48(3)(a).

27 Land Drainage Act 1991 s 48(3)(b).

28 Land Drainage Act 1991 s 48(4). For the prescribed form see the Drainage Rates (Forms) Regulations 1993, SI 1993/223, reg 2, Schedule, Form 1.

29 Land Drainage Act 1991 s 50(1). The statutory provisions are those of Pt IV (ss 36-61). In particular the board may: (1) correct any clerical or administrative error; (2) correct any erroneous insertions or omissions or any misdescriptions; or (3) make such additions or corrections in the rate as appear to the board necessary by reason of any change in the occupation of any hereditament or any property previously rated as a single hereditament becoming liable to be rated in parts: s 50(1)(a)-(c).

30 Land Drainage Act 1991 s 50(2). As to the service of documents see PARA 22.

31 Land Drainage Act 1991 s 50(3).

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## **628. Incidence of and demand for drainage rates.**

The drainage board<sup>1</sup> for an internal drainage district<sup>2</sup> may make a drainage rate in respect of agricultural land<sup>3</sup> and buildings<sup>4</sup> in respect of a financial year<sup>5</sup>. Every such drainage rate so made must be assessed and levied<sup>6</sup> on the occupiers of hereditaments<sup>7</sup> in the district<sup>8</sup>.

The following provisions have effect with respect to the assessment of persons<sup>9</sup> to a drainage rate in respect of any hereditament (the 'relevant hereditament') and the liability of the occupier of that hereditament in respect of the rate<sup>10</sup>. Every rate must be assessed on the person who at the date of the making of the rate<sup>11</sup> is the occupier of the relevant hereditament<sup>12</sup>; and every demand for a drainage rate must be in the prescribed form<sup>13</sup>. The full amount may be recovered from any person who is the occupier of that hereditament at any time during the period in respect of which the rate is made; but a person who is in occupation for part only of the period in respect of which a drainage rate is made is liable to bear only a proportionate part<sup>14</sup>, and if he is required under the above provisions to pay the full amount of the rate, he may, subject to any agreement to the contrary, recover from any other person who has been in occupation for part of that period the amount which that person is liable to bear<sup>15</sup>.

1 As to internal drainage boards see PARA 569.

2 As to internal drainage districts see PARA 569.

3 As to the meaning of 'agricultural land' see PARA 627 note 5.

4 As to the meaning of 'agricultural building' see PARA 627 note 6.

5 Land Drainage Act 1991 s 40(1). As to the meaning of 'financial year' see PARA 627 note 7.

6 In subject to and in accordance with the Land Drainage Act 1991 Pt IV Ch II (ss 40-54) and any order under s 38 (see PARA 631): s 40(2).

7 As to the meaning of 'hereditament' see PARA 626 note 7.

8 Land Drainage Act 1991 s 40(2). The owner of a hereditament is, however, deemed to be its occupier for these purposes during any period during which it is unoccupied: s 40(2).

9 As to the meaning of 'person' see PARA 13 note 29.

10 Land Drainage Act 1991 s 49(1).

11 As to the date on which the rate is treated as being made see PARA 627 note 16.

12 Land Drainage Act 1991 s 49(2). Where the name of any person liable to be assessed to any drainage rate is not known to the board, it is sufficient to assess him by the description of 'the occupier' of the premises, naming them, in respect of which the assessment is made, without further name or description: s 49(5). As to the owner's duty to give information about the occupier see PARA 638.

13 Land Drainage Act 1991 s 49(6). 'Prescribed' means prescribed by regulations under s 65 (see PARA 583): s 72(1). For the prescribed form see the Drainage Rates (Forms) Regulations 1993, SI 1993/223, reg 3, Schedule, Form 2 (amended by virtue of the Environment Act 1995 s 120(1), Sch 22 para 233(1)).

14 Land Drainage Act 1991 s 49(3).

15 Land Drainage Act 1991 s 49(4).

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## **629. Assessment of drainage rates.**

A drainage rate made by the drainage board<sup>1</sup> for an internal drainage district<sup>2</sup> must be assessed, subject to any orders for differential rating<sup>3</sup> or exemption from rating<sup>4</sup> which may be in force, at a uniform amount per pound throughout the internal drainage district on the annual value of agricultural land<sup>5</sup> or agricultural buildings<sup>6</sup> in respect of which it is made<sup>7</sup>. Where the value on which a drainage rate is assessed would otherwise include a fraction of £1, then, if the fraction is greater than 50 pence, it is to be treated as £1 and in any other case it is to be disregarded<sup>8</sup>.

The annual value of any chargeable property<sup>9</sup> is the duly determined<sup>10</sup> amount which is equal to the yearly rent, in respect of a holding comprising the chargeable property, at which the holding might reasonably be expected to have been let by a prudent and willing landlord to a prudent and willing tenant on a tenancy from year to year commencing on 1 April 1988 and on the relevant terms<sup>11</sup>. In determining for these purposes the yearly rents at which a property might reasonably be expected to have been let, any liability for the payment of drainage rates is to be disregarded, but account must be taken of all other relevant factors, including, in every case, the character and situation of the holding (including the locality in which it is situated)<sup>12</sup>, its productive capacity<sup>13</sup> and related earning capacity<sup>14</sup>, and the level of rents for comparable lettings current on 1 April 1988<sup>15</sup>.

The initial determination of the annual value of each chargeable property<sup>16</sup> for these purposes was to be made by the drainage board for every internal drainage district not later than 31 December 1992<sup>17</sup>. Where after that date, any property in an internal drainage district becomes chargeable property<sup>18</sup>, or any property consisting of agricultural land or buildings becomes part of an internal drainage district<sup>19</sup>, then as soon as practicable after the date (the 'valuation date') on which the property becomes chargeable property or, as the case may be, part of the district, the internal drainage board must determine the annual value of the property in accordance with the above provisions<sup>20</sup>. Any such determination has effect from the valuation date<sup>21</sup>; and where such a determination is made the internal drainage board making the determination must serve notice of it<sup>22</sup>, together with a statement in writing<sup>23</sup> of the right of appeal<sup>24</sup>, on the occupier of the property to which the determination relates<sup>25</sup>. For the purpose of enabling an internal drainage board to comply with these obligations, the occupier of a chargeable property must afford reasonable facilities for inspecting the property to the drainage board for the internal drainage district in which the property lies and to the officers and agents of that board<sup>26</sup>.

1 As to drainage boards see PARA 569 et seq.

2 As to internal drainage districts see PARA 569.

3 Ie subject to the Land Drainage Act 1991 s 38: see PARA 631.

4 Ie subject to the Land Drainage Act 1991 s 47: see PARA 632.

5 As to the meaning of 'agricultural land' see PARA 627 note 5. Tidal land (except where vested in the Crown: see the Land Drainage Act 1991 s 74(3)(d); and PARA 20) is not exempt from drainage rates: *Collard v River Stour (Kent) Catchment Board* [1937] 1 All ER 436, DC.

6 As to the meaning of 'agricultural building' see PARA 627 note 6.

7 Land Drainage Act 1991 s 41(1).

8 Land Drainage Act 1991 s 49(7).

9 As to the meaning of 'chargeable property' see PARA 627 note 11.

10 In accordance with the Land Drainage Act 1991 s 42 (see the text to notes 16-26); and subject to ss 43, 44 (see PARA 630): s 41(2).

11 Land Drainage Act 1991 s 41(2). For these purposes, chargeable property is let on the relevant terms if: (1) the tenancy incorporates (a) a covenant by the tenant in the event of the destruction by fire of harvested crops grown on the holding for consumption on it, to return the full equivalent manurial value of the crops destroyed, in so far as the return of that value is required for the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry; (b) a covenant by the tenant to insure all dead stock on the holding and all harvested crops grown on the holding for consumption on it against damage by fire; (c) a power for the landlord to re-enter on the holding in the event of the tenant not performing his obligations under the tenancy agreement; and (d) a covenant by the tenant not to assign, sublet or part with possession of the holding or any part of it except with the landlord's consent in writing; and (2) the property is let on the terms relating to maintenance, repair and insurance of fixed equipment set out in the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, SI 1973/1473, reg 3, Schedule (see **AGRICULTURAL LAND** vol 1 (2008) PARA 333): Land Drainage Act 1991 s 41(3), (4).

12 Land Drainage Act 1991 s 41(5)(a).

13 'Productive capacity', in relation to a holding, means the productive capacity of the holding determined (taking into account fixed equipment and other available facilities on the holding) on the assumption that the holding is in the occupation of a competent tenant practising a system of farming suitable to the holding: Land Drainage Act 1991 s 41(7).

14 Land Drainage Act 1991 s 41(5)(b). 'Related earning capacity', in relation to the productive capacity of a holding, means the extent to which, in the light of that productive capacity, a competent tenant practising a system of farming suitable to the holding could reasonably be expected to profit from farming that holding: Land Drainage Act 1991 s 41(7).

15 Land Drainage Act 1991 s 41(5)(c). In determining for these purposes the level of rents current on 1 April 1988 for comparable lettings: (1) account may be taken of any available evidence with respect to the rents which are or were payable in respect of tenancies of comparable agricultural holdings on terms (other than terms fixing the rent payable) similar to those assumed for the holding in question; but (2) the following must be disregarded: (a) any element of the rents in question which is due to appreciable scarcity of comparable holdings available for letting on such terms compared with the number of persons seeking to become tenants of such holdings on those terms; (b) any element of those rents which is due to the fact that the tenant of, or a person tendering for, a comparable holding is in occupation of other land in the vicinity of that holding that may conveniently be occupied with that holding; and (c) any effect on those rents which is due to any allowances or reductions made in consideration of the charging of premiums: s 41(6). As to the meaning of 'person' see PARA 13 note 29.

16 In as on 31 December 1992: Land Drainage Act 1991 s 42(1).

17 See the Land Drainage Act 1991 s 42(1).

18 Land Drainage Act 1991 s 42(2)(a).

19 Land Drainage Act 1991s 42(2)(b). This may happen eg as part of a boundary review under ss 2, 3: see PARAS 577-578.

20 Land Drainage Act 1991 s 42(2).

21 Land Drainage Act 1991 s 42(3).

22 As to the service of documents see PARA 22.

23 As to the meaning of 'writing' see PARA 22 note 1.

24 In the right of appeal under the Land Drainage Act 1991 s 45: see PARA 634.

25 Land Drainage Act 1991 s 42(4).



26 Land Drainage Act 1991 s 42(5).

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### **630. Adjustment of annual values.**

If the drainage board<sup>1</sup> for any internal drainage district<sup>2</sup> is of the opinion that the amount of the annual value<sup>3</sup> of any chargeable property<sup>4</sup> in that district should be increased or reduced having regard to changes in the relevant circumstances<sup>5</sup>, for the purpose of securing that the burden of the drainage rates payable in respect of all chargeable properties in the district is fairly distributed so far as reasonably practicable among the persons liable to pay those rates<sup>6</sup>, the board may make a determination of annual value<sup>7</sup> specifying a greater or smaller amount<sup>8</sup> as the annual value of the chargeable property in question<sup>9</sup>.

If the occupier of any chargeable property in an internal drainage district is of the opinion that, having regard to changes in the relevant circumstances, the annual value of his property should be altered for the above purposes, he may request the board in writing<sup>10</sup> to make such a determination in respect of the property<sup>11</sup>. The board must either comply with the request or, if it considers that no alteration of the value is required, determine that the request be refused<sup>12</sup>.

Where a drainage board makes a determination under the above provisions it must serve notice of the determination together with a statement in writing of the rights of appeal<sup>13</sup> on the occupier of the property to which the determination relates<sup>14</sup>. Where the determination is made by the board of its own motion<sup>15</sup>, the annual value of the property in question is that specified in the determination for the purposes of any drainage rate made after the effective date<sup>16</sup>. Where, however, the determination is made following a request by the occupier of a chargeable property<sup>17</sup>, the annual value of the property in question is that specified in the determination for the purposes of any drainage rate made in respect of any period included in the financial year<sup>18</sup> in which the request for the determination was made and any drainage rate made in respect of any subsequent period<sup>19</sup>; and if drainage rates for any period in respect of that property have been, or are subsequently, paid by reference to its annual value before the alteration and the period is one for which the amount of those rates so falls to be assessed on the value specified in the determination, that amount must be recalculated accordingly<sup>20</sup>.

1 As to drainage boards see PARA 569 et seq.

2 As to internal drainage districts see PARA 569.

3 As to the assessment of annual value see PARA 629.

4 As to the meaning of 'chargeable property' see PARA 627 note 11.

5 For these purposes, a change in the relevant circumstances, in relation to any chargeable property, is a change in the circumstances by reference to which the annual value of the property in question, or of any other chargeable property in the district, was fixed: Land Drainage Act 1991 s 43(4).

6 As to the persons liable to pay drainage rates see PARAS 627-628. As to the meaning of 'person' see PARA 13 note 29.

7 In accordance with the Land Drainage Act 1991 s 44: see the text to notes 13-20.

8 The determination may specify such greater or smaller amount than the amount of the annual value as the board, having regard to the changes in the relevant circumstances, and to any other alterations of annual value

under these provisions made or proposed by the board, considers just for the purposes mentioned in the text: Land Drainage Act 1991 s 43(3).

9 Land Drainage Act 1991 s 43(1).

10 As to the meaning of 'writing' see PARA 22 note 1. As to the service of documents see PARA 22.

11 Land Drainage Act 1991 s 43(2)(a).

12 Land Drainage Act 1991 s 43(2)(b).

13 Ie the rights of appeal conferred by the Land Drainage Act 1991 s 45: see PARA 634.

14 Land Drainage Act 1991 s 44(1).

15 Ie under the Land Drainage Act 1991 s 43(1): see the text to notes 1-9.

16 Land Drainage Act 1991 s 44(2). Section 44(2) is subject to s 46 (see PARA 635): s 44(2). The 'effective date', in relation to a determination under s 43, means the date on which notice of the determination is served in pursuance of s 44(1) (see the text to notes 13-14) on the occupier of the chargeable property to which the determination relates: s 44(5).

17 Ie under the Land Drainage Act 1991 s 43(2): see the text to notes 10-12.

18 As to the meaning of 'financial year' see PARA 627 note 7.

19 Land Drainage Act 1991 s 44(3). Section 44(3) is subject to s 46 (see PARA 635): s 44(3).

20 Land Drainage Act 1991 s 44(4). Any sum overpaid must be repaid or allowed, and any sum underpaid may be recovered as if it were arrears of drainage rates: s 44(4).

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### **631. Differential drainage rates and special levies.**

A drainage board<sup>1</sup> for an internal drainage district<sup>2</sup>, after consultation with the Environment Agency<sup>3</sup>, may for the purpose of levying differential drainage rates<sup>4</sup> or issuing differential special levies<sup>5</sup>, from time to time by order divide that district into sub-districts<sup>6</sup>, and if, having regard to all the circumstances, it thinks that it is just to do so, exercise its powers<sup>7</sup> to make and levy differential drainage rates or issue differential special levies<sup>8</sup>. Such an order is of no effect unless and until it is confirmed by the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>9</sup>.

The order may determine the proportions of the expenses of the drainage board which are to be raised in the respective sub-districts<sup>10</sup>. Where such an order is in force in respect of an internal drainage district but the order does not determine the proportions of the expenses of the drainage board to be raised in the respective sub-districts, the amount to be so raised is to be determined as follows:

- 1309 (1) expenses incurred in connection with new works or the maintenance or improvement of existing works<sup>11</sup> in each sub-district are to be raised in that sub-district<sup>12</sup>; and
- 1310 (2) there must be raised in each sub-district a proportionate part of the charges incurred by the board in respect of contributions to the Agency<sup>13</sup>, or amounts specified<sup>14</sup> as corresponding to such contributions, and a proportionate part of other expenses and charges not directly attributable to the maintenance of particular works<sup>15</sup>.

Where such an order is in force in respect of an internal drainage district, the proportions of the expenses of the drainage board for that district raised in a sub-district which must be raised by means of drainage rates and special levies respectively must bear the same proportion to each other in respect of a financial year<sup>16</sup> as do the aggregate of the annual values<sup>17</sup> of the chargeable properties<sup>18</sup> in the sub-district and the aggregate of the values of other land<sup>19</sup> in that sub-district<sup>20</sup>.

If a sufficient number of qualified persons<sup>21</sup> or a qualified authority<sup>22</sup> submits a petition to an internal drainage board for the making, variation or revocation of such an order, the board must, except in the specified circumstances<sup>23</sup>, consider the petition<sup>24</sup>. The board must inform the Agency (or, if the Agency is the internal drainage board, inform the Secretary of State or, as appropriate, the Welsh Ministers<sup>25</sup>) that it has received the petition<sup>26</sup> and must also publish a notice that it has done so in one or more of the newspapers circulating in the district<sup>27</sup>. The notice must also state that the making, variation or revocation of an order will be considered<sup>28</sup>, and that representations may be made to the drainage board within a stated period which must not be less than 30 days<sup>29</sup>.

After considering the petition, and not later than six months after it is received, the board must inform the Agency (or, as the case may be, the Secretary of State or the Welsh Ministers<sup>30</sup>) whether it proposes to make, vary or revoke the order<sup>31</sup> and, if it proposes to make or vary the order, the terms of the order or variation<sup>32</sup>. The Agency (or, if the Agency is the board, the Secretary of State or the Welsh Ministers<sup>33</sup>) may direct the board to make, vary or revoke the

order either in accordance with the petition or in accordance with the petition as modified by the direction<sup>34</sup>. If the board objects to such a direction given by the Agency, the direction has no effect unless confirmed, with or without modifications, by the relevant minister<sup>35</sup>. Subject to this, the order must be made, varied or revoked in accordance with the direction<sup>36</sup>.

1 As to drainage boards see PARA 569 et seq.

2 As to internal drainage districts see PARA 569 et seq.

3 As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

4 As to the raising of drainage rates see PARA 627.

5 As to special levies see PARAS 627, 633.

6 Land Drainage Act 1991 s 38(1)(a) (ss 38, 39 amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

7 Ie under the Land Drainage Act 1991 Pt IV Ch II (ss 40-54) or any regulations made under the Local Government Finance Act 1988 s 75.

8 Land Drainage Act 1991 s 38(1)(b).

9 Land Drainage Act 1991 s 38(7)(b). As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

The board must submit the order to the relevant minister and forthwith thereafter publish, in one or more newspapers circulating in the internal drainage district, a notice stating that the order has been so submitted, that a copy of it is open to inspection at a specified place, and that representations with respect to the order may be made to the relevant minister within one month after the publication of the notice: s 38(5), (6). When an order is submitted to the relevant minister, he must take it into consideration forthwith: s 38(7)(a). As to the meaning of 'month' see PARA 23 note 10.

10 Land Drainage Act 1991 s 38(2). As to the apportionment of the expenses of an internal drainage board between drainage rates and special levies see PARA 627.

11 As to the carrying out of drainage works see PARA 589.

12 Land Drainage Act 1991 s 38(3)(a).

13 Ie under the Water Resources Act 1991 s 139: see PARA 613.

14 Ie under the Land Drainage Act 1991 s 58: see PARA 613.

15 Land Drainage Act 1991 s 38(3)(b) (as amended: see note 6).

16 As to the meaning of 'financial year' see PARA 627 note 7. These provisions apply in relation to financial years beginning in or after 1993: Land Drainage Act 1991 s 38(4).

17 As to annual values see PARA 629.

18 As to the meaning of 'chargeable property' see PARA 627 note 11.

19 As to these values see PARA 627.

20 Land Drainage Act 1991 s 38(4). The provisions of s 37(2)-(6) (see PARA 627) have effect in respect of each sub-district for the purpose of determining those aggregate amounts as they have effect in respect of an internal drainage district for the purpose of determining the amounts specified in s 37(2)(a), (b): s 38(4).

21 As to the meaning of 'qualified persons', and as to what constitutes a sufficient number of such persons, see PARA 577 note 3.

22 As to the meaning of 'qualified authority' see PARA 577 note 4.

23 The board is not required to consider any petition or publish any notice of it if: (1) the board has received a petition within the period of ten years immediately preceding the making of the first-mentioned petition; (2) it has, within that period, by an order made in exercise of the powers conferred by the Land Drainage Act 1991 s 38 (see the text to notes 1-20) divided its district into sub-districts or varied or abolished any sub-district; or (3) the petition is frivolous in the opinion of the Agency or, if the Agency is the board, in the opinion of the Secretary of State or, in relation to Wales, the Welsh Ministers: see s 39(6)(a)-(c) (as amended: see note 6). The statutory wording is 'in the opinion of either of the ministers'. As to the meaning of 'the ministers', and as to the transfer of functions to the Welsh Ministers, see PARA 569 note 9. As to the Agency as an internal drainage board see PARA 579.

24 Land Drainage Act 1991 s 39(1)(a).

25 Land Drainage Act 1991 s 39(4)(a) (as amended: see note 6). The statutory wording is 'one of the ministers': as to which see note 23.

26 See the Land Drainage Act 1991 s 39(5)(a).

27 Land Drainage Act 1991 s 39(4)(b).

28 Land Drainage Act 1991 s 39(5)(b).

29 Land Drainage Act 1991 s 39(5)(c).

30 Ie 'one of the ministers': see note 23.

31 Land Drainage Act 1991 s 39(7)(a) (as amended: see note 6).

32 Land Drainage Act 1991 s 39(7)(b).

33 Ie 'either of the ministers': see note 23.

34 See the Land Drainage Act 1991 s 39(1)(b), (2) (as amended: see note 6). The Agency may also give such a direction when it is considering a boundary review under ss 2, 3 (see PARAS 577-578), and if the board objects to the direction the direction has no effect unless confirmed by the Secretary of State or, as the case may be, the Welsh Ministers with or without modification: see s 2(5)(b), (6); and PARA 577.

35 Land Drainage Act 1991 s 39(3) (as amended: see note 6).

36 See the Land Drainage Act 1991 s 39(1)(b).

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### **632. Exemption from drainage rates.**

After consultation with the Environment Agency<sup>1</sup>, the drainage board<sup>2</sup> for an internal drainage district<sup>3</sup> may by order determine that no drainage rates are to be levied<sup>4</sup> on the occupiers of hereditaments<sup>5</sup> in any portion of the district<sup>6</sup> which, in the board's opinion, either by reason of its height above sea level or for any other reason, ought to be exempted wholly from rating<sup>7</sup>. The board must submit the order to the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>8</sup>, and it is of no effect unless and until it is confirmed by the relevant minister<sup>9</sup>.

Where the occupier of any hereditament in an internal drainage district requests the drainage board for the district to make or amend an order so as to exempt from drainage rates the portion of the district in which the hereditament is situated, the board must consider the request<sup>10</sup>. Where the request is refused<sup>11</sup>, that occupier may appeal to the Agency or (if the board is the Agency<sup>12</sup> to the relevant minister), and the Agency or the relevant minister may direct the board to make or amend the order as requested<sup>13</sup>. If so directed, the board must comply with the request<sup>14</sup>.

1 As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

2 As to drainage boards see PARA 569 et seq.

3 As to internal drainage districts see PARA 569 et seq.

4 As to the levying of drainage rates see PARA 627 et seq.

5 As to the meaning of 'hereditament' see PARA 626 note 7.

6 A portion of a district means a portion of the surface area; there is no power to exempt underground workings: *Trent River Authority v National Coal Board* [1971] AC 145, [1970] 1 All ER 558, HL.

7 Land Drainage Act 1991 s 47(1) (s 47 amended by the Environment Act 1995 s 120(1), Sch 22 para 191).

8 Land Drainage Act 1991 s 38(5)(a); s 38(5)-(7) applied by s 47(2). As to the procedure on the making of such an order see s 38(5)-(7) (as so applied); and PARA 631 note 9. As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

9 Land Drainage Act 1991 s 38(7)(b) (as applied: see note 8).

10 Land Drainage Act 1991 s 47(3)(a).

11 If the request is neither refused nor complied with within three months after it is made, it is treated as having been refused: Land Drainage Act 1991 s 47(5). As to the meaning of 'month' see PARA 23 note 10.

12 As to the Agency as an internal drainage board see PARA 579.

13 Land Drainage Act 1991 s 47(4) (as amended: see note 7).

14 Land Drainage Act 1991 s 47(3)(b).





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### **633. Special levies.**

In order to meet the appropriate part of its expenses<sup>1</sup>, an internal drainage board<sup>2</sup> may issue a special levy to a local billing authority<sup>3</sup> in respect of any financial year<sup>4</sup>. A special levy must be issued before 15 February in the financial year preceding that in respect of which it is issued but is not invalid merely because it is issued on or after that date<sup>5</sup>. Where more than one local billing authority is situated within an internal drainage district<sup>6</sup>, the internal drainage board of that district must secure that such of its expenses as are to be met by special levies are met by local billing authorities in proportion<sup>7</sup> by reference to the aggregate annual value<sup>8</sup> of the land<sup>9</sup>, other than agricultural land<sup>10</sup> or agricultural buildings<sup>11</sup>, within each local billing authority's area or (as the case may be) the part of such land that lies within the board's district<sup>12</sup>.

An internal drainage board which has issued a special levy in respect of a financial year may issue a special levy in substitution if the special levy for which it is substituted is quashed because of a failure to secure that its expenses are met by local billing authorities in proportion, or if it appears necessary to the board to do so in order to make the special levy conform with the provisions of the relevant regulations<sup>13</sup>.

A special levy is made in writing under the common seal of the board<sup>14</sup> and must be issued by a board within ten days of being made<sup>15</sup>. The levy must state its amount, the billing authority to which it is issued and the date of issue, and must be issued to every billing authority for any area wholly or partly included in the board's district<sup>16</sup>. An internal drainage board must maintain a record of any special levy issued showing the amount of such levy, the dates on which it was made and issued, the billing authority to which it was issued<sup>17</sup>, and the proportion of expenses raised in respect of each financial year from the proceeds of drainage rates and special levies<sup>18</sup>. The record must be kept open to inspection by members of the public at all reasonable times at the board's principal office<sup>19</sup>.

A local billing authority to which a board issues a special levy under these provisions in respect of a financial year must pay the amount of that levy in that year either at such time and in such instalments, if any, as may be agreed between the authority and the board<sup>20</sup> or, in default of such agreement, by two equal instalments due on 1 May and 1 November in the relevant financial year<sup>21</sup>. Where, at a time when a billing authority makes a calculation of its budget requirements<sup>22</sup>, a board with power to issue a special levy to that authority has not issued such a levy in respect of that year<sup>23</sup>, the authority may take into account, in estimating its expenditure<sup>24</sup>, its estimate of the amount of the special levy that it expects will be issued to it by the board<sup>25</sup>.

A local billing authority may appoint a member or members of an internal drainage board<sup>26</sup> having power to issue special levies to it<sup>27</sup>. The number of members so appointed:

- 1311 (1) must be determined in relation to each board by reference to the proportion of the expenses of the drainage board to be raised from the proceeds of special levies in the first financial year of the three-year appointment period<sup>28</sup>;
- 1312 (2) must not exceed by more than one the number of other members of the board<sup>29</sup>; and
- 1313 (3) must be such that the number bears to the maximum number of all the members of the board as nearly as possible the same proportion as the proportion of the expenses of the board that is to be raised by the proceeds of special levies<sup>30</sup>.

If more than one billing authority is entitled to appoint members of an internal drainage board, each such authority may appoint the number of members of the board calculated by multiplying the maximum number of appointed members by the relevant fraction<sup>31</sup> for that authority and disregarding any fraction in the resulting product<sup>32</sup>.

- 1 As to the appropriate part of these expenses see PARA 627.
- 2 As to internal drainage boards see PARA 569.
- 3 As to local billing authorities see the Local Government Finance Act 1992 s 1; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 229.
- 4 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 6. The provisions of Pt III (regs 5-11) apply in relation to any expenses or special levies in respect of any financial year beginning on or after 1 April 1993: reg 5. As to the meaning of 'financial year' see PARA 627 note 7.
- 5 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 7(1).
- 6 As to internal drainage districts see PARA 569 et seq.
- 7 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 7(2).
- 8 Ie determined in accordance with the Land Drainage Act 1991 s 37: see PARA 627.
- 9 As to the meaning of 'land' see PARA 569 note 2.
- 10 As to the meaning of 'agricultural land' see PARA 627 note 5.
- 11 As to the meaning of 'agricultural building' see PARA 627 note 6.
- 12 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 7(3).
- 13 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 8(1). The relevant regulations referred to are the Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079. In particular, the board may: (1) correct any clerical or arithmetical error; (2) correct any erroneous insertions or omissions or misdescriptions; or (3) make such additions or corrections as are necessary by reason of boundary changes in the board's district or in the district of a local billing authority: reg 8(1)(a)-(c). A special levy in substitution must be issued in accordance with reg 7(2), (3) (see the text to notes 6-12) and reg 9(1), (2) (see the text to notes 14-16): reg 8(2). Where a board issues a special levy in substitution (a 'new levy'), anything paid to it by reference to the special levy for which it is substituted (the 'old levy') must be treated as paid by reference to the new levy (reg 8(3)); but if the amount of the old levy exceeds that of the new levy the amount in excess must be repaid if the local billing authority by which it was paid so requires, and in any other case must either be repaid or be credited against any subsequent liability of the local billing authority in respect of any special levy of the board, as the board determines (reg 8(4)).
- 14 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 9(1). As to the meaning of 'writing' see PARA 22 note 1.
- 15 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 9(2).
- 16 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 9(2).
- 17 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 9(3)(a).
- 18 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 9(3)(b). As to the raising of drainage rates see PARA 627.
- 19 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 9(3).
- 20 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 10(a).
- 21 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 10(b). If in fact the levy is issued after 30 April, payment is due 30 days after date of issue and on 1 November or, if later, 60 days after date of issue: reg 10(b).

22 le under the Local Government Finance Act 1992 s 32: see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 262.

23 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 11(1).

24 le under the Local Government Finance Act 1992 s 32(2), (6): see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 262.

25 Internal Drainage Boards (Finance) Regulations 1992, SI 1992/3079, reg 11(2). As to anticipation of special levies see further reg 11(3)-(7).

26 As to membership of an internal drainage board see PARA 570.

27 Land Drainage Act 1991 Sch 1 para 5(1) (Sch 1 paras 5, 6 amended by virtue of the Local Government Finance Act 1992 s 1). In appointing a person to be a member of an internal drainage board, a billing authority must have regard to the desirability of appointing a person who: (1) has knowledge or experience (including knowledge of the internal drainage district in question or commercial experience) of some matter relevant to the functions of the board; and (2) has shown capacity in such a matter: Land Drainage Act 1991 Sch 1 para 5(2) (as so amended). This provision has effect subject to the restrictions on appointments which are imposed by Sch 1 para 6 (see heads (1)-(3) in the text): Sch 1 para 5(3).

28 Land Drainage Act 1991 Sch 1 para 6(1)(b), (5) (Sch 1 para 6(1)(b) amended by SI 1992/3079). The first three-year appointment period ran from 1 April 1993 to 31 March 1996 and each succeeding period begins with 1 April: Land Drainage Act 1991 Sch 1 para 6(1)(a). The proportion of expenses to be raised from the proceeds of special levies must be determined in accordance with s 37 (see PARA 627): Sch 1 para 6(1)(b) (as so amended).

29 Land Drainage Act 1991 Sch 1 para 6(2)(a), (5).

30 Land Drainage Act 1991 Sch 1 para 6(2)(b), (5) (Sch 1 para 6(2)(b) amended by SI 1992/3079).

31 The relevant fraction, in relation to a billing authority, is the fraction of the expenses of the internal drainage board that is to be raised from the proceeds of special levies in the first financial year of the relevant period referred to in the Land Drainage Act 1991 Sch 1 para 6(1)(a) (see note 28) which is to be raised by special levy issued to that authority: Sch 1 para 6(4) (amended by SI 1992/3079).

32 Land Drainage Act 1991 Sch 1 para 6(3)(a) (amended by virtue of the Local Government Finance Act 1992 s 1). Where in respect of the board: (1) any such authority has appointed a member; or (2) the calculation referred to results in respect of each such authority in a product of less than one, the billing authorities must, unless they otherwise agree, jointly appoint the number of members of the board representing the difference between the maximum number of appointed members and the aggregate number of members that may be appointed by individual billing authorities or, as the case may be, constituting the maximum number of appointed members: Land Drainage Act 1991 Sch 1 para 6(3)(b) (as so amended).

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#### **634. Appeal to valuation tribunal.**

Where a determination of the annual value<sup>1</sup> of any chargeable property<sup>2</sup>, or the adjustment of such annual value<sup>3</sup>, is made by the drainage board<sup>4</sup> for an internal drainage district<sup>5</sup> the occupier of the land<sup>6</sup> in respect of which the determination is made may appeal, in accordance with the following provisions, against the determination<sup>7</sup>.

An occupier who wishes to appeal against any such determination must, before the end of the period of 28 days beginning with the date of service on him of notice of the determination<sup>8</sup>, or such longer period as the drainage board which made the determination may allow (either generally or in any particular case)<sup>9</sup>, serve<sup>10</sup> on the board a notice objecting to the determination and stating the grounds of the objection<sup>11</sup>. Within 28 days of the service of such a notice of objection on it, the internal drainage board may, if it thinks fit, cancel the determination and make a fresh determination in accordance with the appropriate statutory provision<sup>12</sup>.

If any such notice of objection is served and is not withdrawn within the period mentioned above<sup>13</sup>, and the board does not cancel the determination<sup>14</sup>, the board must, forthwith after the end of that period, transmit the notice and a note of the determination to the clerk of the appropriate tribunal<sup>15</sup>. The transmission of the notice of objection constitutes the lodging of an appeal against the determination, by the person who served the notice on the board, to the valuation tribunal<sup>16</sup>.

1 As to the meaning of 'annual value' see PARA 627 note 11.

2 Ie a determination under the Land Drainage Act 1991 s 42: see PARA 629. As to the meaning of 'chargeable property' see PARA 627 note 11.

3 Ie under the Land Drainage Act 1991 s 43: see PARA 630.

4 As to drainage boards see PARA 569.

5 As to internal drainage districts see PARA 569 et seq.

6 As to the meaning of 'land' see PARA 569 note 2.

7 Land Drainage Act 1991 s 45(1). As to the procedure on appeal see PARA 635.

8 Land Drainage Act 1991 s 45(2)(a).

9 Land Drainage Act 1991 s 45(2)(b).

10 As to the service of documents see PARA 22.

11 Land Drainage Act 1991 s 45(2).

12 See the Land Drainage Act 1991 s 45(3). The fresh determination is made under s 42 (see PARA 629) or s 43 (see PARA 630) as appropriate: s 45(3)(b). Section 46(7) (see PARA 635) has effect in relation to the cancellation and the other provisions of Pt IV Ch II (ss 40-54) have effect in relation to the fresh determination: s 45(3). Where notice of objection is served in respect of a determination as to the adjustment of annual value made by a drainage board under s 43, the board may cancel the determination in accordance with s 45(3) without making a fresh determination in its place (s 45(4)(a)); and where it does so, it must serve notice of

cancellation on the person by whom the notice of objection was served (s 45(4)(b)). As to the meaning of 'person' see PARA 13 note 29.

13 Land Drainage Act 1991 s 45(5)(a).

14 Land Drainage Act 1991 s 45(5)(b).

15 Land Drainage Act 1991 s 45(5). 'Appropriate tribunal', in relation to a determination under s 42 (see PARA 629) or s 43 (see PARA 630) means: (1) the valuation tribunal established, in accordance with regulations under the Local Government Finance Act 1988 Sch 11 (see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 147), for the area in which the land to which the determination relates is situated; or (2) where different parts of that land are situated in different areas for which such tribunals are established, such one of those tribunals as may be determined by or under the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152: Land Drainage Act 1991 s 45(7) (amended by the Local Government Finance Act 1992 s 117(1), Sch 13 para 99). As from 1 October 2009 head (1) above is amended by the omission of the words 'established, in accordance with regulations under the Local Government Finance Act 1988 Sch 11': Land Drainage Act 1991 s 45(7)(a) (prospectively amended by the Local Government and Public Involvement in Health Act 2007 ss 220(1), 241, Sch 16 para 6(1), (2), Sch 18 Pt 17); Local Government and Public Involvement in Health Act 2007 (Commencement No 8) Order 2008, SI 2008/3110, art 6(b), (d)(i). In addition from that date the following definition is added: 'Valuation tribunal' means the Valuation Tribunal for England, or a valuation tribunal established under the Local Government Finance Act 1988 Sch 11 para 1; and England is to be treated as the area for which the Valuation Tribunal for England is established: Land Drainage Act 1991 s 45(8) (prospectively added by the Local Government and Public Involvement in Health Act 2007 s 220(1), Sch 16 para 6(1), (3)); Local Government and Public Involvement in Health Act 2007 (Commencement No 8) Order 2008, SI 2008/3110, art 6(b), (d)(i).

Where the hereditament to which the determination relates is a divided hereditament, the prescribed tribunal is determined in accordance with the following provisions: Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 3 (amended by SI 1989/440). Where a divided hereditament to which the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 5 does not apply consists of land which falls to be assessed to drainage rates only on the basis of annual value, the prescribed tribunal is the valuation tribunal for the tribunal area in which that portion is situated which has a greater area than the portion situated in any other tribunal area: reg 4 (amended by SI 1989/440; and by virtue of the Local Government Finance Act 1992 s 15(1)). Where a divided hereditament consists of or includes any land which is occupied (a) by a universal service provider for any purpose in connection with the provision of a universal postal service within the meaning of the Postal Services Act 2000 (see **POST OFFICE**), for the purposes of the successor to the British Railways Board, by London Regional Transport, the British Waterways Board or certain other statutory undertakings; or (b) by the Coal Authority or any licensed operator within the meaning of the Coal Industry Act 1994, the prescribed tribunal is the valuation tribunal for that one of the relevant tribunal areas which contains a greater portion of the drainage district in which the hereditament is comprised than the portion of that district comprised in any other relevant tribunal area: see the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 5 (as so amended; further amended by SI 1994/2567; SI 2001/1149; and by virtue of the London Regional Transport Act 1984 s 1). The other statutory undertakings referred to are water, gas and electricity undertakings (see the Drainage Rates (Appeals) Regulations 1970 reg 5(2)(b), (e), (4)); but following the privatisation of these industries hereditaments occupied by those and other undertakers are now rated en bloc by virtue of the central rating lists compiled under the Local Government Finance Act 1988 s 52: see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 125. As to the privatisation of the water industry and its current organisation see PARA 108 et seq; and as to the structure of the railway industry see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 3 et seq. 'Prescribed tribunal' means the valuation tribunal to whose clerk the notice of objection to a determination is to be transmitted: Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 3(1) (amended by SI 1989/440). 'Divided hereditament' means a hereditament different parts of which are situated in different tribunal areas: reg 2(2).

Where a divided hereditament to which the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 5 does not apply includes the whole or part of one, but not more than one, rating unit, the prescribed tribunal is the valuation tribunal for the tribunal area in which the rating unit is situated: reg 6 (amended by SI 1989/440). Where such a hereditament consists of or includes two or more rating units, or parts of two or more rating units, or one or more rating units and parts of other rating units, and all such rating units are within the same curtilage or contiguous and in the same occupation but, in either case, within not more than two tribunal areas, then (i) if in one relevant tribunal area there are situated rating units having in the aggregate and according to the valuation lists for the time being in force (or, if there are no relevant entries in those valuation lists, according to entries included in proposals made by the valuation officer) a greater rateable value than the rating units situated within the other relevant tribunal area, the prescribed tribunal is the valuation tribunal for the relevant tribunal area first mentioned; (ii) if there is an equality of the aggregate rateable values of those rating units (or, where there is no entry in the valuation list, an equality of the aggregate rateable values of the entries included in proposals made by the valuation officer), the prescribed tribunal is the valuation tribunal for such one of the relevant tribunal areas as the minister may determine: Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 7 (amended by SI 1989/440). In the case of any divided hereditament for which none of the above provisions provide, the prescribed tribunal is the valuation tribunal for such one of the relevant

tribunal areas as the minister may determine: see the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 8 (amended by SI 1989/440). 'The minister' means the Minister of Agriculture, Fisheries and Food: Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 2(2). As to the abolition of the Ministry of Agriculture, Fisheries and Food, and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. 'Tribunal area' means the area for which a valuation tribunal is established in accordance with regulations under the Local Government Finance Act 1988 Sch 11; and 'relevant tribunal area' means a tribunal area in which a part of the hereditament is situated: Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 2(2) (definitions substituted by SI 1989/440). As to rating units, valuation lists and valuation officers see **RATING AND COUNCIL TAX**.

16 See the Land Drainage Act 1991 s 45(6) (amended by the Local Government (Finance) Act 1992 Sch 13 para 99).

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### **635. Procedure on the appeal.**

It is the duty of the president of the valuation tribunal to whose clerk the notice of objection is transmitted<sup>1</sup> to arrange for the appeal to which the notice relates to be heard and determined<sup>2</sup>. The clerk to the prescribed tribunal must give not less than 14 days' notice of the date, time and place fixed for the hearing of an appeal to an appellant and to the drainage board<sup>3</sup>. He must also, not less than 14 days before the date of the hearing, advertise the date, time and place at which the valuation tribunal will sit to hear appeals by causing a notice to be affixed to the tribunal office, and also to be affixed to the office of the drainage board or posted in some conspicuous place or places within the internal drainage district<sup>4</sup>. The notice must also name a place where a list of the appeals to be heard may be inspected<sup>5</sup>.

The valuation tribunal must sit in public on an appeal against a determination of an annual value<sup>6</sup> unless it otherwise orders, on being satisfied on the application of a party to the appeal that the interests of that party would be prejudicially affected<sup>7</sup>. It has power to administer oaths and to take evidence on oath<sup>8</sup>. The person<sup>9</sup> whose notice of objection has resulted in the hearing, any other person who is the occupier of any land<sup>10</sup> to which the determination relates, and the drainage board by which that determination was made, are entitled to appear and be heard as parties to the appeal and to call witnesses and to examine any witnesses before the tribunal<sup>11</sup>. On the hearing of an appeal, the appellant must begin unless the tribunal, having regard to the particular circumstances of the case, otherwise determines with his consent<sup>12</sup>. Subject to that, the parties to the appeal are heard in such order as the tribunal may determine<sup>13</sup>. If any person entitled to appear does not appear at the hearing, the valuation tribunal may, on being satisfied that the notice requirements<sup>14</sup> have been duly complied with, proceed with the hearing on the assumption that he does not desire to be heard<sup>15</sup>.

The valuation tribunal may postpone or adjourn the hearing of an appeal for such time and to such place and upon such terms, if any, as it thinks fit, or may order that different questions arising on the appeal be heard at such different times or in such order or at such different places as may seem expedient to the tribunal<sup>16</sup>.

No person who is a party to an appeal or an employee or member of a body which is such a party, or a person acting for such a party, or a person called as a witness during the hearing, may be present while the valuation tribunal is considering its decision on the appeal<sup>17</sup>. After hearing the persons entitled to appear or such of them as desire to be heard, the tribunal may quash the determination to which the appeal relates, alter the determination in such manner as the tribunal thinks just, or dismiss the appeal<sup>18</sup>. Except where the tribunal consists of only two persons, the decision is a majority decision<sup>19</sup> which must be in writing<sup>20</sup> and signed by the chairman<sup>21</sup>. The clerk to the prescribed tribunal must send a copy of the decision certified by him to every party to the appeal and must inform every such party of the right to appeal against the decision<sup>22</sup>. An appeal lies to the Lands Tribunal<sup>23</sup>.

Where a determination of the amount of the annual value of any property is quashed or altered on appeal or is cancelled<sup>24</sup>, then, except in so far as the parties otherwise agree, that amount of annual value must be recalculated accordingly, and any sum overpaid must be repaid or allowed and any sum underpaid may be recovered as if it were arrears of drainage rates<sup>25</sup>. Where a determination which has been quashed is subsequently restored on appeal the amount of any drainage rate falling to be recalculated in consequence of the appeal must, except so far as the parties otherwise agree, be recalculated accordingly, and any sum

overpaid must be repaid or allowed and any sum underpaid may be recovered as if it were arrears of drainage rates<sup>26</sup>.

1 le in pursuance of the Land Drainage Act 1991 s 45: see PARA 634.

2 Land Drainage Act 1991 s 46(1) (s 46(1), (3), (4), (6) amended by the Local Government Finance Act 1992 s 117(1), Sch 13 para 100). As to the constitution of the tribunal and the appointment of persons to assist it see the General Rate Act 1967 s 88(5), (6) (repealed with savings): applied by the Land Drainage Act 1991 s 46(2), (9). As to valuation tribunals in respect of non-domestic rating under the Local Government Finance Act 1988 see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 147 et seq.

3 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 9(1) (reg 9 amended by SI 1989/440). As to the meaning of 'prescribed tribunal' see PARA 634 note 16. As to drainage boards see PARA 569 et seq.

4 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 9(2) (as amended: see note 3; further amended by virtue of the Local Government Finance Act 1992 s 15(1)).

5 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 9(2).

6 le an appeal against a determination under the Land Drainage Act 1991 s 42 or s 43: see PARA 634.

7 Land Drainage Act 1991 s 46(4)(a) (as amended: see note 2).

8 Land Drainage Act 1991 s 46(4)(b). Subject to s 46(4) and to the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152 (see note 11 and the text to notes 12-17, 19-22), the procedure of the tribunal in relation to the appeal is such as it may determine: Land Drainage Act 1991 s 46(4) (as amended: see note 2). 'Oath' includes affirmation and declaration: Interpretation Act 1978 s 5, Sch 1. As to the administration of oaths see **CIVIL PROCEDURE** vol 11 (2009) PARA 1021 et seq.

9 As to the meaning of 'person' see PARA 13 note 29.

10 As to the meaning of 'land' see PARA 569 note 2.

11 Land Drainage Act 1991 s 46(3) (as amended: see note 2). The drainage board may appear by its clerk or other officer duly appointed for the purpose or by counsel or solicitor, and any other person entitled to appear may appear in person or by counsel or solicitor or other representative: Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 10. Non-compliance with any of the procedural rules contained in regs 10-15 does not render any proceedings in an appeal void unless the valuation tribunal so directs; but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the tribunal thinks fit: reg 16 (regs 11-16 amended by SI 1989/440; further amended by virtue of the Local Government Finance Act 1992 s 15(1)).

12 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 11(1) (as amended: see note 11). As to non-compliance with this provision see note 11.

13 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 11(2) (as amended: see note 11). As to non-compliance with this provision see note 11.

14 le the requirements of the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 9: see the text to notes 3-5.

15 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 12 (as amended: see note 11). As to non-compliance with this provision see note 11.

16 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 13 (as amended: see note 11). As to non-compliance with this provision see note 11.

17 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 14 (as amended: see note 11). As to non-compliance with this provision see note 11.

18 Land Drainage Act 1991 s 46(5).

19 See the Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 15(1) (as amended: see note 11). As to non-compliance with this provision see note 11.

20 As to the meaning of 'writing' see PARA 22 note 1.



21 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 15(2) (as amended: see note 11). As to non-compliance with this provision see note 11.

22 Drainage Rates (Appeals) Regulations 1970, SI 1970/1152, reg 15(3) (as amended: see note 11). As to non-compliance with this provision see note 11.

23 See the Land Drainage Act 1991 s 46(6) (amended by the Local Government (Finance) Act 1992 Sch 13 para 100), applying the General Rate Act 1961 s 77 (repealed with savings) with the appropriate modifications. As to appeals from valuation tribunals to the Lands Tribunal with regard to non-domestic rating under the Local Government Finance Act 1988 see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 151 et seq. As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

24 Is cancelled in accordance with the Land Drainage Act 1991 s 45: see PARA 634.

25 Land Drainage Act 1991 s 46(7). As to the recovery of drainage rates see PARA 637.

26 Land Drainage Act 1991 s 46(8).

## **UPDATE**

### **635 Procedure on the appeal**

TEXT AND NOTE 23--Reference to the Lands Tribunal is now to the Upper Tribunal: Land Drainage Act 1991 s 46(6) (amended by SI 2009/1307).

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### 636. Appeal to the Crown Court.

If any person<sup>1</sup>, as occupier of any hereditament<sup>2</sup> in a drainage district<sup>3</sup>, is aggrieved<sup>4</sup> by a drainage rate<sup>5</sup> or an amendment of a drainage rate, upon any ground other than a ground upon which he might have appealed to the appropriate valuation tribunal<sup>6</sup>, he may appeal to the Crown Court against the rate or the rate as amended<sup>7</sup>. Notice of the appeal, specifying the grounds of it, must be given within 28 days of the making of the rate or, as the case may be, the date on which notice of the amendment is served on the appellant, to the court, to the internal drainage board<sup>8</sup> in question and also, if the appeal relates to a hereditament not in the occupation of the appellant, to the occupier of that hereditament<sup>9</sup>. On such an appeal the court must, as it thinks just, either confirm the rate or annul or modify it<sup>10</sup>.

The appellant and the respondent to such an appeal may agree in writing<sup>11</sup> to refer the matter in dispute to the arbitration of a person agreed between them or, in default of agreement, appointed by the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>12</sup>. In the event of such a reference, the costs of and incidental to the hearing before the arbitrator and his award are in his discretion and, if not agreed by the parties, are assessed as part of the costs of the appeal to the Crown Court<sup>13</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'hereditament' see PARA 626 note 7.

3 As to internal drainage districts see PARA 569 et seq.

4 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664. See also *Cook v Southend Borough Council* [1990] 2 QB 1, [1990] 1 All ER 243, CA.

5 As to drainage rates see PARA 627.

6 I.e. under the Land Drainage Act 1991 s 45: see PARA 634.

7 Land Drainage Act 1991 s 51(1). As to the Crown Court see **COURTS** vol 10 (Reissue) PARA 621 et seq.

8 As to internal drainage boards see PARA 569.

9 Land Drainage Act 1991 s 51(2). The rate is treated as being made on the date of the resolution authorising the affixing of the seal: see s 48(1)(b); and PARA 627.

10 Land Drainage Act 1991 s 51(3).

11 As to the meaning of 'writing' see PARA 22 note 1.

12 Land Drainage Act 1991 s 51(4). As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

13 See the Land Drainage Act 1991 s 51(5).

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### 637. Recovery of drainage rates.

Arrears of any drainage rates<sup>1</sup> may be recovered by the drainage board for an internal drainage district<sup>2</sup> in the same manner in which arrears of a non-domestic rate may be recovered by a billing authority<sup>3</sup>. In proceedings for the recovery of a drainage rate the defendant is not entitled to raise any matter which might have been raised on an appeal to the appropriate valuation tribunal<sup>4</sup> or on an appeal<sup>5</sup> to the Crown Court<sup>6</sup>.

These powers of recovery are in addition to, and not in substitution for, powers conferred by any provision of any local Act on any drainage board for recovery of drainage rates, and for the purposes of any such provisions a rate made under the Land Drainage Act 1991 is to be treated as a rate to which those local Act provisions apply<sup>7</sup>. However, notwithstanding anything in any local Act, no distress for arrears of any rate so made may be levied on the goods or chattels of any person<sup>8</sup> other than the person from whom arrears may be recovered<sup>9</sup> as set out above<sup>10</sup>; and no proceedings may be taken, whether by bringing a claim or otherwise, for the enforcement of any charge on land<sup>11</sup> created by a local Act for securing payment of arrears of any rate so made<sup>12</sup>.

The drainage board for an internal drainage district is not required to enforce payment of any drainage rate in any case where the amount payable is, in its opinion, insufficient to justify the expense of collection<sup>13</sup>.

1    Ie made under the Land Drainage Act 1991 Pt IV Ch II (ss 40-54): see PARA 627 et seq.

2    As to internal drainage boards and internal drainage districts see PARA 569 et seq.

3    Land Drainage Act 1991 s 54(1) (amended by virtue of the Local Government Finance Act 1992 s 1). Recovery is in accordance with the provisions of the Local Government Finance Act 1988 (see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 170 et seq): Land Drainage Act 1991 s 54(1). The drainage board for an internal drainage district may by resolution authorise any member or officer of the board, either generally or in respect of particular proceedings, to institute or defend proceedings or to appear on its behalf, notwithstanding that he is not qualified to act as a solicitor, in any proceedings before a magistrates' court for the issue of a warrant of distress for failure to pay a drainage rate: s 54(2). As from a day to be appointed this provision is amended by the substitution for the words 'warrant of distress' of the words 'warrant of control': s 54(2) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 para 100). At the date at which this volume states the law no such day had been appointed. Such a resolution must be passed before the proceedings are begun: *Bowyer, Philpott and Payne Ltd v Mather* [1919] 1 KB 419, DC; cf *Warwick RDC v Miller-Mead* [1962] Ch 441, [1962] 1 All ER 212, CA.

4    Ie under the Land Drainage Act 1991 s 45: see PARA 634.

5    Ie under the Land Drainage Act 1991 s 51: see PARA 636.

6    Land Drainage Act 1991 s 54(3).

7    Land Drainage Act 1991 s 54(4).

8    As to the meaning of 'person' see PARA 13 note 29.

9    Ie recovered by virtue of the Land Drainage Act 1991 s 54(1): see the text to notes 1-3.

10   Land Drainage Act 1991 s 54(5)(a).

11   As to the meaning of 'land' see PARA 569 note 2.

12 Land Drainage Act 1991 s 54(5)(b).

13 Land Drainage Act 1991 s 54(6).

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### **638. Information.**

The drainage board for an internal drainage district<sup>1</sup> may serve<sup>2</sup> on the owner of any hereditament<sup>3</sup> in the district in respect of which a drainage rate is levied<sup>4</sup> a notice requiring him to state in writing<sup>5</sup> the name and address of any person<sup>6</sup> known to him as being an occupier of that hereditament<sup>7</sup>. If the owner fails without reasonable excuse to comply with the notice<sup>8</sup>, or in pursuance of the notice makes any statement in respect of the information required which he knows to be false in a material particular<sup>9</sup> or recklessly makes such a statement which is false in a material particular<sup>10</sup>, he is guilty of an offence<sup>11</sup>. Where a person is convicted of such an offence in respect of a failure to comply with a notice and the failure continues after conviction, then unless he has a reasonable excuse for the continuance of the failure, he is guilty of a further such offence<sup>12</sup>.

1 As to internal drainage boards and internal drainage districts see PARA 569 et seq.

2 As to the service of documents see PARA 22.

3 As to the meaning of 'hereditament' see PARA 626 note 7.

4 As to the levying of drainage rates see PARA 627 et seq.

5 As to the meaning of 'writing' see PARA 22 note 1.

6 As to the meaning of 'person' see PARA 13 note 29.

7 Land Drainage Act 1991 s 53(1).

8 Land Drainage Act 1991 s 53(2)(a).

9 Land Drainage Act 1991 s 53(2)(b)(i).

10 Land Drainage Act 1991 s 53(2)(b)(ii).

11 Land Drainage Act 1991 s 53(2). A person guilty of such an offence is liable, on summary conviction, to a fine not exceeding level 4 on the standard scale: s 53(3). As to the standard scale see PARA 141 note 18.

12 Land Drainage Act 1991 s 53(4). The penalty for such an offence is, on summary conviction, as provided in s 53(3) (see note 11): see s 53(4).

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### **639. Grants to internal drainage boards and other drainage bodies.**

The Secretary of State or, in relation to Wales, the Welsh Ministers (the 'appropriate minister')<sup>1</sup> may make grants towards expenditure incurred by internal drainage boards<sup>2</sup> or by other drainage bodies<sup>3</sup> in the exercise of their functions in carrying out drainage schemes<sup>4</sup>. In relation to such grants made by the Secretary of State, they must be of such amount and subject to such conditions as may be approved by the Treasury<sup>5</sup>.

Where a drainage body is about to incur expenditure in respect of any work for which, if the work is properly carried out, such a grant will be payable, the appropriate minister may, with Treasury approval in the case of the Secretary of State, make advances to that body on account of the expenditure<sup>6</sup>. The appropriate Minister may also, with Treasury approval in the case of the Secretary of State, make grants to drainage bodies in respect of expenditure properly incurred by them with a view to:

- 1314 (1) carrying out drainage works, being expenditure towards which, if the works had been properly carried out, a grant would have been payable under<sup>7</sup> the above provisions<sup>8</sup>;
- 1315 (2) enabling them to determine in any particular case whether drainage works, or drainage works of any particular description, should or should not be carried out<sup>9</sup>;
- 1316 (3) obtaining or organising information, including information about natural processes affecting the coastline, to enable them to formulate or develop their plans with respect to the defence against sea water of any part of the coastline<sup>10</sup>; or
- 1317 (4) obtaining, at any time after the carrying out of drainage works, information with respect to the quality or effectiveness, or the effect on the environment, of those works<sup>11</sup>, or any matter of a financial nature relating to those works<sup>12</sup>;

and where a drainage body is about to incur expenditure in respect of which it appears to the appropriate minister that a grant will be payable under heads (1) to (4) above, he may, with Treasury approval in the case of the Secretary of State, make advances to the body on account of the expenditure<sup>13</sup>.

The appropriate minister may, with Treasury approval in the case of the Secretary of State: (a) make grants to an internal drainage board or a local authority<sup>14</sup> in respect of the cost of any works carried out<sup>15</sup> by the board or authority by agreement with another person entitled to carry them out<sup>16</sup>; (b) make to an internal drainage board grants in respect of expenditure incurred by the board, and advances on account of expenditure to be incurred by it, in carrying out works for the rebuilding or repair of any bridge maintained by the board, other than works appearing to the minister to be maintenance works of a routine kind<sup>17</sup>.

1 'Appropriate minister' means, in relation to England, the minister, and in relation to Wales, the Secretary of State: Land Drainage Act 1991 s 59(8). As to the meaning of 'the minister', as to the abolition of the Ministry of Agriculture, Fisheries and Food, and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

2 As to internal drainage boards see PARA 569.

3 le any drainage body other than the Environment Agency: Land Drainage Act 1991 s 59(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 191). As to the meaning of 'drainage body' see PARA 573 note 15. As to the Environment Agency see PARA 17. As to grants to the Agency under the Environment Act 1995 s 47 see PARA 611.

4 Land Drainage Act 1991 s 59(1). 'Drainage scheme' is not defined in the Land Drainage Act 1991. As to the meaning of 'drainage' see PARA 573. As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.

5 Land Drainage Act 1991 s 59(2). As to the meaning of 'Treasury' see PARA 108 note 6. The functions of the Treasury under s 59, in relation to Wales, are transferred to the Welsh Ministers: see PARA 569 note 9.

6 Land Drainage Act 1991 s 59(3).

7 le under the Land Drainage Act 1991 s 59(1): see the text to notes 1-4.

8 Land Drainage Act 1991 s 59(4)(a) (s 59(4)(a) designated as such, (4)(b)-(d), (4A) added, by the Environment Act 1995 s 101(2)).

9 Land Drainage Act 1991 s 59(4)(b) (as added: see note 8). Section 59(4)(b)-(d) are without prejudice to any power: (1) to make any grant under s 59(1) or (4)(a) (see the text to notes 1-4, 7-8); or (2) to impose any condition under s 59(2) (see the text to note 5), which could be made or imposed apart from s 59(4)(b)-(d): s 59(4A) (as so added).

10 Land Drainage Act 1991 s 59(4)(c) (as added: see note 8). See also note 9.

11 Land Drainage Act 1991 s 59(4)(d)(i) (as added: see note 8). See also note 9.

12 Land Drainage Act 1991 s 59(4)(d)(ii) (as added: see note 8). See also note 9.

13 Land Drainage Act 1991 s 59(5).

14 As to the meaning of 'local authority' see PARA 573 note 14.

15 le in pursuance of the Land Drainage Act 1991 s 20: see PARA 590.

16 Land Drainage Act 1991 s 59(6).

17 Land Drainage Act 1991 s 59(7).

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#### **640. Borrowing by internal drainage boards.**

An internal drainage board<sup>1</sup> may borrow, on the security of its property or income<sup>2</sup>: (1) for the purpose of defraying any costs, charges or expenses incurred by it in the exercise or performance of any power or duty under the Land Drainage Act 1991 or the Water Resources Act 1991<sup>3</sup>; or (2) for the purpose of discharging any loan contracted by it under the Land Drainage Act 1991 or any provision re-enacted, whether directly or indirectly, by that Act<sup>4</sup>.

The consent of the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>5</sup> is required for any such borrowing other than a borrowing for the purpose of discharging any loan previously contracted<sup>6</sup>. Money so borrowed may be borrowed for such period not exceeding 50 years as the board, with the relevant minister's consent, may in each case determine<sup>7</sup>. Where the drainage board for an internal drainage district<sup>8</sup> borrows any sums in respect of which it has determined that some part only of that district is to be liable, the money borrowed is repayable only out of rates levied on, or special levies issued or contributions received in respect of, that part of the drainage district<sup>9</sup>.

Where the owner of any land<sup>10</sup> comprised within any internal drainage district is authorised to invest money on real security, then unless the instrument authorising the investment provides to the contrary, he may invest money on a first mortgage of the drainage rates leviable by the drainage board for that district<sup>11</sup>.

1 As to internal drainage boards see PARA 569.

2 The provisions of the Commissioners Clauses Act 1847 as to mortgages are deemed to be incorporated in the Land Drainage Act 1991 s 55: s 55(6). The borrowing may be on the security of any property vested in the board or any drainage rates to be levied by the board under the Land Drainage Act 1991, special levies to be issued by the board in accordance with regulations under the Local Government Finance Act 1988 s 75, or contributions to be paid to the board under the Land Drainage Act 1991: s 55(8). Contributions are most likely to be those paid to the board by the Environment Agency under s 57: see PARA 613. As to drainage rates see PARA 627 et seq. As to special levies see PARA 633.

3 Land Drainage Act 1991 s 55(1)(a) (amended by the Water Act 2003 s 101(1), Sch 7 Pt 3 para 40(1), (3)).

4 Land Drainage Act 1991 s 55(1)(b).

5 As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

6 Land Drainage Act 1991 s 55(3).

7 Land Drainage Act 1991 s 55(4).

8 As to internal drainage districts see PARA 569 et seq.

9 Land Drainage Act 1991 s 55(5).

10 As to the meaning of 'land' see PARA 569 note 2.

11 Land Drainage Act 1991 s 55(7).





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### ***C. FINANCES OF LOCAL AUTHORITIES***

#### **641. Defrayal of expenses; borrowing and grants.**

Provision was made under the Land Drainage Act 1976 for the defrayal of amounts due from county councils, metropolitan district councils and London borough councils to the former National Rivers Authority in respect of levies<sup>1</sup>; and this provision is continued in force for the purposes of the Environment Agency (Levies) Regulations 1993<sup>2</sup>.

The council of a county, county borough or London borough and the Common Council of the City of London may borrow for the purposes of the Land Drainage Act 1991<sup>3</sup>. Central government grants may also be payable to a local authority<sup>4</sup> in respect of drainage schemes on the same basis as such grants are payable to internal drainage boards<sup>5</sup>.

<sup>1</sup> See the Land Drainage Act 1976 s 110 (repealed; saved by the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 2(5)). As to the transfer of functions from the former National Rivers Authority to the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 70. As to the Environment Agency see PARA 17. As to the discharge of liabilities by a county council in England which is not a billing authority see the Local Government Act 1972 s 148; and **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 550.

<sup>2</sup> See for the purposes of the Environment Agency (Levies) Regulations 1993, SI 1993/61 (see PARA 612): see the Water Consolidation (Consequential Provisions) Act 1991 Sch 2 para 2(5).

<sup>3</sup> Land Drainage Act 1991 s 55(2) (amended by the Local Government (Wales) Act 1994 s 22(5), Sch 11 para 4(7)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

<sup>4</sup> As to the meaning of 'local authority' see PARA 573 note 14.

<sup>5</sup> See the Land Drainage Act 1991 s 59; and PARA 639.

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## **(v) Environmental Duties of Drainage Authorities**

### **A. IN GENERAL**

#### **642. Duties in relation to drainage boards.**

It is the duty of an internal drainage board<sup>1</sup>, of the Secretary of State or, in relation to Wales, the Welsh Ministers (each of the ministers)<sup>2</sup>, and of the Environment Agency<sup>3</sup>, in formulating or considering any proposals relating to any functions of such a board<sup>4</sup>:

- 1318 (1) so far as may be consistent with the purposes of any enactment relating to the functions of such a board, and in the case of the Secretary of State and the Welsh Ministers with the general duties with respect to the water industry<sup>5</sup>, so to exercise any power conferred with respect to the proposals on the board, the Secretary of State or the Welsh Ministers or, as the case may be, the Agency as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest<sup>6</sup>;
- 1319 (2) to have regard to the desirability of protecting and conserving buildings<sup>7</sup>, sites and objects of archaeological, architectural or historic interest<sup>8</sup>; and
- 1320 (3) to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects<sup>9</sup>.

Subject to the above provisions, it is the duty of an internal drainage board, of the Secretary of State or the Welsh Ministers and of the Agency, in formulating or considering any proposals relating to any functions of such a board<sup>10</sup>:

- 1321 (a) to have regard to the desirability of preserving for the public any freedom of access to areas of woodland, mountains, moor, heath, down, cliff or foreshore and other places of natural beauty<sup>11</sup>;
- 1322 (b) to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural or historic interest<sup>12</sup>; and
- 1323 (c) to take into account any effect which the proposals would have on any such freedom of access or on the availability of any such facility<sup>13</sup>.

Subject to obtaining the consent of any navigation authority<sup>14</sup>, harbour authority<sup>15</sup> or conservancy authority<sup>16</sup> before doing anything which causes navigation which is subject to the control of that authority to be obstructed or otherwise interfered with, it is the duty of an internal drainage board to take such steps as are reasonably practicable<sup>17</sup> and consistent with the purposes of the enactments relating to the functions of that board<sup>18</sup>, for securing, so long as that board has rights to the use of water or land associated with water, that those rights are exercised so as to ensure that the water or land is made available for recreational purposes and is so made available in the best manner<sup>19</sup>.

Nothing in these provisions (or any other provision of the Land Drainage Act 1991) requires recreational facilities made available by an internal drainage board to be made available free of charge<sup>20</sup>.

1 As to internal drainage boards see PARA 569. As to codes of practice relating to the performance of the duties imposed by the Land Drainage Act 1991 s 61A see PARA 646.

2 As to the meaning of 'the ministers', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the Environment Agency see PARA 17. As to the Agency's general environmental duties see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72.

4 The Land Drainage Act 1991 s 61A(1) and (2) (see the text to notes 10-13) apply so as to impose duties on an internal drainage board in relation to:

- 23 (1) any proposals relating to the functions of the Environment Agency or of a water undertaker or sewerage undertaker;
- 24 (2) any proposals relating to the management, by the company holding an appointment as such an undertaker, of any land for the time being held by that company for any purpose whatever (whether or not connected with the carrying out of the functions of a water undertaker or sewerage undertaker); and
- 25 (3) any proposal which by virtue of the Water Industry Act 1991 s 156(7) (disposals of protected land: see PARA 454) falls to be treated for the purposes of s 3 of that Act (see PARA 676) as a proposal relating to the functions of a water undertaker or sewerage undertaker,

as they apply in relation to proposals relating to the functions of an internal drainage board but as if, for that purpose, the reference in head (1) in the text to enactments relating to the functions of such a board were a reference to enactments relating to that to which the proposal relates: Land Drainage Act 1991 s 61A(3) (s 61A added by the Land Drainage Act 1994 s 1; Land Drainage Act 1991 s 61A(1)-(3) amended by the Environment Act 1995 s 120, Sch 22, para 191). As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the meaning of 'land' see PARA 569 note 2. As to the meaning of 'enactment' see PARA 14 note 31.

5 As to the duties under the Water Industry Act 1991 s 2: see PARA 130.

6 Land Drainage Act 1991 s 61A(1)(a) (as added and amended: see note 4).

7 'Building' includes structure: Land Drainage Act 1991 s 61A(7) (as added: see note 4).

8 Land Drainage Act 1991 s 61A(1)(b) (as added: see note 4).

9 Land Drainage Act 1991 s 61A(1)(c) (as added: see note 4).

10 Land Drainage Act 1991 s 61A(2) (as added and amended: see note 4). See also note 4.

11 Land Drainage Act 1991 s 61A(2)(a) (as added: see note 4).

12 Land Drainage Act 1991 s 61A(2)(b) (as added: see note 4).

13 Land Drainage Act 1991 s 61A(2)(c) (as added: see note 4).

14 As to the meaning of 'navigation authority' see PARA 189 note 1.

15 'Harbour authority' means a person or body of persons empowered by an enactment to make charges in respect of ships entering a harbour in the United Kingdom or using facilities therein; and 'harbour in the United Kingdom' means a port, estuary, haven, dock or other place the waters of which are within United Kingdom national waters and in respect of entry into or the use of which by ships a person or body of persons is empowered by an enactment (including a local enactment) to make any charges other than charges in respect of navigational aids or pilotage: Merchant Shipping Act 1995 s 151(1): definition applied by the Land Drainage Act 1991 s 61A(7) (as added: see note 4; and amended by virtue of the Merchant Shipping Act 1995 s 314(2), Sch 13 para 91). As to the meaning of 'United Kingdom' see PARA 22 note 5. As to the meaning of 'person' see PARA 13 note 29.

- 16 As to the meaning of 'conservancy authority' see PARA 189 note 3.
- 17 Land Drainage Act 1991 s 61A(4)(a) (as added: see note 4).
- 18 Land Drainage Act 1991 s 61A(4)(b) (as added: see note 4).
- 19 Land Drainage Act 1991 s 61A(4) (as added: see note 4). It is the duty of every internal drainage board, in determining what steps to take in performance of any duty imposed by virtue of s 61A(4), to take into account the needs of persons who are chronically sick or disabled: s 61A(5) (as so added).
- 20 Land Drainage Act 1991 s 61A(6) (as added: see note 4).

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#### **643. Duties in relation to local authorities.**

It is the duty of a local authority<sup>1</sup>, of the Secretary of State or, in relation to Wales, the Welsh Ministers ('each of the ministers')<sup>2</sup>, and of the Environment Agency<sup>3</sup>, in formulating or considering any proposals relating to any functions of a local authority under the Land Drainage Act 1991:

- 1324 (1) so far as may be consistent with the purposes of the Land Drainage Act 1991, and in the case of the Secretary of State or the Welsh Ministers with the general duties with respect to the water industry<sup>4</sup>, so to exercise any power conferred with respect to the proposals on the local authority, the Secretary of State or the Welsh Ministers or, as the case may be, the Agency as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest<sup>5</sup>;
- 1325 (2) to have regard to the desirability of protecting and conserving buildings<sup>6</sup>, sites and objects of archaeological, architectural or historic interest<sup>7</sup>; and
- 1326 (c) to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects<sup>8</sup>.

Subject to the above provisions, it is the duty of a local authority, of the Secretary of State or the Welsh Ministers, and of the Agency, in formulating or considering any proposals relating to any functions of a local authority under the Land Drainage Act 1991:

- 1327 (a) to have regard to the desirability of preserving for the public any freedom of access to areas of woodland, mountains, moor, heath, down, cliff or foreshore and other places of natural beauty<sup>9</sup>;
- 1328 (b) to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural or historic interest<sup>10</sup>; and
- 1329 (c) to take into account any effect which the proposals would have on any such freedom of access or on the availability of any such facility<sup>11</sup>.

<sup>1</sup> As to the meaning of 'local authority' see PARA 573 note 14. As to codes of practice relating to the performance of the duties imposed by the Land Drainage Act 1991 s 61B see PARA 646.

<sup>2</sup> As to the meaning of 'the ministers', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

<sup>3</sup> As to the Environment Agency see PARA 17. As to the Agency's general environmental duties see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72.

<sup>4</sup> I.e. the duties under the Water Industry Act 1991 s 2: see PARA 130.

<sup>5</sup> Land Drainage Act 1991 s 61B(1)(a) (s 61B added by the Land Drainage Act 1994 s 1; Land Drainage Act 1991 s 61B(1), (2) amended by the Environment Act 1995 s 120, Sch 22 para 191).

- 6 'Building' includes structure: Land Drainage Act 1991 s 61B(3) (as added: see note 5).
- 7 Land Drainage Act 1991 s 61B(1)(b) (as added: see note 5).
- 8 Land Drainage Act 1991 s 61B(1)(c) (as added: see note 5).
- 9 Land Drainage Act 1991 s 61B(2)(a) (as added and amended: see note 5).
- 10 Land Drainage Act 1991 s 61B(2)(b) (as added: see note 5).
- 11 Land Drainage Act 1991 s 61B(2)(c) (as added: see note 5).

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#### **644. Duties with respect to sites of special scientific interest.**

Where Natural England or the Countryside Council for Wales<sup>1</sup> is of the opinion that any area of land<sup>2</sup> in England or Wales<sup>3</sup> is of special interest by reason of its flora, fauna or geological or physiographical features<sup>4</sup> and may at any time be affected by works, operations or activities of an internal drainage board<sup>5</sup>, or by works, operations or activities of a local authority under the Land Drainage Act 1991<sup>6</sup>, Natural England or the Countryside Council for Wales must notify the fact that the land is of special interest for that reason to every internal drainage board and local authority whose works, operations or activities may affect the land<sup>7</sup>.

Where a National Park authority<sup>8</sup> or the Broads Authority<sup>9</sup> is of the opinion that any area of land in a National Park or in the Broads<sup>10</sup> is land in relation to which certain specified matters<sup>11</sup> are of particular importance<sup>12</sup>, and may at any time be affected by such works, operations and activities as are mentioned above<sup>13</sup>, that authority must notify the fact that that land is such land, and the reasons why those matters are of particular importance in relation to the land, to every internal drainage board and local authority whose works, operations or activities may affect the land<sup>14</sup>.

Where an internal drainage board or local authority has received any such notification as is mentioned above with respect to any land, the board or authority must consult the notifying body<sup>15</sup> before carrying out any such works, operations or activities which appear to the board or authority to be likely to destroy or damage any of the flora, fauna or geological or physiographical features by reason of which the land is of special interest<sup>16</sup>, or which appear likely significantly to prejudice anything the importance of which is one of the reasons why the specified matters are of particular importance in relation to that land<sup>17</sup>. This requirement does not, however, apply in relation to anything done in an emergency where particulars of what is done and of the emergency are notified to Natural England, the Countryside Council for Wales, the National Park authority in question or, as the case may be, the Broads Authority as soon as practicable after that thing is done<sup>18</sup>.

The environmental and recreational duties of the Environment Agency and of water undertakers are discussed elsewhere in this title<sup>19</sup>.

1 As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

2 As to the meaning of 'land' see PARA 569 note 2.

3 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

4 Land Drainage Act 1991 s 61C(1)(a) (s 61C added by the Land Drainage Act 1994 s 1).

5 Land Drainage Act 1991 s 61C(1)(b)(i) (as added: see note 4). As to internal drainage boards see PARA 569.

6 Land Drainage Act 1991 s 61C(1)(b)(ii) (as added: see note 4). As to the meaning of 'local authority' see PARA 573 note 14.

7 Land Drainage Act 1991 s 61C(1) (as added (see note 4); and amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 134(1), (2)).



- 8 As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.
- 9 As to the Broads Authority see PARA 734.
- 10 'The Broads' has the same meaning as in the Norfolk and Suffolk Broads Act 1988 (see PARA 735 note 2): Land Drainage Act 1991 s 61C(5) (as added: see note 4).
- 11 In the matters for the purposes of which the Land Drainage Act 1991 ss 61A, 61B have effect: see PARAS 642, 643.
- 12 Land Drainage Act 1991 s 61C(2)(a) (as added: see note 4).
- 13 See the Land Drainage Act 1991 s 61C(2)(b) (as added: see note 4).
- 14 Land Drainage Act 1991 s 61C(2) (as added: see note 4).
- 15 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. As to codes of practice relating to the performance of the duties imposed by the Land Drainage Act 1991 s 61C see PARA 646.
- 16 Land Drainage Act 1991 s 61C(3)(a) (as added: see note 4).
- 17 Land Drainage Act 1991 s 61C(3)(b) (as added: see note 4).
- 18 Land Drainage Act 1991 s 61C(4) (as added (see note 4); and amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 134(1), (3)).
- 19 See PARA 675 et seq.

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#### **645. Ministerial directions to drainage boards.**

Where the Secretary of State or, in relation to Wales, the Welsh Ministers (the 'relevant minister')<sup>1</sup> considers that any works, operations or activities which are being, or are about to be, carried out by an internal drainage board<sup>2</sup> are likely to destroy or seriously damage:

- 1330 (1) any flora or fauna, or any geological or physiographical feature of special interest<sup>3</sup>; or
- 1331 (2) any building, structure, site or object of archaeological, architectural or historic interest<sup>4</sup>,

which in the relevant minister's opinion is of national or international importance, the relevant minister may give such directions as he considers appropriate to the internal drainage board with respect to the exercise and performance of its functions<sup>5</sup>. Except in a case of emergency the relevant minister may not, however, give such directions without first consulting the board<sup>6</sup>.

It is the duty of an internal drainage board to comply with any direction which it is given under these provisions<sup>7</sup>.

1 As to the meaning of 'relevant minister', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

2 As to internal drainage boards see PARA 569.

3 Land Drainage Act 1991 s 61D(1)(a) (s 61D added by the Land Drainage Act 1994 s 1).

4 Land Drainage Act 1991 s 61D(1)(b) (as added: see note 3).

5 Land Drainage Act 1991 s 61D(1) (as added: see note 3). As to the giving of ministerial directions to the Environment Agency in the performance of its functions see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 74.

6 See the Land Drainage Act 1991 s 61D(2) (as added: see note 3). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

7 Land Drainage Act 1991 s 61D(3) (as added: see note 3).

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#### **646. Codes of practice.**

The Secretary of State or, in relation to Wales, the Welsh Ministers ('the ministers')<sup>1</sup> may by order<sup>2</sup> approve any code of practice issued, whether by them or by another person<sup>3</sup>, for the purpose of:

- 1332 (1) giving practical guidance to internal drainage boards<sup>4</sup> and local authorities<sup>5</sup> with respect to any of the specified matters<sup>6</sup> relating to their environmental duties<sup>7</sup>; and
- 1333 (2) promoting what appear to the ministers to be desirable practices by internal drainage boards or local authorities with respect to those matters<sup>8</sup>,

and may at any time by order approve a modification of such a code or withdraw their approval of such a code or modification<sup>9</sup>. The ministers may not, however, make any order approving or modifying such a code or withdrawing such a code or modification unless they have first consulted the Environment Agency<sup>10</sup>, Natural England and the Countryside Council for Wales<sup>11</sup>, the Historic Buildings and Monuments Commission for England<sup>12</sup>, and such other persons or bodies as the ministers consider appropriate<sup>13</sup>.

A contravention of a code of practice as for the time being approved under these provisions does not of itself constitute a contravention of any statutory requirement<sup>14</sup> with regard to environmental duties<sup>15</sup>, or give rise to any criminal or civil liability<sup>16</sup>, but the Secretary of State or the Welsh Ministers are each under a duty to take into account whether there is or has been, or is likely to be, any such contravention in determining when and how they should exercise their powers in relation to an internal drainage board or local authority under the Land Drainage Act 1991<sup>17</sup>.

1 As to the meaning of 'the ministers', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

2 The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Land Drainage Act 1991 s 61E(3) (s 61E added by the Land Drainage Act 1994 s 1). As to the making of orders generally see PARA 584. As to the bringing of subordinate legislation made by the Welsh Ministers before the National Assembly for Wales see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

As to the order made see the Code of Practice on Environmental Procedures for Flood Defence Operating Authorities (Internal Drainage Boards and Local Authorities) Approval Order 1996, SI 1996/3062, which came into force on 1 January 1997 (see art 1) and which approves the code of practice entitled *Code of Practice on Environmental Procedures for Flood Defence Operating Authorities* published by the then Ministry of Agriculture, Fisheries and Food with reference PB 2906 (Code of Practice on Environmental Procedures for Flood Defence Operating Authorities (Internal Drainage Boards and Local Authorities) Approval Order 1996, SI 1996/3062, art 2).

3 As to the meaning of 'person' see PARA 13 note 29.

4 As to internal drainage boards see PARA 569.

5 As to the meaning of 'local authority' see PARA 573 note 14.

6 le, in relation to internal drainage boards, the matters for the purposes of which the Land Drainage Act 1991 ss 61A, 61C (see PARAS 642, 644) have effect; and in relation to local authorities, the matters for the purposes of which ss 61B, 61C (see PARAS 643, 644) have effect: s 61E(1)(a) (as added: see note 2).

7 Land Drainage Act 1991 s 61E(1)(a) (as added: see note 2).

8 Land Drainage Act 1991 s 61E(1)(b) (as added: see note 2).

9 Land Drainage Act 1991 s 61E(1) (as added: see note 2). As to codes of practice with respect to the environmental and recreational duties of the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 79.

10 Land Drainage Act 1991 s 61E(4)(a) (as added (see note 2); and amended by the Environment Act 1995 s 120, Sch 22, para 191). As to the Environment Agency see PARA 17. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 Land Drainage Act 1991 s 61E(4)(b) (as added (see note 2); and amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 135). In the case of any order proposed to be made which relates only to Wales, the requirement to consult Natural England does not have effect: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1 (amended by virtue of the Countryside and Rights of Way Act 2000 s 73(2)). As to the Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

12 Land Drainage Act 1991 s 61E(4)(c) (as added: see note 2). In the case of any order proposed to be made which relates only to Wales, the requirement to consult the Historic Buildings and Monuments Commission for England does not have effect: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1 (as amended: see note 11). As to the Historic Buildings and Monuments Commission for England **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 803 et seq.

13 Land Drainage Act 1991 s 61E(4)(d) (as added: see note 2).

14 le any requirement imposed by the Land Drainage Act 1991 s 61A, 61B or 61C: see PARAS 642-644.

15 Land Drainage Act 1991 s 61E(2)(a) (as added: see note 2).

16 Land Drainage Act 1991 s 61E(2)(b) (as added: see note 2).

17 Land Drainage Act 1991 s 61E(2) (as added: see note 2).

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#### **647. Ministerial guidance.**

The government has produced a strategy for the management of risk from all forms of flooding<sup>1</sup>. Ministerial guidance requires the Environment Agency<sup>2</sup>, internal drainage boards<sup>3</sup>, and certain local authorities to produce and keep under review water level management plans to take account of environmental requirements and opportunities, particularly in sites of special scientific interest and European sites where the control of water levels is important to the maintenance or rehabilitation of the conservation interest. These plans are to provide a means by which the water level requirements within a specified area for a range of activities, including the needs of land drainage and flood defence and conservation, can be balanced and integrated. The plans outline the objectives for the area concerned and the means by which such objectives may be achieved<sup>4</sup>.

Ministerial guidance also requires maritime local authorities and land drainage and flood defence bodies in England to prepare shoreline management plans to encourage the provision of adequate and cost-effective flood warning systems, to encourage the provision of adequate technically, environmentally and economically sound and sustainable flood and coastal defence measures and to discourage inappropriate development in areas at risk from flooding or coastal erosion<sup>5</sup>.

Government policy on development and flood risk is set out in a planning policy statement which aims to regulate development so that flood risk is taken into account at all stages in the planning process and inappropriate development does not take place in areas at risk of flooding<sup>6</sup>.

1 See *Making Space for Water* together with the programme of work thereunder. See also *Future Water* which sets out a framework for water management in England. Copies of all the documents referred to notes 1-5 are available on the Department of Environment, Food and Rural Affairs website at [www.defra.gov.uk](http://www.defra.gov.uk). For strategy, advice and guidance in relation to Wales see the *Environment Strategy for Wales* which is available on the Welsh Assembly Government website at [www.new.wales.gov.uk](http://www.new.wales.gov.uk).

2 As to the Environment Agency see PARA 17.

3 As to internal drainage boards see PARA 569.

4 See the [former] Ministry of Agriculture, Fisheries and Food guidance *Water Level Management Plans* (June 1994); *Water Level Management Plans: Additional Guidance Notes for Operating Authorities* (1999); *Guidance on Water Level Management Plans for European Sites* (2004). See also the *List of Priority WLMP sites* (2004). The former Ministry of Agriculture, Fisheries and Food (MAFF) was incorporated into the Department for Environment, Food and Rural Affairs (Defra) in 2001: see PARA 560 note 1.

Water level management plans may require strategic environmental assessment: see PARA 9.

5 See Defra *Guidance on preparing Shoreline Management Plans* (2006). Shoreline management plans may require strategic environmental assessment: see PARA 9.

6 See *Planning Policy Statement 25 (PPS25): Development and Flood Risk*. This document is available on the Department of Communities and Local Government website at [www.communities.gov.uk](http://www.communities.gov.uk). As to guidance in relation to Wales see *Planning Policy Wales* (2002) which is available on the Welsh Assembly Government website at [www.new.wales.gov.uk](http://www.new.wales.gov.uk). As to national planning policy guidance see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 9.

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#### **648. Conservation of natural habitats.**

The Secretary of State<sup>1</sup> and the Welsh Ministers<sup>2</sup> must exercise their functions<sup>3</sup> relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive<sup>4</sup> and the Wild Birds Directive<sup>5</sup>; and they and every other competent authority<sup>6</sup> in the exercise of any of their functions, must have regard to the requirements of these Directives so far as they may be affected by the exercise of those functions<sup>7</sup>. In relation to marine areas<sup>8</sup> any competent authority having functions relevant to marine conservation<sup>9</sup> must exercise those functions so as to secure compliance with the requirements of the Directives<sup>10</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716 (with certain exceptions not relevant to this title) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to the meaning of 'functions' see PARA 679 note 7.

4 I.e EC Council Directive 92/43 (OJ L206, 22.7.92, p 7) of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

5 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(2); and PARA 679. The Wild Birds Directive is EC Council Directive 79/409 (OJ L103, 25.4.1979, p 1) on the conservation of wild birds.

6 An internal drainage board, the Environment Agency and a local authority exercising flood defence and land drainage functions are competent authorities. As to the meaning of 'competent authority' see PARA 11 note 7.

7 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(4); and PARA 679.

8 As to the meaning of 'marine area' see PARA 679 note 11.

9 This applies in particular to functions under certain enactments including the Water Resources Act 1991 and the Land Drainage Act 1991: see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(3).

10 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(3); and PARA 679.

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## **B. IMPROVEMENT WORKS**

### **649. Restriction on improvement works; determination of environmental effects.**

Unless the works in question are exempted from the prescribed requirements<sup>1</sup>, a drainage body<sup>2</sup> may not carry out any improvement works<sup>3</sup> unless:

- 1334 (1) it has complied with the prescribed requirements<sup>4</sup> in relation to those improvement works<sup>5</sup>; and
- 1335 (2) where a proposal is referred to the appropriate authority<sup>6</sup>, that authority has consented to the carrying out of the improvement works and the works are carried out in accordance with any conditions to which the consent is subject<sup>7</sup>.

In relation to all improvement works, the drainage body, taking into account the prescribed selection criteria<sup>8</sup>, must determine whether the proposed improvement works are likely to have significant effects on the environment<sup>9</sup>.

1 The subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 3(2): reg 3(1). Where the appropriate authority considers, in relation to particular improvement works, that there are exceptional grounds for doing so, it may direct that the provisions of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, do not apply in relation to the works in question: reg 3(2) (reg 3(2) substituted, (2A) added, by SI 2005/1399). In this event, the appropriate authority must: (1) consider whether another form of assessment would be appropriate; (2) where it carries out any other form of assessment, make available to the public the information obtained under that assessment, the reasons for its decision to give a direction under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 3(2) and any information relied on in making that decision: reg 3(2A) (as so added). 'Appropriate authority' means, in relation to England, the Secretary of State (formerly the Minister of Agriculture, Fisheries and Food), and in relation to Wales, the Welsh Ministers: reg 2(1). As to the Secretary of State see PARA 15 note 1. As to the abolition of the Ministry of Agriculture, Fisheries and Food and the transfer of the functions of that ministry see PARA 569 note 9. Functions under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, which were originally vested in the National Assembly for Wales are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

No direction may be made under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 3(2) where either the appropriate authority or the drainage body is aware that the proposed improvement works would be likely to have significant effects on the environment of another EEA state: reg 3(3). Where the appropriate authority makes a direction under reg 3(2) it must: (a) send a copy of the direction to the drainage body; and (b) publish in at least two newspapers local to the site of the proposed improvement works a notice which briefly describes the proposed works, explains the effect of the direction and explains the reasons for it: reg 3(4). 'EEA state' means a state which is a Contracting Party to the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183): see the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1). As to the meanings of 'drainage body' and 'improvement works' see notes 2-3.

2 'Drainage body' means any of the following public authorities which initiates improvement works, namely: (1) the Environment Agency; (2) an internal drainage board; and (3) the council of a county, a county borough, a district (including a metropolitan district) or a London borough, the Common Council of the City of London or the Council of the Isles of Scilly: Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1). As to the Environment Agency see PARA 17. As to internal drainage

boards see PARA 569. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

3 'Improvement works' means works which are: (1) the subject of a project to deepen, widen, straighten or otherwise improve or alter any existing watercourse or remove or alter mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve or alter any existing drainage work; and (2) permitted development by virtue of the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, Sch 2 Pt 14 or Pt 15 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 255 et seq): Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1) (definition amended by SI 2005/1399). 'Watercourse' includes any river and stream and any ditch, drain, cut, culvert, dike, sluice, sewer (other than public sewer as defined in the Water Industry Act 1991 s 219(1): see PARA 138 note 11) and any passage through which water flows; and 'drainage' includes defence against water including sea water: Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1).

Improvement works may also require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.

4 le the requirements of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783: see PARA 650 et seq.

5 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 3(1)(a).

6 le under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(4): see PARA 654.

7 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 3(1)(b).

8 le the selection criteria in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 2: reg 4. The characteristics of improvement works must be considered having regard, in particular, to: (1) the size of the improvement works; (2) the cumulation with other improvement works; (3) the use of natural resources; (4) the production of waste; (5) pollution and nuisances; and (6) the risk of accidents, having regard in particular to substances or technologies used: Sch 2 para 1. The environmental sensitivity of geographical areas likely to be affected by improvement works must also be considered, having regard, in particular, to the existing land use, to the relative abundance, quality and regenerative capacity of natural resources in the area and to the absorption capacity of the natural environment, paying particular attention to the following areas: (a) wetlands; (b) coastal zones; (c) mountain and forest areas; (d) nature reserves and parks; (e) areas classified or protected under member states' legislation; special protection areas designated by member states pursuant to EC Council Directive 79/409 (OJ L103, 25.04.79, p 01) (on the conservation of wild birds: see **ANIMALS** vol 2 (2008) PARA 994) and EC Directive 92/43 (OJ L206, 22.07.92, p 07) (on the conservation of natural habitats of wild fauna and flora: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 729); (f) areas in which the environmental quality standards laid down in Community legislation have already been exceeded; (g) densely populated areas; (h) landscapes of historical, cultural or archaeological significance: Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 2 para 2. The potential significant effects of improvement works must be considered in relation to criteria set out under Sch 2 paras 1 and 2, and having regard in particular to: (i) the extent of the impact (geographical area and size of the affected population); (ii) the transfrontier nature of the impact; (iii) the magnitude and complexity of the impact; (iv) the probability of the impact; (v) the duration, frequency and reversibility of the impact: Sch 2 para 3.

9 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 4. Notes for guidance in relation to the regulations have been issued by the Department of Environment, Food and Rural Affairs and are available on the department's website at [www.defra.gov.uk](http://www.defra.gov.uk). Improvement works may require an appropriate assessment pursuant to the Habitats Directive: see PARA 11.



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**650. Requirements where a drainage body considers improvement works are not likely to have significant effects on the environment.**

Where a drainage body<sup>1</sup> considers<sup>2</sup> that the improvement works<sup>3</sup> are not likely to have significant effects on the environment, it must, by notice in at least two local newspapers<sup>4</sup> and on any website maintained by the drainage body<sup>5</sup>:

- 1336 (1) announce that it proposes to carry out the improvement works in question<sup>6</sup>;
- 1337 (2) describe briefly the nature, size and location of the proposed improvement works<sup>7</sup>;
- 1338 (3) state that it does not intend to prepare an environmental statement<sup>8</sup> in respect of the proposed improvement works<sup>9</sup>;
- 1339 (4) give notice that any person<sup>10</sup> who wishes to do so should make representations to that body in writing<sup>11</sup> in relation to the likely environmental effects of the proposed improvement works at an address specified in the notice within 28 days of the date of publication of the notice<sup>12</sup>; and
- 1340 (5) describe what additional information concerning the improvement works is available, and where it can be obtained<sup>13</sup>.

A drainage body which publishes such a notice must also, on or before the date of such publication, supply a copy of the notice to each of the consultation bodies<sup>14</sup> so that they have an opportunity to make representations in relation to the likely environmental effects of the proposed improvement works before expiry of the period specified in the notice<sup>15</sup>.

Where, within the period provided for in head (4) above, no representations have been made to the effect that the works are likely to have significant effects on the environment, the drainage body may proceed to carry out the improvement works<sup>16</sup>. Where, however, following that period the drainage body considers, whether in the light of any representations or otherwise, that the improvement works are likely to have significant effects on the environment, it must so determine<sup>17</sup>.

Where within the period provided for in head (4) above, any representations have been made to the effect that the works are likely to have significant effects on the environment and, notwithstanding those representations, the drainage body still considers that the improvement works are not likely to have significant effects on the environment, it must apply to the appropriate authority<sup>18</sup> for a determination of whether the improvement works are likely to have significant effects on the environment and must provide the authority with all the relevant facts and copies of all relevant documents in its possession<sup>19</sup>. Where the appropriate authority considers that the information and copy documents so provided do not provide sufficient information to enable a determination to be made, that authority must notify the drainage body in writing of the points on which further information is required and may make a written request to the drainage body for such information as it may be able to provide on the points raised<sup>20</sup>.

Where an application is so made to the appropriate authority, that authority must, taking into account the prescribed selection criteria<sup>21</sup>, determine whether the improvement works are likely to have significant effects on the environment and must inform the drainage body in writing of its determination<sup>22</sup>.

1 As to the meaning of 'drainage body' see PARA 649 note 2.

2 le under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 4: see PARA 649.

3 As to the meaning of 'improvement works' see PARA 649 note 3.

4 Where the site of the proposed improvement works is easily visible from a public highway, the requirements in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, regs 5(1), 6(2) (see PARA 651), 10(1)-10(3) (see PARA 653), 12(3), 12(6)(a) and 12(8) (see PARA 654) to place a notice in at least two newspapers may instead be satisfied by: (1) placing the notice in one such newspaper; and (2) on the date on which that notice is first published, posting on the site in one or more places a notice containing the information specified in the regulation in question: reg 13B(1) (reg 13B added by SI 2005/1399; and substituted by SI 2006/618). Any notice of the kind referred to in head (2) above must: (a) in relation to the information specified in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1)(d) (see the text to notes 10-12), 10(2)(b) or 12(6)(a), specify as the period within which representations may be made the period of not less than 28 days from the date on which the notice is first posted; (b) be left in position for not less than seven consecutive days following the date on which the notice is first posted; and (c) be affixed firmly to some object on the site in such a way as to be easily visible to, and readable by, members of the public without going on to the land: reg 13B(2) (as so added and substituted). Where the requirements in reg 5(1), 6(2), 10(1)-10(3), 12(3), 12(6)(a) or 12(8) as regards the placing of a notice in at least two newspapers are satisfied by the alternative means specified in reg 13B(1), any reference in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783: (i) to a notice, being a notice published under or in accordance with any of those regulations, means the notice published under or in accordance with head (1) above; and (ii) to publication of such a notice (however expressed) is a reference to publication of the notice under or in accordance with that head: reg 13B(3) (as so added and substituted).

The drainage body must make available to the public, at the time that the notice under reg 5(1) is published, all relevant information that is relevant to the improvement works: reg 13A(1)(a) (reg13A added by SI 2005/1399).

5 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1) (amended by SI 2005/1399).

6 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1)(a).

7 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1)(b).

8 As to environmental statements see PARA 652.

9 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1)(c) (amended by SI 2005/1399).

10 As to the meaning of 'person' see PARA 13 note 29.

11 As to the meaning of 'writing' see PARA 22 note 1.

12 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1)(d) (amended by SI 2005/1399).

13 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(1)(e) (added by SI 2005/1399).

14 'Consultation bodies' means: (1) in relation to improvement works which are to be carried out in England, English Nature, English Heritage and the Countryside Agency; (2) in relation to improvement works which are to be carried out in Wales, the Countryside Council for Wales and Cadw, being the executive agency responsible for carrying out the functions vested in the National Assembly for Wales relating to the historic environment; and (3) any other public authority, statutory body or organisation which, in the opinion of the drainage body proposing any improvement works, has an interest in those improvement works: Environmental Impact

Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1) (definition amended by virtue of the Countryside and Rights of Way Act 2000 s 73(2); and by SI 2005/1399). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. English Nature and the Countryside Agency were dissolved and their functions transferred to Natural England: see the Natural Environment and Rural Communities Act 2006 s 1; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523. As to English Heritage see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 803. As to the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

15 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(2).

16 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(3) (amended by SI 2005/1399; SI 2006/618).

17 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(4) (amended by SI 2005/1399; SI 2006/618).

18 As to the meaning of 'appropriate authority' see PARA 649 note 1.

19 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(5) (amended by SI 2005/1399; SI 2006/618).

20 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(6).

21 le the selection criteria in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 2: see PARA 649 note 8.

22 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(7).

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**651. Notification of determination that improvement works are likely to have significant effects on the environment.**

In any case where:

- 1341 (1) a drainage body<sup>1</sup> determines<sup>2</sup> that improvement works<sup>3</sup> are likely to have significant effects on the environment<sup>4</sup>; or
- 1342 (2) the appropriate authority<sup>5</sup> determines<sup>6</sup> that improvement works are likely to have significant effects on the environment<sup>7</sup>,

the drainage body must by notice in at least two local newspapers<sup>8</sup> and on any website maintained by the drainage body<sup>9</sup>:

- 1343 (a) inform the public of the need for a determination of whether the improvement works should proceed, and describe briefly the nature, size and location of the proposed improvement works<sup>10</sup>;
- 1344 (b) state that the works are likely to have significant effects on the environment and that the drainage body intends to prepare an environmental statement<sup>11</sup> in respect of them<sup>12</sup>;
- 1345 (c) give details of the drainage body responsible for taking the decision as to whether to carry out the improvement works, from whom relevant information can be obtained and to which comments or questions can be submitted, and details of the time by which comments or questions must be submitted<sup>13</sup>;
- 1346 (d) give an indication of the availability of the information gathered<sup>14</sup>;
- 1347 (e) give details of times and places where, and the means by which, the relevant information will be made available<sup>15</sup>.

A drainage body which publishes such a notice must, on or before the date of such publication, supply a copy of the notice to each of the consultation bodies<sup>16</sup>.

1 As to the meaning of 'drainage body' see PARA 649 note 2.

2 Ie under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 4 (see PARA 649) or reg 5(4) (see PARA 650).

3 As to the meaning of 'improvement works' see PARA 649 note 3.

4 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(1)(a).

5 As to the meaning of 'appropriate authority' see PARA 649 note 1.

6 Ie under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 5(7): see PARA 650.

7 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(1)(b).

8     le subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 13B: see PARA 650 note 4.

9     Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(2) (amended by SI 2005/1399).

10    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(2)(a) (amended by SI 2005/1399).

11    As to environmental statements see PARA 652.

12    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(2)(b) (amended by SI 2005/1399).

13    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(2)(c) (reg 6(2)(c)-(e) added by SI 2005/1399).

14    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(2)(d) (as added: see note 13).

15    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(2)(e) (as added: see note 13).

16    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6(3). As to the meaning of 'consultation bodies' see PARA 650 note 14.

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## **652. Preparation of environmental statement.**

In any case to which the notification requirements set out in the previous paragraph apply<sup>1</sup>, a drainage body<sup>2</sup> must prepare an environmental statement<sup>3</sup>. 'Environmental statement' means a statement:

1348 (1) that includes such of the prescribed information<sup>4</sup> as is reasonably required to assess the environmental effects of the improvement works<sup>5</sup> and which the drainage body can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile; but

1349 (2) that includes at least the following:

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13. (a) a description of the improvement works comprising information on the site, design and size of the improvement works;
14. (b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
15. (c) the data required to identify and assess the main effects which the improvement works are likely to have on the environment;
16. (d) an outline of the main alternatives studied by the drainage body and an indication of the main reasons for their choice, taking into account the environmental effects;
17. (e) a non-technical summary of the information provided under heads (a) to (d) above<sup>6</sup>.

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A drainage body may request the appropriate authority<sup>7</sup> to give an opinion as to the information to be contained in the environmental statement required for particular improvement works<sup>8</sup>. Where a drainage body requests such an opinion before a determination has been made, the appropriate authority must deal with the request on the assumption that the improvement works will have significant effects on the environment<sup>9</sup>. Before giving such an opinion, the appropriate authority must consult the drainage body and the consultation bodies<sup>10</sup>. Giving such an opinion does not preclude the appropriate authority from requesting further information<sup>11</sup> from the drainage body concerned<sup>12</sup>.

Where a drainage body is required<sup>13</sup> to prepare an environmental statement, the drainage body may<sup>14</sup> enter into consultation with any other authority to determine whether that authority has in its possession any information which may be relevant to the preparation of the environmental statement and if the authority has such information, the authority must make such information available to the drainage body<sup>15</sup>.

1 In any case to which the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 6 applies: see PARA 651.

2 As to the meaning of 'drainage body' see PARA 649 note 2.

3 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 7. As to publicity for environmental statements see PARA 653.

4 le the information referred to in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 1: reg 2(1). That information is as follows:

- 26 (1) a description of the improvement works, including in particular: (a) a description of the physical characteristics of the whole improvement works and the land-use requirements during the construction and operational phases; (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used; (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed improvement works (Sch 1 para 1);
- 27 (2) an outline of the main alternatives studied by the drainage body and an indication of the main reasons for their choice, taking into account the environmental effects (Sch 1 para 2);
- 28 (3) a description of the aspects of the environment likely to be significantly affected by the proposed improvement works, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors (Sch 1 para 3);
- 29 (4) a description of the likely significant effects of the proposed improvement works on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the improvement works, resulting from (a) the existence of the improvement works; (b) the use of natural resources; (c) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the drainage body of the forecasting methods used to assess the effects on the environment (Sch 1 para 4);
- 30 (5) a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment (Sch 1 para 5);
- 31 (6) a non-technical summary of the information provided under heads (1)-(5) (Sch 1 para 6);
- 32 (7) an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the drainage body in compiling the required information (Sch 1 para 7).

5 As to the meaning of 'improvement works' see PARA 649 note 3.

6 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1).

7 As to the meaning of 'appropriate authority' see PARA 649 note 1.

8 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 8(1).

9 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 8(2).

10 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 8(3). As to the meaning of 'consultation bodies' see PARA 650 note 14.

11 le under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(5): see PARA 654.

12 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 8(4).

13 le by virtue of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 7: see the text to notes 1-3.

14 le subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, regs 9(2) and 13: see note 15.

15 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 9(1). Regulation 9(1) does not require the disclosure of information which is capable of being treated as confidential, or must be so treated, under the Environmental Information Regulations 2004, SI 2004/3391, reg

12 (see PARA 681): Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 9(2). Regulation 9(1) does not prevent an authority imposing a reasonable charge for the identification, preparation and copying of any information or making the payment of such a charge a condition of providing the information: reg 13(2).



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### **653. Publicity etc for environmental statements.**

Where a drainage body<sup>1</sup> has prepared an environmental statement<sup>2</sup>, it must publish a notice in accordance with the following provisions<sup>3</sup>. The notice must:

- 1350 (1) announce that the statement has been prepared and give details of the place and times where copies may be inspected<sup>4</sup>;
- 1351 (2) state that any person<sup>5</sup> wishing to make representations in relation to the likely environmental effects of the improvement works<sup>6</sup> to which the statement relates must make them in writing<sup>7</sup> to the drainage body at the address specified in the notice within 28 days from the publication of the notice<sup>8</sup>; and
- 1352 (3) state that where no objection in relation to the likely environmental effects of the works is made and the drainage body, having undertaken the specified assessment<sup>9</sup>, considers that the improvement works should proceed, it may so determine<sup>10</sup>.

The notice must be published in such newspapers<sup>11</sup>, not being less than two, as the drainage body considers necessary to ensure that the environmental statement is made available to the public and in order to give the public concerned the opportunity to express an opinion before a determination is made as to whether the improvement works should proceed<sup>12</sup>.

On or before the date of publication of the notice, the drainage body must supply a copy of the environmental statement and notice to each of the consultation bodies<sup>13</sup> so that they have an opportunity to make representations on the likely environmental effects of the improvement works to which the statement relates before expiry of the period specified in the notice<sup>14</sup>. The drainage body must also provide a copy of the environmental statement to any other person who so requests<sup>15</sup>.

Where it appears to a drainage body that improvement works would be likely to have significant effects on the environment of another EEA state<sup>16</sup>, or where another EEA state likely to be significantly affected requests, the drainage body must inform the appropriate authority without delay<sup>17</sup>, and supply to the appropriate authority all information or documents in its possession which are reasonably required by the appropriate authority for the purpose of complying with the prescribed requirements<sup>18</sup>.

1 As to the meaning of 'drainage body' see PARA 649 note 2.

2 In accordance with the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783: see PARA 652.

3 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(1).

4 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(2)(a).

5 As to the meaning of 'person' see PARA 13 note 29.

6 As to the meaning of 'improvement works' see PARA 649 note 3.

7 As to the meaning of 'writing' see PARA 22 note 1.

8 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(2)(b).

9 le the assessment specified in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(1): see PARA 654.

10 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(2)(c).

11 le subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 13B(1): see PARA 650 note 4.

12 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(3) (amended by SI 2005/1399).

13 As to the meaning of 'consultation bodies' see PARA 650 note 14.

14 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(4). A reasonable charge reflecting printing and distribution costs may be made to a consultation body for any copy of the whole or part of an environmental statement provided in addition to the copy supplied in accordance with reg 10(4): reg 13(1)(a)(i).

15 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(5). A reasonable charge reflecting printing and distribution costs may be made to such person for a copy of the whole or part of an environmental statement so provided: see reg 13(1)(b)(i).

16 As to the meaning of 'EEA state' see PARA 649 note 1.

17 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 11, Sch 3 para 1(a). As to the meaning of 'appropriate authority' see PARA 649 note 1.

18 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 3 para 1(b). The requirements referred to in the text are as follows: Where it appears to the appropriate authority that improvement works would be likely to have significant effects on the environment of another EEA state or where another EEA state likely to be significantly affected requests, the appropriate authority must: (1) send to the EEA state as soon as possible, and no later than the date of publication required by head (2) below, the particulars mentioned in Sch 3 para 3 and, if the authority thinks fit, the information mentioned in Sch 3 para 4; (2) publish the information referred to in head (1) above in a notice placed in the London Gazette with an indication of where further information is available; (3) give the EEA state a reasonable time in which to indicate whether it wishes to participate in the procedure for which the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, provide; and (4) inform the drainage body: Sch 3 para 2. The particulars referred to in head (1) above are a description of the improvement works, together with any available information on their possible significant effect on the environment in another EEA state and information on the nature of the determination which may be made: Sch 3 para 3. Where an EEA state indicates, in accordance with head (3) above, that it wishes to participate in the procedure for which the regulations provide, the appropriate authority must as soon as possible send to that EEA state the information required to be given under reg 6(2) (see PARA 651), but only to the extent that such information has not been provided to the EEA state earlier under head (1) above: Sch 3 para 4 (amended by SI 2005/1399). The appropriate authority, in so far as concerned, must also: (a) arrange for the particulars and information referred to in the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 3 paras 3 and 4 to be made available, within a reasonable time, to the authorities referred to in art 6(1) of the Directive and the public concerned in the territory of the EEA state likely to be significantly affected; and (b) ensure that those authorities and the public concerned are given an opportunity, before a determination is made as to whether the improvement works should proceed, to forward to the appropriate authority, within a reasonable time, their opinion on the information supplied: Sch 3 para 5. The appropriate authority must in accordance with art 7(4) of the Directive: (i) enter into consultations with the EEA state concerned regarding, inter alia, the potential significant effects of the improvement works on the environment of that EEA state and the measures envisaged to reduce or eliminate such effects; and (ii) determine in agreement with the other EEA state a reasonable period of time for the duration of the consultation period: Sch 3 para 6. Where an EEA state has been consulted in accordance with Sch 3 para 6, the appropriate authority must inform the EEA state of the determination in respect of the improvement works in question and must forward to it a statement of the content of the determination and any conditions attached thereto, the main reasons and considerations on which the determination is based and a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the improvement works:

Sch 3 para 7. 'The Directive' means Council Directive 85/337 (OJ L175, 05.07.85, p 40) (as amended by EC Council Directive 97/11 (OJ L73, 14.03.97, p 05)) on the assessment of the effects of certain public and private projects on the environment and Council Directive 2003/35 (OJ L156, 25.06.2003, p 17) on providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337 and Council Directive 96/61 (OJ L257, 10.10.1996, p 26): Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 2(1) (definition amended by SI 2005/1399).

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#### **654. Determination of whether improvement works should proceed.**

On expiry of the period specified in the notice publicising the environmental statement<sup>1</sup>, the drainage body<sup>2</sup> must assess, in the light of the environmental statement and any representations made<sup>3</sup>, the direct and indirect effects of the proposed improvement works<sup>4</sup> on the specified environmental factors<sup>5</sup>. Those factors are: (1) human beings, fauna and flora<sup>6</sup>; (2) soil, water, air, climate and the landscape<sup>7</sup>; (3) material assets and the cultural heritage<sup>8</sup>; and (4) the interaction between the factors mentioned in heads (1) to (3) above<sup>9</sup>.

Where either no objection in relation to the likely environmental effects of the improvement works has been made, or any such objection has been withdrawn, and the drainage body, having undertaken that assessment, considers that the improvement works should proceed, it may so determine, and may so determine subject to conditions<sup>10</sup>. Where a drainage body has so determined that it should proceed with the works or that it should proceed subject to conditions, or where it has determined that it should not so proceed, it must<sup>11</sup>, by notice in at least two local newspapers or by such other means as are reasonable in the circumstances<sup>12</sup>, inform the public of the determination<sup>13</sup>, and give details of the place and times where the public may inspect a statement of:

- 1353 (a) its determination and any conditions to which it is subject<sup>14</sup>;
- 1354 (b) the main reasons and considerations upon which its determination was based<sup>15</sup>; and
- 1355 (c) where necessary, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the improvement works<sup>16</sup>.

Where a drainage body, having undertaken the assessment specified above, considers that the improvement works should proceed but objections to those works made in relation to their likely environmental effects have not been withdrawn, it must refer the proposal for works together with the environmental statement and any representations on it to the appropriate authority<sup>17</sup> for determination<sup>18</sup>. Where the appropriate authority considers that the information supplied in accordance with the above provision does not provide sufficient information to enable a determination to be made, that authority must notify the drainage body in writing<sup>19</sup> of the points on which further information is required and may make a written request to that body for such information as it may be able to provide on the points raised<sup>20</sup>. Where the appropriate authority so requests further information from a drainage body, the body must, no later than the time when it provides that information to the appropriate authority:

- 1356 (i) by notice<sup>21</sup>, published in such newspapers, not being less than two, as the drainage body considers necessary to ensure that the further information is made available to the public and in order to give the public concerned the opportunity to express an opinion before a determination is made as to whether the improvement works should proceed<sup>22</sup>:

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- 18. (A) announce that the further information is available and give details of the place and times where a copy may be inspected<sup>23</sup>; and

19. (B) state that any person who wishes to make representations on the likely environmental effects of the improvement works to which the further information relates should make them in writing to the appropriate authority at the address specified in the notice within 28 days of the date of the publication of the notice<sup>24</sup>;

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- 1357 (ii) on or before the date of publication of the notice, supply a copy of the further information and notice to each of the consultation bodies so that they have an opportunity to make representations to the appropriate authority on the likely environmental effects of the improvement works to which the further information relates before expiry of the period specified in the notice<sup>25</sup>; and
- 1358 (iii) provide a copy of the further information to any other person who so requests<sup>26</sup>.

The appropriate authority must assess, in the light of the environmental statement, any further information provided in response to a request under the above provisions and any representations<sup>27</sup>, the direct and indirect effects of the proposed improvement works on the environmental factors specified in heads (1) to (4) above<sup>28</sup>. Having regard to that assessment, it must either consent to the carrying out of the works absolutely or subject to such conditions as the authority considers appropriate<sup>29</sup>, or refuse consent to the works<sup>30</sup>; and must send to the drainage body a statement in writing of (A) the authority's determination and any conditions attached to it<sup>31</sup>; (B) the main reasons and considerations upon which this determination was based, including information about the public participation process<sup>32</sup>; and (c) where necessary, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the improvement works<sup>33</sup>. The drainage body must<sup>34</sup>, by notice in at least two local newspapers, or by such other means as are reasonable in the circumstances, inform the public of the appropriate authority's determination and give details of the place and times where the public may inspect a copy of the statement so sent to the drainage body<sup>35</sup>.

In relation to any determination made by itself or by the appropriate authority in accordance with these provisions, the drainage body must maintain a record of, and make available to the public on request, the following information: (aa) the content of the decision and any conditions attached thereto<sup>36</sup>; (bb) the main reasons and considerations on which the decision is based, including information about representations received in the course of the public participation process<sup>37</sup>; and (cc) a description, where necessary, of the main measures to avoid and reduce the major adverse effects<sup>38</sup>.

1    I.e. the notice published under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10(1): see PARA 653. As to environmental statements see PARA 652.

2    As to the meaning of 'drainage body' see PARA 649 note 2.

3    I.e. made in accordance with the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10 or Sch 3: see PARA 653.

4    As to the meaning of 'improvement works' see PARA 649 note 3.

5    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(1). The drainage body must make available to the public any further information which is relevant to the assessment under reg 12(1), and which becomes available after the time that the public notice was published in accordance with reg 6(2) (see PARA 651); reg 13A(1)(c) (reg 13(1) amended, reg 13A added, by SI 2005/1399). A reasonable charge reflecting printing and distribution costs may be made to a consultation body and any other person for any copy of the whole or part of further information provided in addition to the copy supplied in accordance with reg 13A: see reg 13(1)(a)(ii), (b)(ii) (as so amended). As to the meaning of 'consultation bodies' see PARA 650 note 14. As to the meaning of 'person' see PARA 13 note 29.

6    Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 4(a).

7 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 4(b).

8 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 4(c).

9 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, Sch 4(d).

10 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(2).

11 <sup>le</sup> subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 13B: see PARA 650 note 4.

12 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(3) (amended by SI 12005/1399).

13 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(3)(A).

14 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(3)(B)(i).

15 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(3)(B)(ii).

16 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(3)(B)(iii).

17 As to the meaning of 'appropriate authority' see PARA 649 note 1.

18 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(4).

19 As to the meaning of 'writing' see PARA 22 note 1.

20 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(5).

21 <sup>le</sup> subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 13B(1): see PARA 650 note 4.

22 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(6)(a) (amended by SI 2005/1399).

23 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(6)(a)(i).

24 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(6)(a)(ii).

25 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(6)(b). A reasonable charge reflecting printing and distribution costs may be made to a consultation body for any copy of the whole or part of further information provided in addition to the copy supplied in accordance with reg 12(6)(b): see reg 13(1)(a)(ii).

26 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(6)(c). A reasonable charge reflecting printing and distribution costs may be made to such person for a copy of the whole or part of further information so provided: see reg 13(1)(b)(ii).

<sup>27</sup> <sup>le</sup> representations in accordance with the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 10 or Sch 3 (see PARA 653) or reg 12(6) (see the text to notes 21-26): reg 12(7)(a).

<sup>28</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7)(a). The drainage body must make available to the public any further information which is relevant to

the determination under reg 12(7), and which only becomes available after the time that the public was given notice in accordance with reg 5(1)(d) (see PARA 650), whether as a result of a request from the appropriate authority under reg 5(6) (see PARA 650) or otherwise: reg 13A(1)(b) (as added: see note 5). A reasonable charge reflecting printing and distribution costs may be made to a consultation body and any other person for any copy of the whole or part of further information provided in addition to the copy supplied in accordance with reg 13A: see reg 13(1)(a)(ii), (b)(ii) (as amended: see note 5).

<sup>29</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7)(b)(i).

<sup>30</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7)(b)(ii).

<sup>31</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7)(c)(i).

<sup>32</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7)(c)(ii) (substituted by SI 2005/1399).

<sup>33</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7)(c)(iii).

<sup>34</sup> Is subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 13B: see PARA 650 note 4.

<sup>35</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(8) (amended by SI 2005/1399).

<sup>36</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(9)(a) (reg 12(9) added by SI 2005/1399).

<sup>37</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(9)(b) (as added: see note 36).

<sup>38</sup> Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(9)(c) (as added: see note 36).

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## **655. Enforcement.**

If a drainage body<sup>1</sup> carries out improvement works<sup>2</sup>: (1) without complying with the prescribed requirements<sup>3</sup>; or (2) without the consent of the appropriate authority<sup>4</sup> where a proposal is referred to that authority<sup>5</sup>, or in breach of a condition to which such consent is subject<sup>6</sup>, the appropriate authority may apply to the court<sup>7</sup> for any of the following orders:

- 1359 (a) that the drainage body must not proceed further with the improvement works<sup>8</sup>;
- 1360 (b) that the drainage body must remove any work carried out<sup>9</sup>;
- 1361 (c) that the drainage body must reinstate the site in accordance with the reasonable requirements of the appropriate authority<sup>10</sup>.

An order made under head (b) or head (c) above may provide that, if the drainage body fails to comply with the order within a specified period, the appropriate authority may remove any work carried out and reinstate the site and may recover the reasonable costs and expenses of doing so from the drainage body as a debt due from that body<sup>11</sup>.

1 As to the meaning of 'drainage body' see PARA 649 note 2.

2 As to the meaning of 'improvement works' see PARA 649 note 3.

3 I.e. without complying with the requirements of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783 (see PARAS 649-654): reg 14(1)(a).

4 I.e. without such consent under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(7): see PARA 654. As to the meaning of 'appropriate authority' see PARA 649 note 1.

5 I.e. referred under the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 12(4): see PARA 654.

6 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 14(1)(b).

7 'Court' means the county court for the district (including a metropolitan district) in which improvement works are being carried out, or the High Court: Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, regs 2(1), 14(3). As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

8 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 14(1)(i).

9 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 14(1)(ii).

10 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 14(1)(iii).

11 Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783, reg 14(2).



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## **(vi) Miscellaneous Provisions**

### **656. Other land drainage powers of local authorities.**

A local authority<sup>1</sup> may contribute, or undertake to contribute, to the expenses of the carrying out or maintenance of any drainage works<sup>2</sup> by a drainage body<sup>3</sup> such an amount as, having regard to the public benefit to be derived from it, appears to the local authority to be proper<sup>4</sup>; and a local authority may borrow for the purpose of making such contributions<sup>5</sup>.

Under public health legislation local authorities<sup>6</sup> also have certain powers to control culverting and watercourses for purposes similar to land drainage purposes<sup>7</sup>. None of these powers may, however, be exercised by a local authority with respect to any stream, watercourse, ditch or culvert under the jurisdiction of a drainage body except after consultation with that body<sup>8</sup>. The owner or occupier of any land must repair, maintain and cleanse any culvert in, on or under that land, and if it appears to the local authority that any person<sup>9</sup> has failed to fulfil these obligations the authority may by notice require him to execute the necessary works of repair, maintenance or cleansing<sup>10</sup>.

A local highway authority may be liable in private nuisance to a landowner whose land suffers excessive flooding because a culvert constructed by the authority is no longer of adequate capacity to carry the natural flow of water from a stream under the highway<sup>11</sup>.

1 For these purposes, 'local authority' includes references to the Sub-Treasurer of the Inner Temple and to the Under Treasurer of the Middle Temple: Land Drainage Act 1991 s 60(3). As to the meaning of 'local authority' see PARA 573 note 14. As to the Temples see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 32.

2 As to the meaning of 'drainage' see PARA 573. As to the meaning of references to the carrying out of drainage works see PARA 574 note 3.

3 As to the meaning of 'drainage body' see PARA 573 note 15. This would include another local authority exercising the powers referred to in PARAS 589, 602.

4 Land Drainage Act 1991 s 60(1). Contributions may be required by the Environment Agency where there has been an order transferring liability from a local authority to the Agency: see the Water Resources Act 1991 s 108; and PARA 575. As to the Environment Agency see PARA 17.

5 See the Land Drainage Act 1991 s 60(2). This provision is expressed to be without prejudice to s 55(2); see PARA 641.

6 As to the meaning of 'local authority' for these purposes see PARA 51 note 1.

7 See the Public Health Act 1936 ss 262-265; and PARA 98 et seq. As to control of culverting for land drainage purposes see PARAS 603-604.

8 Public Health Act 1936 s 266(1)(i).

9 As to the meaning of 'person' see PARA 13 note 29.

10 See the Public Health Act 1936 s 264 (amended by the Statute Law (Repeals) Act 2004). The provisions of the Public Health Act 1936 Pt XII with respect to appeals against, and the enforcement of, notices requiring the execution of works (see s 290; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 125-127) apply in relation to any notice so given s 264.

11 See *Bybrook Barn Garden Centre Ltd v Kent County Council* [2001] BLR 55, [2001] LGR 239, CA; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 397.

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### **657. Local inquiries and other hearings.**

The Secretary of State or, in relation to Wales, the Welsh Ministers<sup>1</sup> have power to cause such inquiries to be held as they consider necessary or desirable for the purposes of the Land Drainage Act 1991<sup>2</sup>. The person appointed to hold such an inquiry may: (1) by summons require any person<sup>3</sup> to attend, at a time and place stated in the summons, to give evidence or to produce any documents in his custody or under his control which relate to any matter in question at the inquiry<sup>4</sup>; and (2) take evidence on oath and for that purpose administer oaths<sup>5</sup>. Any person who: (a) refuses or deliberately fails to attend in obedience to a summons or to give evidence<sup>6</sup>; or (b) deliberately alters, suppresses, conceals, destroys or refuses to produce any book or other document which he is required or liable to be required to produce for these purposes<sup>7</sup>, is guilty of an offence<sup>8</sup>.

Where either the Secretary of State or the Welsh Ministers cause an inquiry to be held, the costs incurred by the Secretary of State or the Welsh Ministers in relation to the inquiry must be paid by such authority or party to the inquiry as the Secretary of State or Welsh Ministers may direct<sup>9</sup>. Where either the Secretary of State or the Welsh Ministers cause an inquiry to be held, they may make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid<sup>10</sup>.

1 The statutory wording is 'each of the ministers'. As to the meaning of 'the ministers', and as to the transfer of functions under the Land Drainage Act 1991 to the Welsh Ministers, see PARA 569 note 9. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

2 Land Drainage Act 1991 s 69(1). As to inquiries and hearings in connection with any of the functions of the Environment Agency, or in connection with ministerial functions in relation to the Agency, under the Environment Act 1995 see s 53; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 89. As to local inquiries under the Water Industry Act 1991 see s 215; and eg PARA 353 note 22.

3 As to the meaning of 'person' see PARA 13 note 29.

4 Land Drainage Act 1991 s 69(2)(a). No person may be required, in obedience to a summons under s 69, to attend to give evidence or to produce any documents, unless the necessary expenses of his attendance are paid or tendered to him; and nothing in s 69 empowers a person holding an inquiry to require the production of the title, or of any instrument relating to the title, of any land which is not the property of a local authority: s 69(3). As to the meaning of 'land' see PARA 569 note 2. As to the meaning of 'local authority' see PARA 573 note 14.

5 Land Drainage Act 1991 s 69(2)(b). As to the meaning of 'oath' see PARA 635 note 8. As to the administration of oaths see **CIVIL PROCEDURE** vol 11 (2009) PARA 1021 et seq.

6 Land Drainage Act 1991 s 69(4)(a).

7 Land Drainage Act 1991 s 69(4)(b).

8 Land Drainage Act 1991 s 69(4). The penalty for such an offence is, on summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding level 3 on the standard scale or both: s 69(4). As to the standard scale see PARA 141 note 18.

9 Land Drainage Act 1991 s 69(5)(a). The Secretary of State or, as the case may be, the Welsh Ministers may cause the amount of the costs so incurred to be certified (s 69(5)(b)); and any amount so certified and directed to be paid by any authority or person is recoverable from that authority or person by the Secretary of State or Welsh Ministers summarily as a civil debt (s 69(5)). The Housing and Planning Act 1986 s 42 (recovery of

minister's costs in connection with inquiries: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) applies where either the Secretary of State or the Welsh Ministers are authorised to recover costs so incurred by them in relation to an inquiry as it applies where a minister is so authorised by virtue of an enactment specified in s 42(1): Land Drainage Act 1991 s 69(7). As to prescribed standard daily amounts in respect of such costs see the Fees for Inquiries (Standard Daily Amount) (England) Regulations 2000, SI 2000/2307; the Local Inquiries, Qualifying Inquiries and Qualifying Procedures (Standard Daily Amount) (Wales) Regulations 2007, SI 2007/728.

10 Land Drainage Act 1991 s 69(6)(a). Every such order may be made a rule of the High Court on the application of any party named in the order: s 69(6)(b). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

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**658. Flood plans for large reservoirs.**

The Secretary of State or, in relation to Wales, the Welsh Ministers, may direct the undertakers in relation to a large raised reservoir to prepare a flood plan setting out the action they would take in order to control or mitigate the effects of flooding likely to result from any escape of water from the reservoir<sup>1</sup>.

<sup>1</sup> See the Reservoirs Act 1975 s 12A; and PARA 288.

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### **659. Flood defence in the London area.**

The general flood defence and land drainage powers conferred by the Water Resources Act 1991 and the Land Drainage Act 1991 on the Environment Agency and local authorities<sup>1</sup> now apply to watercourses within the former London excluded area<sup>2</sup>, depending on the status of those watercourses<sup>3</sup>. In addition to those powers, the Environment Agency also has power to execute and maintain flood defence works with respect to certain rivers in the London area by virtue of various local enactments<sup>4</sup>.

In the exercise of powers conferred by the Thames Barrier and Flood Prevention Act 1972, the former Greater London Council carried out works to provide a flood barrier with movable flood gates across the River Thames in Woolwich Reach<sup>5</sup>. Responsibility for the operation of this flood barrier has now passed to the Environment Agency<sup>6</sup>, which has powers to use and operate the barrier and, in particular, to close the barrier gates for such periods as it considers necessary or desirable<sup>7</sup>.

1 As to such powers see PARA 573 et seq. As to the Environment Agency see PARA 17.

2 As to the former 'London excluded area' see the Land Drainage Act 1976 s 116(1), defining the 'London excluded area' as so much of Greater London and of any area adjoining Greater London as did not, on 31 March 1986, lie, for the purpose of the exercise of land drainage functions, within the area of any water authority (definition substituted by SI 1986/208).

3 I.e. depending on whether a watercourse is main river (in relation to which functions are exercisable by the Agency) (see PARA 574), an 'ordinary watercourse' (see PARA 573 note 16), a metropolitan watercourse or a main metropolitan watercourse.

4 As to these local enactments and the rivers to which they apply see the Land Drainage Act 1976 s 105, Sch 5 paras 1, 2. As to flood defence in the London area see further **LONDON GOVERNMENT**.

5 See the Thames Barrier and Flood Prevention Act 1972 s 18; and **LONDON GOVERNMENT**.

6 The Thames Barrier, and all other property held by the former Greater London Council for the purposes of the Thames Barrier and Flood Prevention Act 1972, vested, following the abolition of that council on 1 April 1986 (see the Local Government Act 1985 s 1(1)(a), (2)), in the former Thames Water Authority: see the Local Government Reorganisation (Property etc) Order 1986, SI 1986/148 art 20. The functions formerly exercisable by the council under the 1972 Act became exercisable by that authority: see the Thames Barrier and Flood Prevention Act 1972 (Amendment) Order 1986, SI 1986/227, art 2. That authority was subsequently abolished and its functions transferred to the National Rivers Authority (now abolished) and thence to the Environment Agency.

7 See the Thames Barrier and Flood Prevention Act 1972 s 35; and **LONDON GOVERNMENT**.

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## **(vii) Works Interfering with Flood Defences etc**

### **660. Protection for flood defences etc used under local statutory provisions.**

The provisions of the Water Industry Act 1991 and the Water Resources Act 1991 do not confer upon any person<sup>1</sup> power to do anything, except with the consent of the person so using them, which interferes with any sluices, floodgates, groynes, sea defences or other works used by any person for draining, preserving or improving any land<sup>2</sup> under any local statutory provision<sup>3</sup>, or with any such works used by any person for irrigating any land<sup>4</sup>. A consent for these purposes may be given subject to reasonable conditions but may not be unreasonably withheld<sup>5</sup>. Any dispute as to whether anything done or proposed to be done interferes or will interfere as mentioned<sup>6</sup> above<sup>7</sup>, as to whether any consent for these purposes is being unreasonably withheld<sup>8</sup>, or as to whether any condition subject to which any such consent has been given was reasonable<sup>9</sup>, must be referred to the arbitration of a single arbitrator to be appointed by agreement between the parties or, in default of agreement, by the President of the Institution of Civil Engineers<sup>10</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'land' see PARA 14 note 21.

3 Water Industry Act 1991 s 186(1)(a); Water Resources Act 1991 s 179(1)(a). As to the meaning of 'local statutory provision' see PARA 14 note 24.

4 Water Industry Act 1991 s 186(1)(b); Water Resources Act 1991 s 179(1)(b).

5 Water Industry Act 1991 s 186(6); Water Resources Act 1991 s 179(3).

6 ie in the Water Industry Act 1991 s 186(1); Water Resources Act 1991 s 179(1): see the text to notes 1-4.

7 Water Industry Act 1991 s 186(7)(a); Water Resources Act 1991 s 179(4)(a).

8 Water Industry Act 1991 s 186(7)(b); Water Resources Act 1991 s 179(4)(b).

9 Water Industry Act 1991 s 186(7)(c); Water Resources Act 1991 s 179(4)(c).

10 Water Industry Act 1991 s 186(7); Water Resources Act 1991 s 179(4). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209. The provisions of the Water Industry Act 1991 s 186 and the Water Resources Act 1991 s 179 are without prejudice to the provisions of the Water Industry Act 1991 Sch 13 and the Water Resources Act 1991 Sch 22 respectively (see PARA 490): Water Industry Act 1991 s 186(9); Water Resources Act 1991 s 179(5).

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### **661. Other protective provisions.**

Where a relevant undertaker<sup>1</sup> or the Environment Agency<sup>2</sup> proposes to construct or alter any inland waters<sup>3</sup> in an internal drainage district<sup>4</sup> which do not form part of a main river<sup>5</sup>, or to construct or alter any works on or in any such inland waters, it must, unless compulsory powers are being exercised<sup>6</sup>, consult the internal drainage board<sup>7</sup> for that district before doing so<sup>8</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'inland waters' see PARA 187 note 2.

4 As to internal drainage districts see PARA 569 et seq.

5 As to the meaning of 'main river' see PARA 574: definition applied for the purposes of the Water Industry Act 1991 s 186(5) by s 186(8).

6 As to compulsory works powers see PARA 455 et seq.

7 As to internal drainage boards see PARA 569. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

8 Water Industry Act 1991 s 186(5); Water Resources Act 1991 s 179(2) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).



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### **(3) DAMAGE BY WATER**

#### **(i) Introduction**

##### **662. General principles of liability.**

The principles governing liability for damage caused by the escape of water, whether from land, buildings or public or private water supply systems, are part of and derived from the law relating to negligence<sup>1</sup> or, in the absence of negligence, the law relating to nuisance<sup>2</sup> and the rule in *Rylands v Fletcher*<sup>3</sup>. Damage arising as the result of the pollution of water is dealt with elsewhere in this work<sup>4</sup>.

Water undertakers<sup>5</sup>, the Environment Agency<sup>6</sup> and other persons<sup>7</sup> having control of land or waterworks may be liable for damage caused by the escape of water under the Water Industry Act 1991 or the Water Resources Act 1991<sup>8</sup>, or under other statutory provisions<sup>9</sup>.

Liability in relation to escapes of water may also be affected by the terms of deeds, covenants, easements or other arrangements made between the water undertakers or the Agency and other persons, such as landowners<sup>10</sup>.

A riparian owner is entitled to raise his banks from time to time as may be necessary, so as to confine the flood water within the banks and to prevent it overflowing his land, provided that by doing so he does not occasion any injury to the land or property of other persons<sup>11</sup>. Where a tidal river is kept from overflowing by an artificial river wall protecting land the level of which is below that of high-water mark, failure by a riparian owner to keep his frontage up to the level of the rest of the river wall may render him liable in damages if his frontage is overtopped and the property of a neighbouring landowner is damaged<sup>12</sup>. Similarly, a provision in an Act of Parliament which requires the promoters to maintain and keep the banks of a watercourse in good and sufficient repair, and from time to time to strengthen and support them for containing the water, so that the adjacent land is not overflowed or damaged by water except in the case of flood may impose an absolute obligation on the promoters and their successors to protect the adjoining land from injury<sup>13</sup>. Further, under the 'common enemy rule'<sup>14</sup>, a landowner may erect defences the effect of which will be that water which would otherwise have flowed onto his land will be diverted onto that of his neighbours, provided that: (1) there is no interference with an established watercourse; and (2) the landowner does not thereby cause water which has already or will in any event come onto his land to flow from it onto that of his neighbour<sup>15</sup>.

It has been held that the word 'flood' as an insured peril in a householder's insurance policy should, save for any constraint in its context in the policy, be given its ordinary and natural meaning, and should not be construed by reference to a list of rigid criteria or without regard to the size and nature of the property insured<sup>16</sup>.

In determining whether or not the escape of water gives rise to liability for damage caused thereby, a distinction has traditionally been drawn between naturally flowing water and artificial water features, and the discussion in the following paragraphs preserves this distinction<sup>17</sup>; but the Court of Appeal has recently cast some doubt on its utility<sup>18</sup>.

1 See **NEGLIGENCE**.

- 2 See **NUISANCE** vol 78 (2010) PARAS 101 et seq, 181 et seq.
- 3 As to the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 see **NUISANCE** vol 78 (2010) PARA 148 et seq. As to the application of the rule specifically to the escape of water see PARA 667.
- 4 See **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 158 et seq (pollution control); **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 998 et seq (sewers and drains); **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 270 et seq.
- 5 As to the meaning of 'water undertaker' see PARA 137 note 4. As to the statutory liability for discharges into and from public sewers see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 296.
- 6 As to the Environment Agency see PARA 17.
- 7 As to the meaning of 'person' see PARA 13 note 29.
- 8 See the Water Industry Act 1991 s 209; the Water Resources Act 1991 s 208; and PARA 672. See also PARA 670.
- 9 See eg the general duties imposed by the Health and Safety at Work etc Act 1974 (see **HEALTH AND SAFETY AT WORK**); and the New Roads and Street Works Act 1991 s 82 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 472).
- 10 It is, of course, necessary to refer to the particular terms of any such documents which may be relevant.
- 11 *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, HL; *Trafford v R* (1832) 8 Bing 204, Ex Ch; *Ridge v Midland Rly Co* (1888) 53 JP 55, DC. Where, however, the water flowing in time of heavy flood over the land of a riparian owner on one side of a river was increased because of an embankment erected by a riparian owner on the other side of the river about half a mile from it, it was held that the former riparian owner was not entitled to an injunction and damages against the latter: *Gerrard v Crowe* [1921] 1 AC 395, PC. Cf *Strange v Andrews* [1956] NZLR 948; and see PARA 666.
- 12 *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 ChD 503, CA, where the riparian owner, a dock company, was authorised by its special Act to make and maintain certain works to a level slightly less than the level of the rest of the river wall, which it failed to do, and the flooding resulted from a tide which was higher than both those levels. Cf *Thomas and Evans Ltd v Mid-Rhondda Co-operative Society Ltd* [1941] 1 KB 381, [1940] 4 All ER 357, CA. As to land drainage and flood protection generally see PARA 573 et seq.
- 13 *Vyner v North Eastern Rly Co* (1898) 14 TLR 554, HL. In *Vyner v North Eastern Rly Co* (1904) 20 TLR 192, CA, however, it was held that such a provision did not impose a liability to keep up flood banks not constructed for keeping the water within the alveus of the river, but erected away from the banks for the purpose of preventing the overflow of land in times of flood. Cf *Trafford v R* (1832) 8 Bing 204, Ex Ch. A duty to construct sluices to prevent flooding imports a liability for negligent construction (*Collins v Middle Level Comrs* (1869) LR 4 CP 279), and a duty to maintain sea walls imposes a liability for damage caused by overflow (*Bramlett v Tees Conservancy Comrs* (1885) 49 JP 214). As to liability for damage caused by failure to maintain banks see *Sephton v Lancashire River Board* [1962] 1 All ER 183, [1962] 1 WLR 623.
- 14 See PARA 501.
- 15 See *Arcscott v Coal Authority* [2004] EWCA Civ 892, 148 Sol Jo LB 880, [2004] All ER (D) 194 (Jul).
- 16 See *Rohan Investments Ltd v Cunningham and other members of Syndicate 877 at Lloyds (t/a Criterion Insurance Services)* [1999] Lloyd's Rep IR 190 [1998] All ER (D) 5, CA. See also *Young v Sun Alliance and London Insurance Ltd* [1976] 3 All ER 561, [1976] 1 WLR 104, CA; and **INSURANCE** vol 25 (2003 Reissue) PARA 654.
- 17 See PARA 663 et seq.
- 18 See *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2004] 1 P & CR 520, [2003] All ER (D) 426 (Feb).

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## **(ii) Flooding from Natural Watercourses**

### **663. Escape of water naturally on land in the course of ordinary use.**

It has traditionally been held that an owner or occupier of land is not liable for the consequences of the escape from his land, either on the surface or underground, of water which has flowed to it or collected there naturally<sup>1</sup>, if the escape occurred in the ordinary and proper<sup>2</sup> use of the land<sup>3</sup>. However, the Court of Appeal has recently ruled that there is no authority for the proposition that no duty of care arises in relation to a hazard where that hazard is naturally flowing water; the expression 'naturally flowing water' is capable of bearing more than one meaning and, in the context of the English landscape, a distinction between 'natural' and 'artificial' features is an inherently uncertain foundation on which to rest a decision as to the existence of liability in nuisance<sup>4</sup>.

1 As to the escape of water artificially accumulated on land see PARA 667.

2 As to the escape of water amounting to a nuisance or caused by negligence or a wilful act see PARA 664.

3 *Rylands v Fletcher* (1868) LR 3 HL 330; *Wilson v Waddell* (1876) 2 App Cas 95, HL; *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1899] 2 Ch 217, CA.

4 See *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2004] 1 P & CR 520, [2003] All ER (D) 426 (Feb).

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**664. Escape of water amounting to nuisance or caused by negligence or wilful act.**

Although an owner or occupier of land is not liable for the escape of water in the course of the ordinary and proper use of the land<sup>1</sup>, he may be liable if an escape of water from his land occurs in circumstances amounting to a nuisance<sup>2</sup>, or if the escape is caused by his negligence<sup>3</sup> or by a wilful act on his part which is not within the ordinary or natural use of the land<sup>4</sup>.

1 See PARA 663.

2 See eg *Broder v Saillard* (1876) 2 ChD 692 (where damage was caused by water which penetrated from adjoining land through a wall against which an artificial mound had been placed on which a stable had been built); *Fawcett v Phoenix Inns Ltd* [2003] EWCA Civ 128, [2003] All ER (D) 150 (Feb) (foul and surface water escaping from the rain and foul water drains of a hotel, which penetrated the party wall between the two properties and accumulated in the cellar of the claimant's property). See also *Hurdman v North Eastern Rly Co* (1878) 3 CPD 168, CA; and PARA 673 note 2. As to circumstances amounting to a nuisance see **NUISANCE** vol 78 (2010) PARA 141; and as to nuisance from roof water drainage see PARA 669.

3 *Rylands v Fletcher* (1868) LR 3 HL 330. See also *Smith v Kenrick* (1849) 7 CB 515; *Evans v Manchester, Sheffield and Lincolnshire Rly Co* (1887) 36 ChD 626. As to negligence generally see **NEGLIGENCE**. As to escapes from an internal water supply system due to negligence see PARA 668; and as to negligence in the exercise of statutory powers or duties see PARA 670.

4 *Crompton v Lea* (1874) LR 19 Eq 115; *Hurdman v North Eastern Rly Co* (1878) 3 CPD 168, CA; *Whalley v Lancashire and Yorkshire Rly Co* (1884) 13 QBD 131, CA; *Foster v Warblington UDC* [1906] 1 KB 648, CA; *Thomas v Gower RDC* [1922] 2 KB 76, DC. See also *Baird v Williamson* (1863) 15 CBNS 376; and PARA 673.

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### **665. Damage due to diversion or silting up of stream.**

A person who alters the course of a natural stream will be liable for damage caused by water which escapes or overflows from the new channel due to the inadequacy or defective construction of the new channel<sup>1</sup>.

The owner of the bed of a natural watercourse or of an artificial channel is not liable at common law for damage done by water which has overflowed from the watercourse or channel because of the natural and gradual silting up of the bed and the growth of weeds<sup>2</sup>.

The 'common enemy rule' whereby a landowner is permitted to erect flood defences without being liable in nuisance<sup>3</sup> does not permit interference with an established watercourse<sup>4</sup>.

1 *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, HL; *R v Trafford* (1831) 1 B & Ad 874 (on appeal sub nom *Trafford v R* (1832) 8 Bing 204, Ex Ch); *Fletcher v Smith* (1877) 2 App Cas 781, HL. The new channel must be sufficient to contain the run-off resulting from extraordinary rainfall: *Fletcher v Smith*; *Greenock Corp v Caledonian Rly Co* [1917] AC 556, HL; *R v Southern Canada Power Co Ltd* [1937] 3 All ER 923, PC. A landowner who has permitted a person to alter the course of a stream on his land will be jointly liable with that person for flood damage caused by the inadequacy of the new channel: *Pemberton v Bright* [1960] 1 All ER 792, [1960] 1 WLR 436, CA; see also (1960) 229 LT Jo 261.

2 *Normile v Ruddie* (1912) 47 ILT 179; cf *Cracknell v Thetford Corp* (1869) LR 4 CP 629; *Hodgson v York Corp* (1873) 28 LT 836. As to the powers of the Environment Agency and drainage boards to remove obstructions when a watercourse is in such a condition that the proper flow of water is impeded see PARA 599.

3 See PARA 501.

4 See *Arscott v Coal Authority* [2004] EWCA Civ 892, 148 Sol Jo LB 880, [2004] All ER (D) 194 (Jul).

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### **666. Protection from flood water; entry for repairs.**

Provided he does not divert the flow of a river from its normal course in time of flood<sup>1</sup>, an owner or occupier of land may take action to prevent flood water from reaching his land, and may construct an embankment for that purpose even though the amount of water flowing over neighbouring land in time of heavy flood is thereby increased<sup>2</sup>. However, if flood water has collected on land, the owner or occupier may be liable for any damage caused if the water escapes by reason of a wilful act on his part which is not within the ordinary or natural use of the land<sup>3</sup>. An owner of land on the seaward side of a sea wall<sup>4</sup> vested in a drainage board<sup>5</sup> is not entitled to permit water to escape from his land through the sea wall<sup>6</sup>.

A person who is responsible for the safekeeping of water is entitled to enter on land to do the necessary repairs<sup>7</sup>. No prescriptive right is acquired in respect of water which escapes because of lack of repairs<sup>8</sup>.

1 *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, HL.

2 *Farquharson v Farquharson* (1741) Mor Dict 12779, cited in 3 Bli NS at 421; *Thomas v Birmingham Canal Navigation Proprietors Co* (1879) 43 LT 435, DC; *Maxey Drainage Board v Great Northern Rly Co* (1912) 106 LT 429, DC; *Gerrard v Crowe* [1921] 1 AC 395, HL. Cf *Strange v Andrews* [1956] NZLR 948. See also PARA 662. No duty lies on the owner of a canal analogous to that imposed on the owner of a watercourse (see PARA 101) not to impede the flow of water, even if the obstruction may cause flooding: *Nield v London and North Western Rly Co* (1874) LR 10 Exch 4, followed in *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, HL. As to restrictions on the erection or alteration of structures designed to contain or divert flood water see the Water Resources Act 1991 s 109(3); and PARA 603.

3 See *Whalley v Lancashire and Yorkshire Rly Co* (1884) 13 QBD 131, CA; and PARA 664. Cf *Tennent v Earl of Glasgow* (1864) 2 M (Ct of Sess) 22, HL, where the owner of a wall broken by flood water was not liable for damage to adjoining land; and *Thomas and Evans Ltd v Mid-Rhondda Co-operative Society Ltd* [1941] 1 KB 381, [1940] 4 All ER 357, CA, where a riparian owner who removed a riverside wall, thus allowing flood water to reach his neighbour's land, was not liable for damage on the ground of negligence or nuisance or on the principle in *Rylands v Fletcher* (1868) LR 3 HL 330 (see PARA 667) because the neighbour who benefited from the wall had no right to have it maintained. The position would be different if there was a statutory duty to maintain the barrier: *Coe v Wise* (1864) 33 LJQB 281 at 288 per Blackburn J (affd (1866) LR 1 QB 711, Ex Ch); applied in *Sephton v Lancashire River Board* [1962] 1 All ER 183, [1962] 1 WLR 623. A landowner may, however, acquire as an easement the right to discharge flood water onto his neighbour's land or the right to do acts on it to prevent his own land from being flooded: *Simpson v Godmanchester Corp* [1897] AC 696, HL. As to easements in respect of water generally see PARA 89; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 197 et seq.

4 As to coast protection generally see PARA 499 et seq.

5 As to land drainage generally see PARA 573 et seq.

6 *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548, [1936] 3 All ER 908, CA.

7 *McSwiney v Haynes* (1839) 1 I Eq R 322. As to statutory powers of entry on land see PARAS 608, 476 et seq.

8 *Brymbo Water Co v Lesters Lime Co* (1894) 8 R 329; and see PARA 89.

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### (iii) Flooding from Artificial Watercourses, Pipes and Gutters

#### 667. Escape of water artificially accumulated on land.

By the rule in *Rylands v Fletcher* a person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, keeps it in at his peril; and prima facie he is liable for all damage which is the natural consequence of its escape<sup>1</sup>. Thus, if an owner or occupier brings water to his land or collects or accumulates it there for his own convenience to an extent greater than would occur naturally<sup>2</sup>, he is prima facie liable, whether he is negligent or not<sup>3</sup>, for all damage<sup>4</sup> which is the natural consequence of its escape<sup>5</sup> or overflow<sup>6</sup>. His liability in this respect is not diminished because he has granted to a neighbour rights to use and regulate the flow of the water so collected<sup>7</sup>. Liability under this rule is strict and it is no defence that the thing escaped without his wilful act, default or neglect or even that he has no knowledge of its existence<sup>8</sup>.

However, the rule does not apply to things naturally on the land<sup>9</sup>; nor is an owner or occupier liable under the rule for damage caused by the escape of water which he has accumulated on or brought to his land where the escape, or the damage resulting from it, is due to: (1) an act of God<sup>10</sup>; (2) the act of a stranger over whose acts the owner or occupier has no control and which was not an act which he ought reasonably to have foreseen and guarded against<sup>11</sup>; or (3) the act or default of the person who suffered the damage<sup>12</sup>. An owner or occupier is not liable for the consequences of the escape from his land of water which was collected and impounded there by, and for the purpose of, another person<sup>13</sup> or with the consent of the injured person and for his benefit<sup>14</sup>. Liability may also be avoided in certain cases where there is statutory authority<sup>15</sup>.

The House of Lords has recently reaffirmed that the rule in *Rylands v Fletcher* is not to be abrogated or treated as absorbed by the principles of ordinary negligence, but is rather to be regarded as a species of nuisance<sup>16</sup>.

1 See *Rylands v Fletcher* (1868) LR 3 HL 330; *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL; and **NUISANCE** vol 78 (2010) PARA 148 et seq.

2 As to the escape of water naturally on land in the course of ordinary use see PARA 663.

3 See *Humphries v Cousins* (1877) 2 CPD 239, DC, where, although not negligent, the defendant was liable for damage caused by an escape from a defective drain which he had a duty to prevent. As to escape due to negligence or a wilful act see PARA 664. For a review of the law of nuisance and the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, and the relevance of foreseeability in determining liability, see *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL; and see also *Arscott v Coal Authority* [2004] EWCA Civ 892, 148 Sol Jo LB 880, [2004] All ER (D) 194 (Jul).

4 See **NUISANCE** vol 78 (2010) PARA 147.

5 As to the meaning of 'escape' for this purpose see **NUISANCE** vol 78 (2010) PARA 151.

6 *Rylands v Fletcher* (1868) LR 3 HL 330; *Sharp v Powell* (1872) LR 7 CP 253; *Fletcher v Smith* (1877) 2 App Cas 781, HL; *Snow v Whitehead* (1884) 27 ChD 588.

7 *RH Buckley & Sons Ltd v N Buckley & Sons* [1898] 2 QB 608, CA; explained in *Gilson v Kerrier RDC* [1976] 3 All ER 343 at 352, [1976] 1 WLR 904 at 914, CA, per Goff LJ.

8 See *Rylands v Fletcher* (1868) LR 3 HL 330; and **NUISANCE** vol 78 (2010) PARA 148 et seq. In respect of damage caused by pollution as a result of the escape see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 275.

9 See *Rylands v Fletcher* (1868) LR 3 HL 330; and **NUISANCE** vol 78 (2010) PARA 148 et seq. The piping of a water supply from the mains to storage tanks serving a block of flats is a routine function not raising any special hazard: *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1, [2004] 1 All ER 589. The importance of the legal distinction between natural and non-natural uses is, however, receding: see eg *Arscott v Coal Authority* [2004] EWCA Civ 892 at [29], 148 Sol Jo LB 880, [2004] All ER (D) 194 (Jul) per Laws LJ.

10 *Rylands v Fletcher* (1868) LR 3 HL 330; *Nichols v Marsland* (1876) 2 Ex D 1, CA. As to what constitutes an act of God see **CONTRACT** vol 9(1) (Reissue) PARA 907. It is not necessary that an extraordinary natural event should never have happened before for it to be an act of God; it is sufficient that it could not reasonably have been expected: *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 ChD 503, CA. If there is a duty to maintain an embankment, act of God is no defence if damage is caused due to failure to fulfil that duty: *Nichols v Marsland* (see above). In *Thomas v Birmingham Canal Co* (1879) 49 LJQB 851, DC, canal owners were not liable for flood damage occasioned by the raising of a sluice during unprecedented rainfall in order to prevent the bursting of the canal and the even greater damage which that would have caused. A special Act may impose an absolute liability on canal owners for flood damage caused by act of God: see *J & J Makin Ltd v London and North Eastern Rly Co* [1943] KB 467, [1943] 1 All ER 645, CA.

11 *Carstairs v Taylor* (1871) LR 6 Exch 217; *Box v Jubb* (1879) 4 Ex D 76; *Rickards v Lothian* [1913] AC 263, PC. Where the defendant would be liable if the damage was not due to the act of a stranger, the onus is on him to prove that it was so caused: *A Prosser & Son Ltd v Levy* [1955] 3 All ER 577, [1955] 1 WLR 1224, CA. As to pollution caused by a stranger see *Impress (Worcester) Ltd v Rees* [1971] 2 All ER 357, DC.

12 *Rylands v Fletcher* (1868) LR 3 HL 330.

13 *Cracknell v Thetford Corpn* (1869) LR 4 CP 629; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427 at 438.

14 *Gill v Edouin* (1895) 72 LT 579, CA; *Peters v Prince of Wales Theatre (Birmingham) Ltd* [1943] KB 73, [1942] 2 All ER 533, CA, where a burst in a sprinkler system extending over two premises within the same building caused damage to the plaintiff's premises, and he was unable to recover because he knew of and impliedly consented to the system; *Gilson v Kerrier RDC* [1976] 3 All ER 343, [1976] 1 WLR 904, CA. See also **NUISANCE** vol 78 (2010) PARA 153.

15 As to statutory authority see PARA 670. As to reservoirs see PARAS 277 et seq, 671. As to escapes from mains and service pipes vested in a water undertaker or in the Environment Agency see PARA 672. As to the vesting of pipes in a water undertaker or the Agency see PARA 464.

16 See *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1, [2004] 1 All ER 589.



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#### **668. Escape from internal water supply systems.**

Where water has been brought artificially to a building for the use of the occupants, and then escapes, the person who has possession and control of the water, or of the apparatus from which it has escaped, is not liable for any damage suffered by an occupant by reason of the escape unless such escape was due to his negligence or that of his employee for which he is responsible under the rules relating to vicarious liability<sup>1</sup>. To this proposition there is, however, an important statutory exception, relating to liability for loss and damage caused by an escape of water from a pipe vested in water undertakers or the Environment Agency<sup>2</sup>.

<sup>1</sup> *Ross v Fedden* (1872) LR 7 QB 661; *Anderson v Oppenheimer* (1880) 5 QBD 602, CA, where a landlord was not liable, either under his covenant for quiet enjoyment (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 508 et seq) or under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 (see PARA 667), for damage caused by a burst pipe in a water supply system provided for the benefit of the plaintiff and other tenants; *Stevens v Woodward* (1881) 6 QBD 318, DC; *Sutton and Ash v Card* [1886] WN 120; *Blake v Land and House Property Corp'n Ltd* (1887) 3 TLR 667; *Ruddiman & Co v Smith* (1889) 60 LT 708, DC; *Abelson v Brockman* (1889) 54 JP 119; *Blake v Woolf* [1898] 2 QB 426, DC; *Rickards v Lothian* [1913] AC 263, PC; *A Prosser & Son Ltd v Levy* [1955] 3 All ER 577, [1955] 1 WLR 1224, CA; *Irish Linen Manufacturing Co v Lowe* (1956) 106 L Jo 828. See also **NUISANCE** vol 78 (2010) PARA 152.

<sup>2</sup> See PARA 672.

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### **669. Roof water drainage.**

It is an actionable nuisance for a person to allow water from his eaves and gutters to fall on his neighbour's land or house<sup>1</sup>, but a right to do so may be acquired as an easement in the same way as other easements are acquired<sup>2</sup>. However, a claim does not lie for damage caused by the escape of roof water from a tank in circumstances beyond the control of the owner<sup>3</sup>, or because of an arrangement to which the injured party has consented<sup>4</sup>.

On the other hand, if damage is caused to a tenant of part of a building because a rain water gutter has become blocked and the owner of the building has been warned of the danger, the owner, being in possession and control of the gutter, may be liable in damages to the tenant<sup>5</sup>.

1 *Anon* (1344) YB 18 Edw 3, 22b, pl 1; *Tucker v Newman* (1839) 11 Ad & El 40; *Fay v Prentice* (1845) 1 CB 828. The owner of the land on which the water falls may sue for damages to his reversion if he is not in possession: *Tucker v Newman* (see above). A claim to prevent such a nuisance arising may be brought before any rain has fallen and caused damage: *Fay v Prentice* (see above). See also **NUISANCE** vol 78 (2010) PARA 121.

2 See **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 34. Such a right is not lost: (1) by increasing the height of the structure from which the water drops if the burden of the servient tenement is not thereby increased (*Thomas v Thomas* (1835) 2 Cr M & R 34; *Harvey v Walters* (1873) LR 8 CP 162); or (2) by unity of possession of the dominant and servient tenements, if it is an easement of absolute necessity (*Holland v Deakin* (1828) 7 LJOSKB 145).

3 *Carstairs v Taylor* (1871) LR 6 Exch 217. See further PARA 667.

4 *Carstairs v Taylor* (1871) LR 6 Exch 217; *Gill v Edouin* (1895) 72 LT 579, CA.

5 See *Hargroves, Aronson & Co v Hartopp* [1905] 1 KB 472, DC; and see further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 413, 476.

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## **670. Liability and statutory authority.**

The fact that an act which causes injury is done under statutory authority will not afford a defence to the person performing it in a claim by the person injured where there is negligence or want of proper precaution in doing the act<sup>1</sup>. Water undertakers<sup>2</sup>, the Environment Agency<sup>3</sup> and others who are entitled by statute to accumulate water artificially are not normally<sup>4</sup> liable except for acts which are not authorised directly or by implication, or for acts which, although authorised, are negligently performed<sup>5</sup>.

Thus, where water is brought to or collected on land in the exercise of statutory powers, in the absence of negligence<sup>6</sup>, the undertaker or the Agency is liable for damage done by its escape only if the undertaker or, as the case may be, the Agency is expressly made liable for nuisance, or not exempted from liability, by the empowering statute<sup>7</sup>. The empowering statute<sup>8</sup> may, however, expressly provide that the undertaker or the Agency, even if not negligent, remains liable for nuisance caused by the exercise of the powers<sup>9</sup>.

Where the nuisance is attributable to the performance by the undertaker or the Agency of a duty imposed by statute, as distinct from the exercise of a power conferred by statute, the undertaker or, as the case may be, the Agency is only liable if the duty is negligently performed<sup>10</sup> and is not liable in the absence of negligence<sup>11</sup> even if by statute it is expressly made liable for nuisance, or is not exempted from liability for nuisance<sup>12</sup>. The common law of nuisance does not impose obligations on a statutory sewerage undertaker<sup>13</sup> inconsistent with the statutory scheme of the Water Industry Act 1991<sup>14</sup>, and that statutory scheme is not unreasonable in its impact on householders whose properties are periodically subject to sewer flooding; a fair balance has to be struck between the interests of the individual and of the community as a whole<sup>15</sup>.

1 See **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 859; **TORT** vol 97 (2010) PARAS 457, 719-720.

2 As to the meaning of 'water undertaker' see PARA 137 note 4.

3 As to the Environment Agency see PARA 17.

4 There is, however, liability for damage caused by the escape of water from reservoirs constructed under statutory powers: see PARA 671. As to the escape of water from a pipe see note 5. As to the liability of public authorities in the exercise of statutory powers generally see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 182 et seq.

5 *Dunn v Birmingham Canal Co* (1872) LR 8 QB 42, Ex Ch; *Dixon v Metropolitan Board of Works* (1881) 7 QBD 418; *Snook v Grand Junction Waterworks Co Ltd* (1886) 2 TLR 308; *Green v Chelsea Waterworks Co* (1894) 70 LT 547, CA; *Burniston v Bangor Corp'n* [1932] NI 178, NI CA.

Undertakers are guilty of negligence if they fail to take reasonable precautions in laying or maintaining their pipes, or in detecting or remedying any leaks that may occur: *Manchester Corp'n v Markland* [1936] AC 360, HL. As to the precautions that should be taken to test pipes and to secure notification of leaks see *Manchester Corp'n v Markland* (see above). As to liability for loss or damage caused by an escape of water from a pipe vested in a water undertaker or the Agency see PARA 672. As to the vesting of pipes in a water undertaker or the Agency see PARA 464.

Where a canal or waterworks company is guilty of an act which is not authorised, and the remedy for it is provided by the statute from which the company draws its powers, that remedy must be employed; in some cases the statute appears to contemplate that there may also be an action for negligence: *Evans v Manchester, Sheffield and Lincolnshire Rly Co* (1887) 36 ChD 626.

6 *Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430, HL. The reference to the absence of negligence here reflects the requirement that the undertakers, as a condition of obtaining immunity from action, carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons: *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011, [1981] 1 All ER 353 at 356, HL, per Lord Wilberforce; applied by *Department of Transport v North West Water Authority* [1984] AC 336 at 359, [1983] 3 All ER 273 at 276, HL, per Lord Fraser of Tullybelton.

7 *Midwood & Co v Manchester Corpn* [1905] 2 KB 597, CA; *Price's Patent Candle Co Ltd v LCC* [1908] 2 Ch 526, CA (affd sub nom *LCC v Price's Patent Candle Co Ltd* (1911) 75 JP 329, HL); *Longhurst v Metropolitan Water Board* [1948] 2 All ER 834; *Dunne v North Western Gas Board* [1964] 2 QB 806, [1963] 3 All ER 916, CA. See the third proposition in *Department of Transport v North West Water Authority* [1984] AC 336 at 344, [1983] 1 All ER 892 at 895 (affd [1984] AC 336, [1983] 3 All ER 273, HL).

For these purposes, references to liability in nuisance include liability under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 (as to which see PARA 667; and **NUISANCE** vol 78 (2010) PARA 148 et seq): *Department of Transport v North West Water Authority* (see above).

8 See eg the Land Drainage Act 1991 s 15(3); the Water Resources Act 1991 s 167(2); and PARA 597.

9 *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772, CA; and see the fourth proposition in *Department of Transport v North West Water Authority* [1984] AC 336, [1983] 1 All ER 892 (affd [1984] AC 336 at 359, [1983] 3 All ER 273 at 276, HL). See also note 7; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 187.

If the statutory tribunal assessing damages is in abeyance, the damages may be assessed by the court: *Bentley v Manchester, Sheffield and Lincolnshire Rly Co* [1891] 3 Ch 222; *Walker v Canal Co* (1913) 2 LJCCR 112, DC.

10 Thus, where the damage is attributable to the obligation of a water undertaker to maintain water under pressure in its pipes by virtue of the Water Industry Act 1991 ss 65-66 (see PARA 353), or to the performance of its duty to supply water under s 52 (see PARA 339) or s 55 (see PARA 347), the undertaker is not liable unless negligent.

11 *Hammond v St Pancras Vestry* (1874) LR 9 CP 316. See the first proposition in *Department of Transport v North West Water Authority* [1984] AC 336, [1983] 1 All ER 892 (affd [1984] AC 336 at 359, [1983] 3 All ER 273 at 276, HL).

12 *Stretton's Derby Brewery Co v Derby Corpn* [1894] 1 Ch 431; *Smeaton v Ilford Corpn* [1954] Ch 450, [1954] 1 All ER 923. See also *Dunne v North Western Gas Board* [1964] 2 QB 806, [1963] 3 All ER 916, CA; and *Department of Transport v North West Water Authority* [1984] AC 336, [1983] 3 All ER 273, HL.

13 As to the meaning of 'sewerage undertaker' see PARA 137 note 4. As to the duty on a sewerage undertaker to carry out certain of its functions so as not to create a nuisance see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1069.

14 As to regulation of the water industry generally see PARA 109 et seq; and as to sewerage see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 998 et seq.

15 See *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42, [2004] 1 All ER 135. Cf *Dobson v Thames Water Utilities* [2009] EWCA Civ 28, [2009] All ER (D) 252 (Jan).

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### **671. Liability in respect of reservoirs constructed under statutory powers.**

In the case of certain reservoirs the rule of strict liability applies<sup>1</sup>. Where damage or injury is caused by the escape of water from a reservoir constructed after 1930<sup>2</sup> under statutory powers granted after July 1930<sup>3</sup>, the fact that the reservoir was so constructed does not exonerate the persons<sup>4</sup> for the time being having the management and control of the reservoir from any indictment, action or other proceedings<sup>5</sup> to which they would otherwise have been liable<sup>6</sup>.

<sup>1</sup> See under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330: see PARA 667; and **NUISANCE** vol 78 (2010) PARA 148 et seq.

<sup>2</sup> The Reservoirs (Safety Provisions) Act 1930, which imposed the requirement to observe special precautions in the construction, alteration and use of certain large reservoirs, is repealed by the Reservoirs Act 1975 s 28(1), and is replaced by the provisions of that Act. Notwithstanding the repeal, the Reservoirs (Safety Provisions) Act 1930 s 7 continues to have effect subject to minor necessary changes in wording: see the Reservoirs Act 1975 s 28(2), Sch 2. These continued provisions apply only to reservoirs constructed after 31 July 1930, and do not apply to other artificial waters. See further PARA 301.

<sup>3</sup> The date of the passing of the Reservoirs (Safety Provisions) Act 1930 was 1 August 1930.

<sup>4</sup> As to the meaning of 'person' see PARA 13 note 29.

<sup>5</sup> As to liability for damage caused by the escape of water generally see PARA 662 et seq. As to remedies for nuisance, including criminal proceedings for public nuisance, see **NUISANCE** vol 78 (2010) PARA 213 et seq.

<sup>6</sup> Reservoirs (Safety Provisions) Act 1930 s 7, as continued by the Reservoirs Act 1975 s 28(2), Sch 2: see PARA 301. This provision excludes the defence (which would otherwise be available) of statutory authority. As to liability and statutory authority see PARA 670.

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**672. Liability for loss or damage caused by escape of water from pipes vested in water undertakers or the Environment Agency.**

Where an escape of water, however caused, from a pipe<sup>1</sup> vested<sup>2</sup> in a water undertaker<sup>3</sup> or in the Environment Agency<sup>4</sup> causes loss or damage<sup>5</sup>, the undertaker or, as the case may be, the Agency is liable<sup>6</sup>, subject to the exceptions mentioned below, for the loss or damage<sup>7</sup>.

A water undertaker or, as the case may be, the Agency does not incur any liability for such loss or damage if the escape was due wholly to the fault of the person who sustained the loss or damage or of any servant, agent or contractor of that person<sup>8</sup>. Nor does a water undertaker, or the Agency, incur any liability under these provisions in respect of any loss or damage for which the undertaker or, as the case may be, the Agency would not otherwise be liable and which is sustained: (1) in relation to the liability of a water undertaker, by the Agency<sup>9</sup>; or (2) in relation to the liability of a water undertaker or of the Agency, by a relevant undertaker<sup>10</sup> or by other specified undertakers, bodies or persons<sup>11</sup>.

Special provision is made with respect to civil liability for pollution<sup>12</sup>.

1 As to the meaning of 'pipe' in the Water Industry Act 1991 see PARA 138 note 11; and in the Water Resources Act 1991 see PARA 187 note 2.

2 As to the vesting of pipes see PARA 464.

3 As to the meaning of 'water undertaker' see PARA 137 note 4. As to the duty on a sewerage undertaker to carry out certain of its functions so as not to create a nuisance see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1069.

4 As to the Environment Agency see PARA 17.

5 As to the meaning of 'damage' see PARA 129 note 7.

6 The Law Reform (Contributory Negligence) Act 1945 (see **NEGLIGENCE** vol 78 (2010) PARA 75 et seq), the Fatal Accidents Act 1976 (see **NEGLIGENCE** vol 78 (2010) PARA 24 et seq) and the Limitation Act 1980 (see **LIMITATION PERIODS** vol 68 (2008) PARA 901 et seq) apply in relation to any loss or damage for which a water undertaker or the Agency is liable under these provisions but which is not due to the undertaker's or agency's fault, as if it were due to its fault: Water Industry Act 1991 s 209(4); Water Resources Act 1991 s 208(4) (s 208(1)-(6) amended by the Environment Act 1995 s 120, Sch 22 para 128). For these purposes, 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would give rise, apart from the Law Reform (Contributory Negligence) Act 1945, to the defence of contributory negligence: s 4 (definition applied by the Water Industry Act 1991 s 209(7); Water Resources Act 1991 s 208(7)).

7 Water Industry Act 1991 s 209(1); Water Resources Act 1991 s 208(1) (as amended: see note 6). These provisions amend the rule of law whereby an action does not lie against a body exercising statutory powers without negligence in respect of the flooding of land by water escaping from water pipes: see *Green v Chelsea Waterworks Co* (1894) 70 LT 547; and PARA 670.

Nothing in the Water Industry Act 1991 s 209(1) or in the Water Resources Act 1991 s 208(1) affects any entitlement which a water undertaker or, as the case may be, the Agency may have to recover contribution under the Civil Liability (Contribution) Act 1978 (see **DAMAGES** vol 12(1) (Reissue) PARA 837 et seq), and for the purpose of that Act any loss for which a water undertaker or, as the case may be, the Agency is liable under these provisions is treated as if it were damage: Water Industry Act 1991 s 209(5); Water Resources Act 1991 s 208(5) (as so amended). Where a water undertaker or the Agency is liable under any enactment or agreement passed or made before 1 April 1982 (the date on which Water Act 1981 s 6 (now repealed) came into force and containing the equivalent of the provisions that are now contained in the Water Industry Act 1991 s 209 and the

Water Resources Act 1991 s 208) to make any payment in respect of any loss or damage, the undertaker or agency does not incur liability under the Water Industry Act 1991 s 209(1) or the Water Resources Act 1991 s 208(1) in respect of the same loss or damage: Water Industry Act 1991 s 209(6); Water Resources Act 1991 s 208(6) (as so amended). As to the meaning of 'enactment' see PARA 14 note 31.

The Water Industry Act 1991 s 209(1) does not have the effect of extending liability beyond liability in negligence and, as a result, 'loss or damage' must be interpreted as being restricted to any loss or damage to property: *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173, [2001] All ER (D) 59 (Feb). If there has been an escape of water that has caused some physical damage then prima facie it is only the cost of reinstatement of that physical damage which is recoverable: *Skandia Property (UK) v Thames Water Utilities Ltd* [1999] All ER (D) 881, CA (decided under previous legislation). As to causation under the Water Industry Act 1991 s 209(1) see *Harvey Nichols & Co Ltd v Thames Water Utilities Ltd* [1999] All ER (D) 1272.

8 Water Industry Act 1991 s 209(2); Water Resources Act 1991 s 208(2) (as amended: see note 6). As to the meaning of 'person' see PARA 13 note 29.

9 Water Industry Act 1991 s 209(3)(a) (s 209(3) amended by the Environment Act 1995 Sch 22 para 122).

10 le a water undertaker or a sewerage undertaker: see PARA 137 note 8.

11 See the Water Industry Act 1991 s 209(3) (as amended: see note 9); Water Resources Act 1991 s 208(3) (as amended: see note 6). The specified undertakers, bodies or persons are: (1) any statutory undertakers within the meaning of the Town and Country Planning Act 1990 s 336(1) (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1009); (2) any gas transporter within the meaning of the Gas Act 1986 Pt I (ss 4AA-48) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 805); (3) the holder of a licence under the Electricity Act 1989 s 6(1) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065); (4) any highway authority (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq); or (5) any person on whom a right to compensation is conferred by the New Roads and Street Works Act 1991 s 82 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 472); Water Industry Act 1991 s 209(3)(a)-(d) (s 209(3)(a) as so amended; s 209(3)(b) amended by virtue of the Gas Act 1995 s 16(1), Sch 4 para 2(2)(m); the Utilities Act 2000 s 76(7)); Water Resources Act 1991 s 208(3)(a)-(d) (s 208(3)(b) amended by virtue of the Gas Act 1995 Sch 4 para 2(2)(n); the Utilities Act 2000 s 76(7)).

12 See the Water Resources Act 1991 s 100; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 290.

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#### (iv) Seepage

##### 673. Damage by seepage.

Where by an artificial erection<sup>1</sup> on his land a person causes water to seep into his neighbour's land, he is liable for any injury caused to his neighbour by that seepage<sup>2</sup> unless the injury is the consequence of the natural user by a person of his land<sup>3</sup>, such as the excavating and raising of minerals<sup>4</sup>. Although an owner of mining rights may not be liable for damage caused by water which reaches his neighbour's mine by percolation<sup>5</sup>, he is liable if damage results from his causing a greater quantity of water to flow to his neighbour's mine than would naturally gravitate there<sup>6</sup>.

1 Such an erection has been described as an artificial work which collects the water, in the nature of an artificial sponge, which absorbs it and keeps it together, until it oozes out by reason of the nature of the sponge: *Broder v Saillard* (1876) 2 ChD 692 at 700 per Jessel MR.

2 *Hurdman v North Eastern Rly Co* (1878) 3 CPD 168, CA, where rubble placed against a boundary wall to raise the level of the railway land caused rainwater to percolate through the wall into the plaintiff's house, and the defendants were held to be liable for the damage, following *Broder v Saillard* (1876) 2 ChD 692. See also PARA 664 note 2.

3 *Hurdman v North Eastern Rly Co* (1878) 3 CPD 168 at 174, CA, per Cotton LJ. If, by the natural user of land, there is any accumulation of water and if, by the operation of the laws of nature, that accumulation of water passes off into a person's land, he cannot complain: *Rylands v Fletcher* (1868) LR 3 HL 330 at 338 per Lord Cairns LC. Water is a common enemy against which each person must defend himself: *Smith v Kenrick* (1849) 7 CB 515 at 566 per Cresswell J. As to the 'common enemy rule' see PARA 501.

4 *Wilson v Waddell* (1876) 2 App Cas 95, HL, where the proper removal of coal (which had formed an impervious strata) by the lessee of a mine enabled rainwater to percolate into the lower workings of another lessee, who was held to be unable to claim the cost of pumping it away. A person may work his mine in the manner most convenient and beneficial to himself even if the natural consequence is that some prejudice will accrue to the owner of an adjoining mine, so long as that does not arise from negligent or malicious conduct: *Smith v Kenrick* (1849) 7 CB 515 at 564 per Cresswell J.

5 *Cooper v Barber* (1810) 3 Taunt 99; *Smith v Kenrick* (1849) 7 CB 515; *Lomax v Stott* (1870) 39 LJ Ch 834; *Jegon v Vivian* (1871) 6 Ch App 742; *Wilson v Waddell* (1876) 2 App Cas 95, HL; *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680, CA; *Bartlett v Tottenham* [1932] 1 Ch 114, where damage caused by the escape of water due to the tapping of springs in the course of the proper use of land was not actionable; *Westhoughton Coal and Cannel Co Ltd v Wigan Coal Corp Ltd* [1939] Ch 800, [1939] 3 All ER 579, CA; and see *West Cumberland Iron and Steel Co v Kenyon* (1879) 11 ChD 782, CA. See further **NUISANCE** vol 78 (2010) PARA 101 et seq.

6 See *Firmstone v Wheeley* (1844) 2 Dow & L 203; *Baird v Williamson* (1863) 15 CBNS 376; *Crompton v Lea* (1874) LR 19 Eq 115; and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 272. As to liability for flood water see PARA 662 et seq.



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## 10. AMENITY, RECREATION AND ENVIRONMENT

### (1) THE WATER ENVIRONMENT

#### 674. European Community legislation.

The Water Framework Directive<sup>1</sup>, which has already been discussed, states in its preamble that water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such<sup>2</sup>. The Directive requires member states to establish a programme of measures for each river basin which will implement the environmental objectives set out in the Directive<sup>3</sup>.

A number of European Directives dealing with water pollution have an impact on the water environment<sup>4</sup>. Additionally, Directives such as the Habitats Directive<sup>5</sup> and the Wild Birds Directive<sup>6</sup>, and the regulations which have been made for the purpose of implementing them<sup>7</sup>, affect the water environment. Certain water or water-related plans and projects require environmental assessment under regulations made for the purpose of implementing the relevant Directive<sup>8</sup> on the assessment of the effects of certain public and private projects on the environment<sup>9</sup>.

The Directive on Public Access to Environmental Information 2003<sup>10</sup> has as its objectives to guarantee the right of access to environmental information<sup>11</sup> held by or for public authorities<sup>12</sup> and to ensure that such information is progressively made available and disseminated to the public<sup>13</sup>.

The Directive on environmental liability with regard to the prevention and remedying of environmental damage<sup>14</sup> aims to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage<sup>15</sup>, and applies, inter alia, to damage to water<sup>16</sup>. Regulations have been made for the purpose of implementing the Directive and these are covered in detail elsewhere in this work<sup>17</sup>.

1    Ie European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01): see PARA 7.

2    See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) preamble para (1): see PARA 7.

3    See European Parliament and EC Council Directive 2000/60 (OJ L327, 22.12.2000, p 01) arts 4, 11: see PARA 7. As to the regulations made for the purpose of implementing the Directive see PARAS 7, 198 et seq.

4    As to European legislation relating to the prevention and control of water pollution see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 23.

5    Ie EC Council Directive 92/43 (OJ L206, 22.07.92, p 07) of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728.

6    Ie EC Council Directive 79/409 (OJ L103, 25.04.79, p 01) of 2 April 1979 on the conservation of wild birds: see **ANIMALS** vol 2 (2008) PARAS 994, 1006; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728.

7    See principally the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716; and PARA 679. See also the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007, SI 2007/1842; and PARA 679.

8    Ie EC Council Directive 85/337 (OJ L175, 05.07.85, p 40) of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (the 'EIA Directive').

9 See the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, SI 1999/1783; and PARA 649 et seq; the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, SI 2003/164; and PARAS 271-272; the Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633, and the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, SI 2004/1656; and PARA 9. See also the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England) Regulations 2007, SI 2007/1067, and the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Wales) Regulations 2007, SI 2007/2610. See further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 7; **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 60 et seq.

10 The European Parliament and EC Council Directive 2003/4 (OJ L41, 14.02.2003, p 26) of 28 January 2003 on public access to environmental information. The Environmental Information Regulations 2004, SI 2004/3391, have been made for the purpose of implementing the Directive: see PARAS 680-681. The Directive repealed EC Council Directive 90/313 (OJ L158, 23.06.90, p 56) (see European Parliament and EC Council Directive 2003/4 (OJ L41, 14.02.2003, p 26) art 11) which initiated a process of change in the manner in which public authorities approach the issue of openness and transparency, establishing measures for the exercise of the right of public access to environmental information: see European Parliament and EC Council Directive 2003/4, preamble para (2).

11 For these purposes, 'environmental information' means any information in written, visual, aural, electronic or any other material form on: (1) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (2) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in head (1) above; (3) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in heads (1) and (2) above as well as measures or activities designed to protect those elements; (4) reports on the implementation of environmental legislation; (5) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in head (3) above; and (6) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in head (1) above or, through those elements, by any of the matters referred to in heads (2) and (3) above: European Parliament and EC Council Directive 2003/4, art 2.1. See also Case C-321/96 *Mecklenberg v Kreis Pinneberg-Der Landrat* [1999] All ER (EC) 166, [1998] ECR I-3809, ECJ (meaning of 'environmental information' for purposes of the earlier Directive cited in note 10); C-316/01 *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2003] ECR I-5995, [2003] All ER (D) 147 (Jun) (while the concept of 'information relating to the environment' as defined in the Directive, was a broad one it did not include all information held by public authorities which had a connection, however minimal, with one of the environmental factors mentioned in that definition).

12 'Public authority' means: (1) government or other public administration, including public advisory bodies, at national, regional or local level; (2) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and (3) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within head (1) or (2) above: European Parliament and EC Council Directive 2003/4, art 2.2. 'Information held by a public authority' means environmental information in its possession which has been produced or received by that authority: art 2.3. 'Information held for a public authority' means environmental information which is physically held by a natural or legal person on behalf of a public authority: art 2.4.

13 See European Parliament and EC Council Directive 2003/4 (OJ L41, 14.02.2003, p 26) art 1. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, is to be promoted: art 1. 'Public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups: European Parliament and EC Council Directive 2003/4, art 2.5.

14 The European Parliament and EC Council Directive 2004/35 (OJ L143, 30.4.2004, p 56).

15 See European Parliament and EC Council Directive 2004/35 (OJ L143, 30.4.2004, p 56) art 1.

16 See European Parliament and EC Council Directive 2004/35 (OJ L143, 30.4.2004, p 56) art 2.1.

17 See the Environmental Damage (Prevention and Remediation) Regulations 2009, SI 2009/153; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 5, 54.

## UPDATE

#### **674 European Community legislation**

NOTE 17--See Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, SI 2009/995, which have also been made for the purpose of implementing Directive 2004/35.

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### **675. General environmental duties under domestic legislation.**

Under the Environment Act 1995, the Environment Agency<sup>1</sup> has a general duty to promote the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters, and the conservation of flora and fauna which are dependent on an aquatic environment<sup>2</sup>. The Agency is also subject to a general duty, in formulating or considering any proposals relating to any its functions, to exercise any power conferred on it with respect to the proposals so as to further the conservation and enhancement of the environment<sup>3</sup>.

Water and sewerage undertakers<sup>4</sup>, land drainage bodies<sup>5</sup>, and local authorities<sup>6</sup> have very similar duties under the water industry and land drainage legislation. Similar duties are imposed on the Secretary of State<sup>7</sup> and the Welsh Ministers<sup>8</sup>; and the Secretary of State and the Welsh Ministers have power to issue and approve codes of practice giving practical guidance to the Agency and the other bodies as to the exercise of these duties and to promote desirable practices in relation to them<sup>9</sup>. They also have power to issue guidance about the making by the Water Services Regulation Authority<sup>10</sup> of a contribution towards the attainment of any social or environmental policies set out or referred to in the guidance<sup>11</sup>.

1 As to the Environment Agency see PARA 17.

2 See the Environment Act 1995 s 6(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 76.

3 See the Environment Act 1995 s 7(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 77. See also the Environment Act 1995 ss 8, 9; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 78-79.

4 See the Water Industry Act 1991 ss 3-5; and PARAS 676-678. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4.

5 See the Land Drainage Act 1991 ss 61A-61E; and PARAS 642-646. As to land drainage bodies see PARA 569 et seq.

6 See the Land Drainage Act 1991 s 61B; and PARA 643.

7 As to the Secretary of State see PARA 15 note 1.

8 See the provisions referred to in notes 1-6. As to the Welsh Ministers see PARA 16 note 5.

9 See the Environment Act 1995 s 9 (**ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 79); the Land Drainage Act 1991 s 61E (see PARA 646); and the Water Industry Act 1991 s 5 (see PARA 678).

10 As to the Water Services Regulation Authority see PARA 109.

11 See the Water Industry Act 1991 s 2A; and PARA 113.

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**676. General environmental and recreational duties under the Water Industry Act 1991.**

It is the duty of:

- 1362 (1) the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>;
- 1363 (2) the Water Services Regulation Authority<sup>3</sup>; and
- 1364 (3) every company holding an appointment as a relevant undertaker<sup>4</sup>,

in formulating or considering any proposals relating to any functions<sup>5</sup> of a relevant undertaker (including, in the case of such a company, any functions which, by virtue of that appointment, are functions of the company itself) to comply with the requirements imposed in relation to the proposals by the following provisions<sup>6</sup>. The requirements so imposed are:

- 1365 (a) a requirement<sup>7</sup> so to exercise any power conferred with respect to the proposals on the person<sup>8</sup> subject to the requirement as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest and, in the case of the exercise of such a power by a company holding an appointment as a relevant undertaker, as to further water conservation<sup>9</sup>;
  - 1366 (b) a requirement to have regard to the desirability of protecting and conserving buildings<sup>10</sup>, sites and objects of archaeological, architectural or historic interest<sup>11</sup>; and
  - 1367 (c) a requirement to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects<sup>12</sup>; and
  - 1368 (d) subject to the requirements imposed by heads (a) to (c) above:
- 66
- 20. (i) a requirement to have regard to the desirability of preserving for the public any freedom of access to areas of woodland, mountains, moor, heath, down, cliff or foreshore and other places of natural beauty<sup>13</sup>;
  - 21. (ii) a requirement to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural or historic interest<sup>14</sup>; and
  - 22. (iii) a requirement to take into account any effect which the proposals would have on any such freedom of access or on the availability of any such facility<sup>15</sup>.

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The above provisions apply so as to impose duties on the Water Services Regulation Authority and any company holding an appointment as a relevant undertaker in relation to any proposal relating to the functions of the Environment Agency<sup>16</sup>, or the functions of an internal drainage board<sup>17</sup>, as they apply in relation to any proposals relating to the functions of such an undertaker<sup>18</sup>.

Subject to obtaining the consent of any navigation authority<sup>19</sup>, harbour authority<sup>20</sup> or conservancy authority<sup>21</sup> before doing anything which causes navigation which is subject to the control of that authority to be obstructed or otherwise interfered with, it is the duty of every company holding an appointment as a relevant undertaker to take such steps as are reasonably practicable<sup>22</sup>, and consistent with the purposes of the enactments relating to the functions of the undertaker in question<sup>23</sup>, for securing, so long as that company has rights to the use of water or land associated with water, that those rights are exercised so as to ensure that the water or land is made available for recreational purposes and is so made available in the best manner<sup>24</sup>.

The obligations under the above provisions of a company holding an appointment as a relevant undertaker are enforceable<sup>25</sup> by the Secretary of State or, as appropriate, the Welsh Ministers<sup>26</sup>; but nothing in the Water Industry Act 1991<sup>27</sup> requires recreational facilities made available by a relevant undertaker to be made available free of charge<sup>28</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 Water Industry Act 1991 s 3(1)(a). The functions of the Secretary of State under the Water Industry Act 1991 s 3, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales and were exercisable by the Assembly to the same extent as the powers, duties and other provisions to which that section applies were exercisable by the Assembly: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 Water Industry Act 1991 s 3(1)(c) (amended by the Water Act 2003 s 36(2)). As to the Water Services Regulation Authority see PARA 109.

4 Water Industry Act 1991 s 3(1)(d). As to the meaning of 'relevant undertaker' see PARA 137 note 8. As to the appointment of such undertakers see PARA 137 et seq.

5 For these purposes, references to the functions of a relevant undertaker are to be construed, without prejudice to the Water Industry Act 1991 s 156(7) (see PARA 454), as if those functions included the management, by a company holding an appointment as such an undertaker, of any land for the time being held by that company for any purpose whatever, whether or not connected with the carrying out of the functions of a relevant undertaker: s 3(9). As to the meaning of 'functions' generally see PARA 133 note 5. As to the meaning of 'land' see PARA 14 note 21.

6 Water Industry Act 1991 s 3(1) (amended by SI 2002/794).

7 In so far as may be consistent: (1) with the purposes of any enactment relating to the functions of the undertaker (Water Industry Act 1991 s 3(2)(a)(i)); and (2) in the case of the Secretary of State or, as the case may be, the Welsh Ministers and the Water Services Regulation Authority, with their duties under the Water Industry Act 1991 s 2 (see PARA 130) (Water Industry Act 1991 s 3(2)(a)(ii) (amended by the Water Act 2003 s 36(2))). As to the meaning of 'enactment' see PARA 14 note 31.

8 As to the meaning of 'person' see PARA 13 note 29.

9 Water Industry Act 1991 s 3(2)(a) (amended by the Water Act 2003 s 82).

10 'Building' includes structure: Water Industry Act 1991 s 3(10).

11 Water Industry Act 1991 s 3(2)(b).

12 Water Industry Act 1991 s 3(2)(c).

13 Water Industry Act 1991 s 3(3)(a).

14 Water Industry Act 1991 s 3(3)(b).

15 Water Industry Act 1991 s 3(3)(c).

- 16 Water Industry Act 1991 s 3(4)(a)(i) (amended by the Environment Act 1995 s 120(1), Sch 22 para 97). As to the Environment Agency see PARA 17. As to the environmental functions and duties of the Agency generally see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 72 et seq.
- 17 Water Industry Act 1991 s 3(4)(a)(ii). As to internal drainage boards see PARA 569.
- 18 Water Industry Act 1991 s 3(4) (amended by the Water Act 2003 s 36(2)). For these purposes, the reference in the Water Industry Act 1991 s 3(2)(a) (see head (a) in the text) to the functions of the undertaker has effect as a reference to the functions of the Agency or, as the case may be, of the internal drainage board in question: s 3(4) (amended by the Environment Act 1995 s 120(1), Sch 22 para 97).
- 19 As to the meaning of 'navigation authority' see PARA 189 note 1.
- 20 As to the meaning of 'harbour authority' see PARA 189 note 2.
- 21 As to the meaning of 'conservancy authority' see PARA 189 note 3.
- 22 Water Industry Act 1991 s 3(5)(a).
- 23 Water Industry Act 1991 s 3(5)(b).
- 24 Water Industry Act 1991 s 3(5). In determining what steps to take in performance of any duty imposed by virtue of this provision, it is the duty of a company holding an appointment as a relevant undertaker to take into account the needs of persons who are chronically sick or disabled: s 3(6). Neither 'chronically sick' nor 'disabled' is defined in the Water Industry Act 1991. As to the definitions of 'disability' and 'disabled person' in the Disability Discrimination Act 1995 see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 511. As to discrimination in the provision of goods, facilities and services to disabled persons see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 582 et seq.
- 25 Ie under the Water Industry Act 1991 s 18: see PARA 163.
- 26 Water Industry Act 1991 s 3(7).
- 27 Ie nothing in the Water Industry Act 1991 s 3 or any subsequent provisions of the Act.
- 28 Water Industry Act 1991 s 3(8).

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### **677. Environmental duties under the Water Industry Act 1991 in relation to sites of special interest.**

Where Natural England or the Countryside Council for Wales<sup>1</sup> is of the opinion that any land<sup>2</sup> in England<sup>3</sup> or, as the case may be, in Wales<sup>4</sup> is of special interest by reason of its flora, fauna or geological or physiographical features<sup>5</sup>, and may at any time be affected by schemes, works, operations or activities of a relevant undertaker<sup>6</sup>, Natural England or (as the case may be) the Council must notify the fact that the land is of special interest for that reason to every relevant undertaker whose works, operations or activities may affect the land<sup>7</sup>. Similarly, where a National Park authority<sup>8</sup> or the Broads Authority<sup>9</sup> is of the opinion that any area of land in a National Park or in the Broads<sup>10</sup> is land in relation to which certain environmental matters<sup>11</sup> are of particular importance<sup>12</sup>, and may at any time be affected by schemes, works, operations or activities of a relevant undertaker<sup>13</sup>, that authority must notify every relevant undertaker whose works, operations or activities may affect the land, of the fact that the land is such land, and of the reasons why those matters are of particular importance in relation to that land<sup>14</sup>.

Where a relevant undertaker has received any such notification with respect to any land, it must consult<sup>15</sup> the notifying body before carrying out any works, operations or activities which appear to that undertaker likely: (1) to destroy or damage any of the flora, fauna or geological or physiographical features by reason of which the land is of special interest<sup>16</sup>; or (2) significantly to prejudice anything the importance of which is one of the reasons why the specified environmental matters<sup>17</sup> are of particular importance in relation to that land<sup>18</sup>. This requirement for consultation does not, however, apply in relation to anything done in an emergency where particulars of what is done and of the emergency are notified to the appropriate body<sup>19</sup> as soon as practicable after that thing is done<sup>20</sup>.

The obligations of a relevant undertaker under these provisions are enforceable<sup>21</sup> by the Secretary of State<sup>22</sup> or, in relation to Wales, the Welsh Ministers<sup>23</sup>.

Similar provision is made by the Environment Act 1995 with respect to sites of special interest which may be affected by schemes, works, operations or activities of the Environment Agency<sup>24</sup> or by an authorisation given by that Agency<sup>25</sup>.

1 As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

2 As to the meaning of 'land' see PARA 14 note 21.

3 As to the meaning of 'England' see PARA 19 note 8.

4 As to the meaning of 'Wales' see PARA 16 note 2.

5 Water Industry Act 1991 s 4(1)(a).

6 Water Industry Act 1991 s 4(1)(b). As to the meaning of 'relevant undertaker' see PARA 137 note 8. The Water Industry Act 1991 s 3(9) (see PARA 676 note 5) applies, as it applies in relation to s 3, for construing, in accordance with s 6 (see PARA 137) any references to a relevant undertaker: s 4(6).

7 Water Industry Act 1991 s 4(1) (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 129(1), (2)). As to sites of special interest see generally *Southern Water Authority v*



*Nature Conservancy Council* [1992] 3 All ER 481, [1992] 1 WLR 775, HL. As to sites of special scientific interest see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 674 et seq.

8 As to National Park authorities see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526 et seq.

9 As to the Broads Authority see PARA 734.

10 'The Broads' has the same meaning as in the Norfolk and Suffolk Broads Act 1988 (see PARA 735 note 2): Water Industry Act 1991 s 4(6).

11 Ie the matters for the purposes of which the Water Industry Act 1991 s 3 has effect: see PARA 676.

12 Water Industry Act 1991 s 4(2)(a).

13 Water Industry Act 1991 s 4(2)(b).

14 Water Industry Act 1991 s 4(2).

15 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

16 Water Industry Act 1991 s 4(3)(a).

17 Ie the matters mentioned in the Water Industry Act 1991 s 4(2): see the text to notes 8-14.

18 Water Industry Act 1991 s 4(3)(b).

19 Ie Natural England, the Countryside Council for Wales, the National Park authority in question or, as the case may be, the Broads Authority.

20 Water Industry Act 1991 s 4(4) (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 129(1), (3)).

21 Ie under the Water Industry Act 1991 s 18: see PARA 163.

22 As to the Secretary of State see PARA 15 note 1.

23 Water Industry Act 1991 s 4(5). The functions of the Secretary of State under the Water Industry Act 1991 s 4, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

24 As to the Environment Agency see PARA 17.

25 See the Environment Act 1995 s 8; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 78.

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**678. Codes of practice under the Water Industry Act 1991 with respect to environmental and recreational duties.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, may by order<sup>3</sup> approve any code of practice issued (whether by them or by another person<sup>4</sup>) for the purpose of:

- 1369 (1) giving practical guidance to relevant undertakers<sup>5</sup> with respect to any of the specified environmental matters<sup>6</sup>; and
- 1370 (2) promoting what appear to the Secretary of State or, as the case may be, the Welsh Ministers to be desirable practices by such undertakers with respect to those matters<sup>7</sup>,

and may at any time by such an order approve a modification<sup>8</sup> of such a code or withdraw approval of such a code or modification<sup>9</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may not, however, make such an order unless they have first consulted<sup>10</sup>:

- 1371 (a) the Environment Agency<sup>11</sup>;
- 1372 (b) Natural England and the Countryside Council for Wales<sup>12</sup>;
- 1373 (c) the Historic Buildings and Monuments Commission for England<sup>13</sup>;
- 1374 (d) the Sports Council and the Sports Council for Wales<sup>14</sup>; and
- 1375 (e) such relevant undertakers and other persons as the Secretary of State or the Welsh Ministers consider it appropriate to consult<sup>15</sup>.

A contravention<sup>16</sup> of a code of practice as for the time being so approved does not of itself constitute a contravention of any requirement imposed by the general environmental and recreation duties of relevant undertakers<sup>17</sup> or give rise to any criminal or civil liability; but the Secretary of State and the Welsh Ministers are under a duty to take into account whether there has been or is likely to be any such contravention in determining when and how they should exercise their statutory powers<sup>18</sup> in relation to any relevant undertaker<sup>19</sup>.

Under the Environment Act 1995, there are similar powers to approve codes of practice in relation to the Environment Agency<sup>20</sup>; and codes of practice may also be approved in relation to internal drainage boards and local authorities exercising land drainage functions<sup>21</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Water Industry Act 1991 s 5, in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

3 The power to make such an order is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Water Industry Act 1991 s 5(3). As to the procedure in relation to subordinate legislation made by the Welsh

Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 As to the meaning of 'person' see PARA 13 note 29.

5 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

6 Water Industry Act 1991 s 5(1)(a). The matters referred to are those for the purposes of which the Water Industry Act 1991 ss 3 and 4 have effect: see PARAS 676-677.

7 Water Industry Act 1991 s 5(1)(b).

8 As to the meaning of 'modifications' see PARA 141 note 20.

9 Water Industry Act 1991 s 5(1). As to the order made see the Water and Sewerage (Conservation, Access and Recreation) (Code of Practice) Order 2000, SI 2000/477. This order (1) so far as it relates to the Water Industry Act 1991, does not apply to any water or sewerage undertaker whose area of appointment is wholly or mainly in Wales (Water and Sewerage (Conservation, Access and Recreation) (Code of Practice) Order 2000, SI 2000/477, art 1(2)(a)); and (2) approves the Code of Practice on Conservation, Access and Recreation which was issued on 22 February 2000 (see art 2). As to water undertakers areas see PARA 318.

10 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

11 Water Industry Act 1991 s 5(4)(a) (amended by the Environment Act 1995 s 120(1), Sch 22 para 98). As to the Environment Agency see PARA 17.

12 Water Industry Act 1991 s 5(4)(b) (amended by SI 1999/416; the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 130). As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

13 Water Industry Act 1991 s 5(4)(c). The Historic Buildings and Monuments Commission for England is commonly known as 'English Heritage': see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 803.

14 Water Industry Act 1991 s 5(4)(d). As to the Sports Councils see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 965.

15 Water Industry Act 1991 s 5(4)(e).

16 As to the meaning of 'contravention' see PARA 20 note 5.

17 Is any requirement imposed by the Water Industry Act 1991 s 3 or s 4: see PARAS 676-677.

18 Is by virtue of the Water Industry Act 1991, any of the other consolidation Acts or the Water Act 1989. The 'other consolidation Acts' means the Water Resources Act 1991, the Statutory Water Companies Act 1991, the Land Drainage Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991: Water Industry Act 1991 s 5(5).

19 Water Industry Act 1991 s 5(2) (amended by SI 2002/794).

20 See the Environment Act 1995 s 9; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 79.

21 See the Land Drainage Act 1991 s 61E: and PARA 646.

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## **679. Conservation of natural habitats.**

The Conservation (Natural Habitats etc) Regulations 1994<sup>1</sup> have been made for the purpose of implementing, for Great Britain<sup>2</sup>, the Habitats Directive<sup>3</sup> and the Wild Birds Directive<sup>4</sup>. The Secretary of State<sup>5</sup> and the Welsh Ministers<sup>6</sup> must exercise their functions<sup>7</sup> relating to nature conservation, including those under the regulations, so as to secure compliance with the requirements of these Directives<sup>8</sup>; and they and every other competent authority<sup>9</sup> in the exercise of any of their functions, must have regard to the requirements of these Directives so far as they may be affected by the exercise of those functions<sup>10</sup>. In relation to marine areas<sup>11</sup> any competent authority having functions relevant to marine conservation must exercise those functions so as to secure compliance with the requirements of the Directives<sup>12</sup>. The regulations are discussed in detail elsewhere in this work<sup>13</sup>.

The Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007<sup>14</sup> have been made for the purpose of implementing the Wild Birds Directive and the Habitats Directive in relation to marine areas where the United Kingdom has jurisdiction beyond its territorial sea. It is the duty, in relation to those areas covered by the regulations, of any competent authority<sup>15</sup> having functions relevant to marine conservation to exercise those functions so as to secure compliance with the requirements of the Habitats Directive and the Wild Birds Directive<sup>16</sup>. The regulations are discussed in detail elsewhere in this work<sup>17</sup>.

Under regulations made for the purpose of implementing the common agricultural policy, aid is payable to an eligible person<sup>18</sup> who undertakes not to use eligible land on water fringes for agricultural production, and to manage it and any features bordering on it in accordance with the prescribed requirements<sup>19</sup> for the management period<sup>20</sup>. Aid is also available for the establishment of salt-marshes in England<sup>21</sup> and for the setting aside and management of coastal belt land in Wales<sup>22</sup>. The relevant provisions are discussed elsewhere in this work<sup>23</sup>.

1    Ie the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716.

2    As to the meaning of 'Great Britain' see PARA 22 note 5.

3    Ie EC Council Directive 92/43 (OJ L206, 22.7.92, p 7) of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: see PARA 11.

4    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(1) (amended by SI 1997/3055). The Wild Birds Directive is EC Council Directive 79/409 (OJ L103, 25.4.1979, p 1) on the conservation of wild birds.

5    As to the Secretary of State see PARA 15 note 1.

6    The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716 (with certain exceptions not relevant to this title) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

7    'Functions' includes powers and duties: Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 2(1).

8    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(2).

- 9 As to the meaning of 'competent authority' see PARA 11 note 7.
- 10 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(4).
- 11 'Marine area' means any land covered, continuously or intermittently, by tidal waters or any part of the sea in or adjacent to Great Britain up to the seaward limit of territorial waters; and 'land' includes land covered by water: Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 2(1). The correct interpretation of the Habitats Directive is that it extends beyond the area of territorial waters to those waters within national jurisdiction; the confinement of the scope of the regulations to territorial waters fails to give full effect to the Directive: see *R v Secretary of State for Trade and Industry, ex p Greenpeace Ltd* (2000) Times, 19 January, [1999] All ER (D) 1232. See now the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007, SI 2007/1842; and see the text to notes 14-17. As to territorial waters see PARA 31.
- 12 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(3). This applies in particular to functions under certain enactments including the Water Resources Act 1991, the Land Drainage Act 1991 and under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716: see reg 3(3).
- 13 See **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728 et seq.
- 14 See the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007, SI 2007/1842.
- 15 'Competent authority' means: (1) any Minister of the Crown, government department, public or statutory undertaker, or public body of any description or person holding a public office; (2) the Scottish Ministers; (3) the Welsh Ministers; (4) any Northern Ireland department; and (5) any person exercising any function of a person or body referred to in heads (1)-(4) above: Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007, SI 2007/1842, reg 5(1). 'Public office' means: (a) an office under Her Majesty; (b) an office created or continued in existence by a public general Act of Parliament; or (c) an office the remuneration in respect of which is paid out of public funds: reg 5(2).
- 16 See the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007, SI 2007/1842, reg 6(1). This duty applies in particular, inter alia, to the Coast Protection Act 1949 s 34 (restriction of works detrimental to navigation: see PARA 533) and the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007, SI 2007/1842: see reg 6(2)(b), (n).
- 17 See **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 736.
- 18 'Eligible person' means a person who on the date of submission of his application for aid: (1) occupies eligible land as an owner or tenant; and (2) is not prohibited by the relevant European legislation from providing an undertaking pursuant to an agri-environment scheme: see the Habitat (Water Fringe) Regulations 1994, SI 1994/1291, reg 2(1) (definition substituted by SI 1996/3106); the Habitat (Water Fringe) (Wales) Regulations 1994, SI 1994/3100, reg 2(1) (definition substituted by SI 1996/3073).
- 19 For the prescribed requirements in England see the Habitat (Water Fringe) Regulations 1994, SI 1994/1291, reg 3, Schs 2-4 (Sch 2 amended by SI 1996/1480); and for the prescribed requirements in Wales see the Habitat (Water Fringe) (Wales) Regulations 1994, SI 1994/3100, reg 3, Schedule.
- 20 See the Habitat (Water Fringe) Regulations 1994, SI 1994/1291, reg 3 (amended by SI 1996/3106; SI 1996/1480); Habitat (Water Fringe) (Wales) Regulations 1994, SI 1994/3100 (amended by SI 1996/3072).
- 21 See the Habitat (Salt-Marsh) Regulations 1994, SI 1994/1293.
- 22 See the Habitat (Coastal Belt) (Wales) Regulations 1994, SI 1994/3101.
- 23 See **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 758; and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 810.

## UPDATE

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NOTES 11,14-16--As to the power of marine enforcement officers to enforce nature conservation legislation see Marine and Coastal Access Act 2009 s 237(1), (2); and PARA 30F.3.

NOTE 12--SI 1994/2716 reg 3(3) amended to include the Planning Act 2008: SI 2009/2438.



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/10. AMENITY, RECREATION AND ENVIRONMENT/(1) THE WATER ENVIRONMENT/680. Access to environmental information held by public authorities.

#### **680. Access to environmental information held by public authorities.**

The Environmental Information Regulations 2004<sup>1</sup> have been made for the purpose of implementing the Directive on public access to environmental information<sup>2</sup>. The regulations apply to public authorities<sup>3</sup>, and for the purposes of the regulations, environmental information is held by a public authority if the information is in the authority's possession and has been produced or received by the authority, or is held by another person on behalf of the authority<sup>4</sup>. 'Environmental information' means any information in written, visual, aural, electronic or any other material form on:

- 1376 (1) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- 1377 (2) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in head (1) above;
- 1378 (3) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in heads (1) and (2) above as well as measures or activities designed to protect those elements;
- 1379 (4) reports on the implementation of environmental legislation;
- 1380 (5) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in head (3) above; and
- 1381 (6) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in head (1) above or, through those elements, by any of the matters referred to in heads (2) and (3) above<sup>5</sup>.

A public authority must in respect of environmental information that it holds<sup>6</sup>: (a) progressively make the information available to the public<sup>7</sup> by electronic means which are easily accessible<sup>8</sup>; and (b) take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination to the public of the information<sup>9</sup>.

A public authority that holds environmental information must make it available on request<sup>10</sup> as soon as possible and no later than 20 working days<sup>11</sup> after the date of receipt of the request<sup>12</sup>. Any enactment<sup>13</sup> or rule of law that would prevent the disclosure of information in accordance with the regulations does not apply<sup>14</sup>. Where a public authority makes environmental information available in accordance with such a request the authority may charge the applicant for making the information available<sup>15</sup>. A public authority must provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants<sup>16</sup>. Where a public authority decides that an applicant has formulated a request in too general a manner, it must ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request<sup>17</sup>, and assist the applicant in providing those particulars<sup>18</sup>.

Where a public authority that receives a request for environmental information does not hold the information requested but believes that another public authority or a Scottish public authority holds the information, the public authority must either (i) transfer the request to the other public authority or Scottish public authority<sup>19</sup>; or (ii) supply the applicant with the name and address of that authority<sup>20</sup>, and inform<sup>21</sup> the applicant accordingly<sup>22</sup>.

An applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of the regulations in relation to the request<sup>23</sup>. The public authority must on receipt of the representations and free of charge consider them and any supporting evidence produced by the applicant<sup>24</sup>, and decide if it has complied with the requirement<sup>25</sup>; and must notify the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations<sup>26</sup>.

The Secretary of State<sup>27</sup> may issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in the Secretary of State's opinion, be desirable for them to follow in connection with the discharge of their functions under the regulations<sup>28</sup>. The code may make different provision for different public authorities<sup>29</sup>.

Special provision is made where a request relates to information contained in an historical record<sup>30</sup> or a transferred public record<sup>31</sup>.

Where a request for environmental information has been made<sup>32</sup> to a public authority<sup>33</sup>, and the applicant would have been entitled<sup>34</sup> (subject to payment of any charge) to that information<sup>35</sup>, the public authority and any person who is employed by, is an officer of, or is subject to the direction of, the public authority<sup>36</sup> is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled<sup>37</sup>. No proceedings for such an offence may be instituted in England and Wales<sup>38</sup>, except by the Information Commissioner or by or with the consent of the Director of Public Prosecutions<sup>39</sup>.

The enforcement and appeals provisions of the Freedom of Information Act 2000<sup>40</sup> apply for the purposes of the regulations as they apply for the purposes of the Act but with the specified modifications<sup>41</sup>.

1    le the Environmental Information Regulations 2004, SI 2004/3391.

2    le EC Council Directive 2003/4 (OJ L41, 14.2.2003, p 26) on public access to environmental information: see PARA 674.

3    Environmental Information Regulations 2004, SI 2004/3391, reg 3(1). 'Public authority' means: (1) government departments; (2) any other public authority as defined in the Freedom of Information Act s 3(1) (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 583), disregarding for this purpose the exceptions in Sch 1 para 6 to the Act, but excluding (a) any body or office-holder listed in Sch 1 to the Act only in relation to information of a specified description; or (b) any person designated by Order under s 5 of the Act; (3) any other body or other person that carries out functions of public administration; or (4) any other body or other person that is under the control of a person falling within head (1), (2) or (3) above and has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment, or provides public services relating to the environment: Environmental Information Regulations 2004, SI 2004/3391, art 2(1), (2). Except as provided by reg 12(10) (see PARA 681 note 15) a Scottish public authority is not a 'public authority': reg 2(3). The regulations do not apply to any public authority to the extent that it is acting in a judicial or legislative capacity (reg 3(3)); nor do they apply to either House of Parliament to the extent required for the purpose of avoiding an infringement of the privileges of either House (reg 3(4)). Each government department is to be treated as a person separate from any other government department for the purposes of the regulations except those of Pt 3 (regs 12-15) (see PARA 681) relating to exceptions to the duty to disclose information: see reg 3(5). As to the meaning of 'person' see PARA 13 note 29. 'Scottish public authority' means a body referred to in the Freedom of Information Act 2000 s 80(2) and, in so far as not such a body, a Scottish public authority as defined in the Freedom of Information (Scotland) Act 2002 s 3: Environmental Information Regulations 2004, SI 2004/3391, reg 2(1).



4 Environmental Information Regulations 2004, SI 2004/3391, reg 3(2).

5 Environmental Information Regulations 2004, SI 2004/3391, reg 2(1). The name of the person operating an installation can properly constitute environmental information, and disclosure of environmental information can extend to the disclosure of that person's name: see *Office of Communications v Information Comr* [2009] EWCA Civ 90, (2009) Times, 27 February, [2009] All ER (D) 212 (Feb) (in which case it was held that the disclosure of the names of mobile phone network operators in connection with the location of mobile phone base stations was justified).

6 The Environmental Information Regulations 2004, SI 2004/3391, reg 4(1) does not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under reg 12 (see PARA 681): reg 4(3). The information under reg 4(1) must include at least: (1) the information referred to in EC Council Directive 2003/4 (OJ L41, 14.2.2003, p 26) art 7(2); and (2) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals: reg 4(4).

7 As to the meaning of 'public' see PARA 674 note 13: definition applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 2(5).

8 Environmental Information Regulations 2004, SI 2004/3391, reg 4(1)(a). For these purposes the use of electronic means to make information available or to organise information is not required in relation to information collected before 1 January 2005 in non-electronic form: reg 4(2).

9 Environmental Information Regulations 2004, SI 2004/3391, reg 4(1)(b). See also note 7.

10 Environmental Information Regulations 2004, SI 2004/3391, reg 5(1). This provision is expressed to be subject to reg 5(3) and in accordance with reg 5(2), (4), (5) and (6) (see below and the text to notes 10-13) and the provisions of regs 6-11 (see note 11 and the text to notes 14-25) and Pt 3 (regs 12-15) (see PARA 681). To the extent that the information requested includes personal data of which the applicant is the data subject, reg 5(1) does not apply to those personal data: reg 5(3). For the purposes of reg 5(1), where the information made available is compiled by or on behalf of the public authority it must be up to date, accurate and comparable, so far as the public authority reasonably believes: reg 5(4). Where a public authority makes available information in head (2) of the definition of environmental information, and the applicant so requests, the public authority must, in so far as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used: reg 5(5). 'Personal data' and 'data subject' have the same meanings as they have in the Data Protection Act 1998 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 506); and 'data' has the same meaning as in the Data Protection Act 1998 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 506), except that for the purposes of the Environmental Information Regulations 2004, SI 2004/3391, regs 12(3) and 13 (see PARA 681) a public authority referred to in the definition of data in s 1(1)(e) of that Act means a public authority within the meaning of the Environmental Information Regulations 2004, SI 2004/3391: reg 2(4). 'Applicant', in relation to a request for environmental information, means the person who made the request: reg 2(1).

11 'Working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321) in any part of the United Kingdom: Freedom of Information Act 2000 s 10(6); definition applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 2(1). As to the meaning of 'United Kingdom' see PARA 22 note 5.

12 Environmental Information Regulations 2004, SI 2004/3391, reg 5(2). Where an applicant requests that the information be made available in a particular form or format, a public authority must make it so available, unless: (1) it is reasonable for it to make the information available in another form or format; or (2) the information is already publicly available and easily accessible to the applicant in another form or format: reg 6(1). If the information is not made available in the form or format requested, the public authority must: (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information (reg 6(2)(a)); (b) provide the explanation in writing if the applicant so requests (reg 6(2)(b)); and (c) inform the applicant of the provisions of reg 11 (see the text to notes 22-25) and of the enforcement and appeal provisions of the Freedom of Information Act 2000 applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 18 (see the text to notes 39-40) (reg 6(2)(c)). As to the meaning of 'writing' see PARA 22 note 1.

Where a request is made under reg 5, the public authority may extend the period of 20 working days referred to in reg 5(2), reg 6(2)(a) and reg 14(2) (see PARA 681) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so: reg 7(1), (2). Where reg 7(1) applies the public authority must notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request: reg 7(3).

13 As to the meaning of 'enactment' see PARA 14 note 31.

14 Environmental Information Regulations 2004, SI 2004/3391, reg 5(6).

15 Environmental Information Regulations 2004, SI 2004/3391, reg 8(1). A public authority must not make any charge for allowing an applicant to access any public registers or lists of environmental information held by the public authority; or to examine the information requested at the place which the public authority makes available for that examination: reg 8(2). A charge must not exceed an amount which the public authority is satisfied is a reasonable amount: reg 8(3). A public authority may require advance payment of a charge for making environmental information available and if it does it must, no later than 20 working days after the date of receipt of the request for the information, notify the applicant of this requirement and of the amount of the advance payment: reg 8(4). Where a public authority has so notified an applicant that advance payment is required, the public authority is not required to make available the information requested, or to comply with reg 6 (see note 11) or reg 14 (see PARA 681), unless the charge is paid no later than 60 working days after the date on which it gave the notification: reg 8(5). The period beginning with the day on which the notification of a requirement for an advance payment is made and ending on the day on which that payment is received by the public authority is to be disregarded for the purposes of determining the period of 20 working days referred to in reg 5(2) (see the text to note 11), reg 6(2)(a) (see note 11) and reg 14(2) (see PARA 681), including any extension to those periods under reg 7(1) (see note 11): reg 8(6), (7). A public authority must publish and make available to applicants a schedule of its charges and information on the circumstances in which a charge may be made or waived: reg 8(8).

16 Environmental Information Regulations 2004, SI 2004/3391, reg 9(1). Where a code of practice has been made under reg 16 (see the text to notes 26-28), and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it must be taken to have complied with reg 9(1) in relation to that case: reg 9(3).

17 Environmental Information Regulations 2004, SI 2004/3391, reg 9(2)(a). Where reg 9(2) applies, in respect of reg 5(2) (see the text to note 11), reg 6(2)(a) (see note 11) and reg 14(2) (see PARA 681), the date on which the further particulars are received by the public authority must be treated as the date after which the period of 20 working days referred to in those provisions is calculated: reg 9(4), (5).

18 Environmental Information Regulations 2004, SI 2004/3391, reg 9(2)(b).

19 Environmental Information Regulations 2004, SI 2004/3391, reg 10(1)(a). Where a request is transferred to a public authority, for the purposes of reg 5(2) (see the text to note 11), reg 6(2)(a) (see note 11) and reg 14(2) (see PARA 681), the request is received by that public authority on the date on which it receives the transferred request: reg 10(2), (3).

20 Environmental Information Regulations 2004, SI 2004/3391, reg 10(1)(b).

21 In with the refusal sent under the Environmental Information Regulations 2004, SI 2004/3391, reg 14(1): see PARA 681.

22 Environmental Information Regulations 2004, SI 2004/3391, reg 10(1).

23 Environmental Information Regulations 2004, SI 2004/3391, reg 11(1). Such representations must be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement: reg 11(2).

24 Environmental Information Regulations 2004, SI 2004/3391, reg 11(3)(a).

25 Environmental Information Regulations 2004, SI 2004/3391, reg 11(3)(b).

26 Environmental Information Regulations 2004, SI 2004/3391, reg 11(4). Where the public authority decides that it has failed to comply with the regulations in relation to the request, the notification must include a statement of (1) the failure to comply; (2) the action the authority has decided to take to comply with the requirement; and (3) the period within which that action is to be taken: reg 11(5).

27 As to the Secretary of State see PARA 15 note 1.

28 Environmental Information Regulations 2004, SI 2004/3391, reg 16(1). Before issuing or revising any such code, the Secretary of State must consult the Information Commissioner: reg 16(3). The Secretary of State must lay before each House of Parliament any code issued or revised under these provisions: reg 16(4). The general functions of the Commissioner under the Freedom of Information Act 2000 s 47 and the power of the Commissioner to give a practice recommendation under s 48 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 608) apply for the purposes of the Environmental Information Regulations 2004, SI 2004/3391, as they apply for the purposes of the Act but with the specified modifications: reg 16(5). For the

purposes of the application of the Freedom of Information Act 2000 ss 47 and 48 to the regulations, any reference to: (1) a public authority is a reference to a public authority within the meaning of the regulations; (2) the requirements or operation of the Act, or functions under the Act, includes a reference to the requirements or operation of the regulations, or functions under the regulations; and (3) a code of practice made under s 45 of the Act includes a reference to a code of practice made under the Environmental Information Regulations 2004, SI 2004/3391, reg 16: reg 16(6). As to the Information Commissioner see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 518.

29 Environmental Information Regulations 2004, SI 2004/3391, reg 16(2).

30 A record becomes an 'historical record' at the end of the period of 30 years beginning with the year following that in which it was created: Freedom of Information Act 2000 s 62(1); definition applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 2(1).

31 See the Environmental Information Regulations 2004, SI 2004/3391, reg 17. As to the meaning of 'transferred public record' see the Freedom of Information Act 2000 s 15 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 584); definition applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 2(1).

32 Ie under the Environmental Information Regulations 2004, SI 2004/3391, reg 5: see the text to notes 9-13.

33 Environmental Information Regulations 2004, SI 2004/3391, reg 19(1)(a).

34 Ie in accordance with the Environmental Information Regulations 2004, SI 2004/3391, reg 5: see the text to notes 9-13.

35 Environmental Information Regulations 2004, SI 2004/3391, reg 19(1)(b).

36 See the Environmental Information Regulations 2004, SI 2004/3391, reg 19(2). A government department is not liable to prosecution in relation to an offence under reg 19(1) but that offence does apply to a person in the public service of the Crown and to a person acting on behalf of either House of Parliament or on behalf of the Northern Ireland Assembly as it applies to any other person: reg 19(5). As to the Northern Ireland Assembly see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

37 Environmental Information Regulations 2004, SI 2004/3391, reg 19(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: reg 19(3). As to the standard scale see PARA 141 note 18.

38 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

39 Environmental Information Regulations 2004, SI 2004/3391, reg 19(4)(a). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

40 'The enforcement and appeals provisions of the Freedom of Information Act 2000' means: (1) Pt IV (ss 50-56) (enforcement: see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 609 et seq), including Sch 3 (powers of entry and inspection) which has effect by virtue of s 55; and (2) Pt V (ss 57-61) (appeals: see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 614); Environmental Information Regulations 2004, SI 2004/3391, reg 18(2). The Freedom of Information Act 2000 Pt IV does not apply in any case where a certificate has been issued in accordance with the Environmental Information Regulations 2004, SI 2004/3391, reg 15(1) (see PARA 681): reg 18(3).

41 Environmental Information Regulations 2004, SI 2004/3391, reg 18(1). As to the specified modifications see reg 18(4)-(10).

## UPDATE

### 680 Access to environmental information held by public authorities

NOTE 5--*Office of Communications*, cited, reported at [2009] IP & T 906.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/10. AMENITY, RECREATION AND ENVIRONMENT/(1) THE WATER ENVIRONMENT/681. Exceptions to the duty to disclose environmental information.

### **681. Exceptions to the duty to disclose environmental information.**

A public authority<sup>1</sup> must apply a presumption in favour of disclosure of environmental information<sup>2</sup>. A public authority may refuse to disclose environmental information requested<sup>3</sup> if: (1) an exception<sup>4</sup> to disclosure applies<sup>5</sup>; and (2) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information<sup>6</sup>. For the purposes of head (1) above, a public authority may refuse to disclose information to the extent that:

- 1382 (a) it does not hold that information when an applicant's request is received<sup>7</sup>;
- 1383 (b) the request for information is manifestly unreasonable<sup>8</sup>;
- 1384 (c) the request for information is formulated in too general a manner and the public authority has complied with its obligation<sup>9</sup> to provide advice and assistance to applicants and prospective applicants<sup>10</sup>;
- 1385 (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data<sup>11</sup>; or
- 1386 (e) the request involves the disclosure of internal communications<sup>12</sup>.

For those purposes, a public authority may also refuse to disclose information to the extent that its disclosure would adversely affect:

- 1387 (i) international relations, defence, national security or public safety<sup>13</sup>;
- 1388 (ii) the course of justice, the ability of a person<sup>14</sup> to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature<sup>15</sup>;
- 1389 (iii) intellectual property rights<sup>16</sup>;
- 1390 (iv) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law<sup>17</sup>;
- 1391 (v) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest<sup>18</sup>;
- 1392 (vi) the interests of the person who provided the information where that person: (A) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority<sup>19</sup>; (B) did not supply it in circumstances such that that or any other public authority is entitled<sup>20</sup> to disclose it<sup>21</sup>; and (C) has not consented to its disclosure<sup>22</sup>; or
- 1393 (vii) the protection of the environment to which the information relates<sup>23</sup>.

Nothing<sup>24</sup> authorises a refusal to make available any environmental information contained in or otherwise held with other information which is withheld<sup>25</sup> unless it is not reasonably capable of being separated from the other information for the purpose of making available that information<sup>26</sup>. To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either of the prescribed conditions is satisfied, a public authority must not disclose the personal data<sup>27</sup>. If a request for environmental information is refused by a public authority<sup>28</sup>, the refusal must be made in writing<sup>29</sup> and comply with the prescribed requirements<sup>30</sup>.

A Minister of the Crown<sup>31</sup> may certify<sup>32</sup> that a refusal to disclose information<sup>33</sup> is because the disclosure would adversely affect national security<sup>34</sup>, and would not be in the public interest under head (2) above<sup>35</sup>. A certificate issued in accordance with this provision is conclusive evidence of such matters<sup>36</sup>, and may identify the information to which it relates in general terms<sup>37</sup>. A document purporting to be such a certificate must be received in evidence and deemed to be such a certificate unless the contrary is proved<sup>38</sup>; and a document which purports to be certified by or on behalf of a Minister of the Crown as a true copy of a such certificate issued by that minister must in any legal proceedings be evidence of that certificate<sup>39</sup>.

1 As to the meaning of 'public authority' see PARA 680 note 3.

2 See the Environmental Information Regulations 2004, SI 2004/3391, reg 12(2). As to the meaning of 'environmental information' see PARA 680. To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data must not be disclosed otherwise than in accordance with reg 13 (see the text to note 27): reg 12(3). As to the meanings of 'data', 'personal data' and 'data subject' see PARA 680 note 9.

3 As to requests for the disclosure of environmental information see PARA 680.

4 Ie under the Environmental Information Regulations 2004, SI 2004/3391, reg 12(4) or (5): see heads (a)-(e) and (i)-(vii) in the text.

5 Environmental Information Regulations 2004, SI 2004/3391, reg 12(1)(a).

6 Environmental Information Regulations 2004, SI 2004/3391, reg 12(1)(b). The exceptions to disclosure are to be considered together, not separately, when balancing the public interests against and for disclosure. When carrying out the public interest balancing exercise, the benefit arising from use of the information, even if that use would be in breach of intellectual property rights, may be taken into account to be weighed in the balance against the adverse effect on the holders of those rights: *Office of Communications v Information Comr* [2009] EWCA Civ 90, (2009) Times, 27 February, [2009] All ER (D) 212 (Feb).

7 Environmental Information Regulations 2004, SI 2004/3391, reg 12(4)(a). As to the meaning of 'applicant' see PARA 680 note 9. As to when environmental information is held by a public authority see PARA 680.

8 Environmental Information Regulations 2004, SI 2004/3391, reg 12(4)(b).

9 Ie under the Environmental Information Regulations 2004, SI 2004/3391, reg 9: see PARA 680.

10 Environmental Information Regulations 2004, SI 2004/3391, reg 12(4)(c).

11 Environmental Information Regulations 2004, SI 2004/3391, reg 12(4)(d).

12 Environmental Information Regulations 2004, SI 2004/3391, reg 12(4)(e). For these purposes, internal communications includes communications between government departments: reg 12(8).

13 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(a). A public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in reg 12(5)(a) and would not be in the public interest under reg 12(1)(b) (see head (2) in the text): reg 12(6). For the purposes of such a response, whether information exists and is held by the public authority is itself the disclosure of information: reg 12(7).

14 As to the meaning of 'person' see PARA 13 note 29.

15 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(b). For the purposes of reg 12(5) (b), (d) and (f), references to a public authority include references to a Scottish public authority: reg 12(10). As to the meaning of 'Scottish public authority' see PARA 680 note 3.

16 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(c).

17 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(d). To the extent that the environmental information to be disclosed relates to information on emissions, a public authority is not entitled to refuse to disclose that information under an exception referred to in reg 12(5)(d)-(g): reg 12(9). See also note 15.

- 18 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(e). See also note 17.
- 19 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(f)(i). See also notes 15, 17.
- 20 Ie apart from the Environmental Information Regulations 2004, SI 2004/3391.
- 21 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(f)(ii). See also notes 15, 17.
- 22 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(f)(iii). See also notes 15, 17.
- 23 Environmental Information Regulations 2004, SI 2004/3391, reg 12(5)(g). See also note 17.
- 24 Ie nothing in the Environmental Information Regulations 2004, SI 2004/3391.
- 25 Ie by virtue of the Environmental Information Regulations 2004, SI 2004/3391.
- 26 Environmental Information Regulations 2004, SI 2004/3391, reg 12(11).
- 27 Environmental Information Regulations 2004, SI 2004/3391, reg 13(1). The first condition is:
- 33 (1) in a case where the information falls within any of paragraphs (a)-(d) of the definition of 'data' in the Data Protection Act 1998 s 1(1) (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 506), that the disclosure of the information to a member of the public otherwise than under the Environmental Information Regulations 2004, SI 2004/3391, would contravene any of the data protection principles, or the Data Protection Act 1998 s 10 (right to prevent processing likely to cause damage or distress: see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 526) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it (Environmental Information Regulations 2004, SI 2004/3391, reg 13(2)(a)); and
- 34 (2) in any other case, that the disclosure of the information to a member of the public otherwise than under the Environmental Information Regulations 2004, SI 2004/3391, would contravene any of the data protection principles if the exemptions in the Data Protection Act 1998 s 33A(1) (which relate to manual data held by public authorities: see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 552) were disregarded (Environmental Information Regulations 2004, SI 2004/3391, reg 13(2)(b)).

The second condition is that by virtue of any provision of the Data Protection Act 1998 Pt IV (ss 27-39) the information is exempt from s 7(1) (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 524) and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it: Environmental Information Regulations 2004, SI 2004/3391, reg 13(3). In determining whether anything done before 24 October 2007 would contravene any of the data protection principles, the exemptions in the Data Protection Act 1998 Sch 8 Pt III (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARAS 529, 534) must be disregarded: Environmental Information Regulations 2004, SI 2004/3391, reg 13(4). For the purposes of reg 13 a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that: (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or the Data Protection Act 1998 s 10 or would do so if the exemptions in s 33A(1) were disregarded; or (b) by virtue of any provision of the Data Protection Act 1998 Pt IV, the information is exempt from s 7(1)(a): Environmental Information Regulations 2004, SI 2004/3391, reg 13(5). 'Data protection principles' has the same meaning as in the Data Protection Act 1998 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 507 et seq): Environmental Information Regulations 2004, SI 2004/3391, reg 2(4). As to the meaning of 'public' see PARA 674 note 13: definition applied by reg 2(5).

28 Ie under the Environmental Information Regulations 2004, SI 2004/3391, reg 12(1) (see the text to notes 1-6) or reg 13(1) (see the text to note 27).

29 As to the meaning of 'writing' see PARA 22 note 1.

30 See the Environmental Information Regulations 2004, SI 2004/3391, reg 14(1). The refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request: reg 14(2). The refusal must specify the reasons not to disclose the information requested, including: (1) any exception relied on under reg 12(4), 12(5) (see heads (a)-(e) and (i)-(vii) in the text) or reg 13 (see the text to note 27) (reg 14(3)(a)); and (2) the matters the public authority considered in reaching its decision with respect to the public interest under reg 12(1)(b) (see head (2) in the text) or, where these apply, reg 13(2)(a)(ii) or 13(3) (see note 27) (reg 14(3)(b)). If the exception in reg 12(4)(d) (see head (d) in the text) is specified in the refusal, the authority must also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed: reg 14(4). The

refusal must inform the applicant that he may make representations to the public authority under reg 11 (see PARA 680) (reg 14(5)(a)); and of the enforcement and appeal provisions of the Freedom of Information Act 2000 applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 18 (see PARA 680) (reg 14(5)(b)).

31 The power conferred by the Environmental Information Regulations 2004, SI 2004/3391, reg 15(1), (2) (see notes 32, 33), (5) (see the text to note 39) on a Minister of the Crown is not exercisable except by a minister who is a member of the Cabinet or by the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland: Freedom of Information Act 2000 s 25(3); definition applied by the Environmental Information Regulations 2004, SI 2004/3391, reg 15(6). As to the Cabinet see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 401-413. As to the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529.

32 For these purposes, a Minister of the Crown may designate a person to certify the matters on his behalf: Environmental Information Regulations 2004, SI 2004/3391, reg 15(2)(a).

33 le under the Environmental Information Regulations 2004, SI 2004/3391, reg 12(1): see the text to notes 1-6. A refusal to disclose information under reg 12(1) includes a response under reg 12(6) (see note 13): reg 15(2)(b).

34 Environmental Information Regulations 2004, SI 2004/3391, reg 15(1)(a).

35 Environmental Information Regulations 2004, SI 2004/3391, reg 15(1)(b).

36 Environmental Information Regulations 2004, SI 2004/3391, reg 15(3)(a). As to conclusive evidence see **CIVIL PROCEDURE** vol 11 (2009) PARA 767.

37 Environmental Information Regulations 2004, SI 2004/3391, reg 15(3)(b).

38 Environmental Information Regulations 2004, SI 2004/3391, reg 15(4).

39 Environmental Information Regulations 2004, SI 2004/3391, reg 15(5). As to the evidential effect of certificates admissible by statute see **CIVIL PROCEDURE** vol 11 (2009) PARA 897.

## UPDATE

### 681 Exceptions to the duty to disclose environmental information

NOTE 6--*Office of Communications*, cited, reported at [2009] IP & T 906.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/10. AMENITY, RECREATION AND ENVIRONMENT/(1) THE WATER ENVIRONMENT/682. River basin management.

## **682. River basin management.**

Regulations with regard to river basin management<sup>1</sup> impose various environmental and other duties on the Environment Agency<sup>2</sup> and other appropriate authorities<sup>3</sup> which are discussed elsewhere in this title<sup>4</sup>. Those duties include the preparation and maintenance of a register of protected areas<sup>5</sup>, the preparation of proposals for environmental objectives<sup>6</sup>, and the production of river basin management plans<sup>7</sup>.

1     In the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242: see PARA 198 et seq. See also the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003, SI 2003/3245, and the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004, SI 2004/99; and PARA 198 et seq.

2     As to the Environment Agency see PARA 17.

3     As to the appropriate authorities for these purposes see PARA 199 note 8.

4     See PARA 198 et seq.

5     See PARA 200.

6     See PARA 202.

7     See PARA 202.



Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/10. AMENITY, RECREATION AND ENVIRONMENT/(2) DUTIES AS TO WATER AMENITY AND RECREATION/683. General recreational duties.

## **(2) DUTIES AS TO WATER AMENITY AND RECREATION**

### **683. General recreational duties.**

The Environment Agency<sup>1</sup> is under a general duty to promote the use of inland and coastal waters, and of land associated with such waters, for recreational purposes<sup>2</sup>. Subject to obtaining the consent of any authority having control of navigation, the Agency is also under a duty to take steps for securing, so long as the Agency has rights to the use of water or land associated with water, that those rights are exercised so as to ensure that the water or land is made available for recreational purposes and is so made available in the best manner<sup>3</sup>. In formulating or considering any proposals relating to any functions of the Agency, the Agency, the Secretary of State<sup>4</sup> and the Welsh Ministers<sup>5</sup> are under a duty: (1) to have regard to the desirability of preserving for the public any freedom of access to areas of woodland, mountains, moor, heath, down, cliff or foreshore and other places of natural beauty; (2) to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural, engineering or historic interest; and (3) to take into account any effect which the proposals would have on any such freedom of access or on the availability of any such facility<sup>6</sup>.

Similar duties are imposed on the Secretary of State, the Welsh Ministers, the Water Services Regulation Authority<sup>7</sup> and relevant undertakers<sup>8</sup> under the Water Industry Act 1991<sup>9</sup>.

1 As to the Environment Agency see PARA 17.

2 See the Environment Act 1995 s 6(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 76.

3 See the Environment Act 1995 s 7(4), (5); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 77.

4 As to the Secretary of State see PARA 15 note 1.

5 As to the Welsh Ministers see PARA 16 note 5.

6 See the Environment Act 1995 s 7(2); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 77. See also the Environment Act 1995 ss 8, 9; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 78-79.

7 As to the Water Services Regulation Authority see PARA 109.

8 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

9 See PARA 676.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/10. AMENITY, RECREATION AND ENVIRONMENT/(2) DUTIES AS TO WATER AMENITY AND RECREATION/684. Registration of pleasure boats and pleasure boats byelaws.

#### **684. Registration of pleasure boats and pleasure boats byelaws.**

On many rivers and inland waterways pleasure boats must be registered with or licensed by the appropriate navigation authority or local authority<sup>1</sup>. Local authorities have a general power to license pleasure boats and vessels to be let for hire or to be used for carrying passengers for reward<sup>2</sup>.

A district council, a London borough council, the Common Council of the City of London and the council of a Welsh county or county borough<sup>3</sup> each has powers to make byelaws<sup>4</sup>:

- 1394 (1) for regulating the numbering and naming of pleasure boats and vessels which are let for hire to the public and the mooring places for such boats and vessels<sup>5</sup>; and
- 1395 (2) for fixing the qualifications of the boatmen or other persons in charge of such boats or vessels<sup>6</sup>; and
- 1396 (3) for securing their good and orderly conduct while in charge<sup>7</sup>.

These powers do not, however, apply in relation to pleasure boats or vessels operating on any water owned or managed by the British Waterways Board<sup>8</sup>. Nor do they apply in relation to such boats or vessels operating on:

- 1397 (a) any inland waters<sup>9</sup> in respect of which the Environment Agency<sup>10</sup> may make<sup>11</sup> byelaws<sup>12</sup>;
- 1398 (b) any canal or other inland navigation which a navigation authority<sup>13</sup> is required or empowered to manage or maintain under any enactment, unless the local council in question is itself required or empowered to maintain that canal or inland navigation<sup>14</sup>; or
- 1399 (c) any harbour maintained or managed by a harbour authority<sup>15</sup>.

1 Byelaws may be made under the Public Health Act 1961 s 76 as to the use of pleasure boats: see PARA 51. As to the power of the Environment Agency to make byelaws relating to boating see PARA 709. As to the powers of the British Waterways Board to make byelaws in respect of waterways under its control see PARA 784. As to public health regulations affecting canal boats used as dwellings see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 967 et seq. As to byelaws regulating navigation on the river Thames see **LONDON GOVERNMENT**.

2 See the Public Health Acts Amendment Act 1907 s 94(1); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 597.

3 Local Government, Planning and Land Act 1980 s 185(1)(i)-(iv) (s 185(1)(iv) added by the Local Government (Wales) Act 1994 s 66(6), Sch 16 para 59(4)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

4 As to the making of such byelaws see **LOCAL GOVERNMENT** vol 69 (2009) PARA 553 et seq.

5 Local Government, Planning and Land Act 1980 s 185(1)(a).

6 Local Government, Planning and Land Act 1980 s 185(1)(b).

7 Local Government, Planning and Land Act 1980 s 185(1)(c).

8 Local Government, Planning and Land Act 1980 s 185(2)(a). As to the British Waterways Board see PARA 725 et seq.

9 As to the meaning of 'inland waters' see PARA 187 note 2: definition applied by the Local Government, Planning and Land Act 1980 s 185(2)(b) (substituted by the Water Consolidation (Consequential Provisions) Act 1991 s 2(1), Sch 1 para 35)).

10 As to the Environment Agency see PARA 17.

11 le by virtue of the Water Resources Act 1991 Sch 25 para 1: see PARA 709.

12 Local Government, Planning and Land Act 1980 s 185(2)(b) (as substituted (see note 9); and amended by SI 1996/593).

13 For these purposes, 'navigation authority' means a person or body of persons, whether corporate or unincorporate, having a duty or power imposed or conferred by or under an enactment to manage or maintain a canal, whether navigable or not, or to manage or maintain an inland navigation other than a canal, whether natural or artificial and whether tidal or not: Water Resources Act 1963 s 135(1) (repealed; applied for these purposes, notwithstanding its repeal, by the Local Government, Planning and Land Act 1980 s 185(2)(c), and by virtue of the Water Consolidation (Consequential Provisions) Act 1991 Sch 1 para 35(b)). As to the meaning of 'person' see PARA 13 note 29.

14 See the Local Government, Planning and Land Act 1980 s 185(2)(c), (3).

15 Local Government, Planning and Land Act 1980 s 185(2)(d). 'Harbour authority' has the same meaning as in the Merchant Shipping Act 1995 (see PARA 505 note 9): Local Government, Planning and Land Act 1980 s 185(2)(d) (applying the Harbours Act 1964 s 57(1)).

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#### **685. Waterway byelaws; in general.**

Water undertakers<sup>1</sup> and the Environment Agency<sup>2</sup> have powers to make byelaws<sup>3</sup> with respect to any waterway<sup>4</sup> owned or managed by them and any land held or managed with it, for the preservation of order, the prevention of damage to the land or anything on or in the waterway or land, and for securing that persons resorting to the waterway or land will so behave themselves as to avoid undue interference with the enjoyment of the waters or land by other persons<sup>5</sup>. These powers include power to make byelaws regulating sailing, boating, bathing and fishing and other forms of recreation<sup>6</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17.

3 See the Water Industry Act 1991 s 157(4), Sch 10; the Water Resources Act 1991 s 210(1), Sch 25; and PARAS 709, 711.

4 The Agency also has powers to make byelaws in relation to inland waters: see PARA 709.

5 See PARAS 709, 711. Byelaws may also be made under local Acts. As to local legislation generally see PARA 14.

6 See further PARAS 709-711.

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#### **686. Recreation facilities at reservoirs.**

Where the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> make a compulsory works order<sup>3</sup> authorising a water undertaker<sup>4</sup> or the Environment Agency<sup>5</sup> to carry out works for or in connection with the construction or operation of a reservoir or conferring compulsory powers for that purpose on a water undertaker or the Agency<sup>6</sup>, and it appears to the Secretary of State or, as the case may be, the Welsh Ministers that the works may permanently affect the area and are not primarily intended to benefit its inhabitants<sup>7</sup>, provision may be made in the order for facilities for recreation or other leisure-time occupation for their benefit<sup>8</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the transfer of functions under the Water Industry Act 1991 s 167 and the Water Resources Act 1991 s 168 to the Welsh Ministers see PARA 455 note 8. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

3 Ie under the Water Industry Act 1991 s 167 or the Water Resources Act 1991 s 168: see PARA 455.

4 As to the meaning of 'water undertaker' see PARA 137 note 4.

5 As to the Environment Agency see PARA 17.

6 Water Industry Act 1991 s 167(5)(a); Water Resources Act 1991 s 168(5)(a) (s 168(5) amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 Water Industry Act 1991 s 167(5)(b); Water Resources Act 1991 s 168(5)(b).

8 See the Water Industry Act 1991 s 167(5); Water Resources Act 1991 s 168(5) (as amended: see note 6). As to the making of such orders see PARA 458. Functions under the Water Resources Act 1991 s 168(5) must be exercised so as to secure compliance with the requirements of the Water Framework Directive: see the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(1), (3), Sch 2; and PARA 198 note 4. As to the Water Framework Directive see PARA 7.

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### **687. Discharge of recreation functions in Wales.**

Where a water undertaker<sup>1</sup> or the Environment Agency<sup>2</sup> carries out any works for or in connection with the construction or operation of a reservoir in Wales<sup>3</sup> which permanently affect one or more communities<sup>4</sup>, and are not primarily intended by that undertaker or the Agency to benefit the inhabitants of that community or of those communities<sup>5</sup>, it is the duty of the undertaker or, as the case may be, the Agency to make available facilities for recreation or other leisure-time occupation for the benefit of those inhabitants, or to assist others to make such facilities available<sup>6</sup>. In performing this duty, the undertaker or the Agency must consult the community councils of the communities affected, in the case of communities having such councils<sup>7</sup>, and, in any case, the council of any county or county borough in which any community affected is situated<sup>8</sup>.

In the case of a water undertaker, these duties are enforceable<sup>9</sup> by the Welsh Ministers<sup>10</sup>; and in the case of the Agency, they must be exercised so as to secure compliance with the requirements of the Water Framework Directive<sup>11</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 As to the Environment Agency see PARA 17.

3 As to the meaning of 'Wales' see PARA 16 note 2.

4 Water Industry Act 1991 s 191(1)(a); Water Resources Act 1991 s 184(1)(a).

5 Water Industry Act 1991 s 191(1)(b); Water Resources Act 1991 s 184(1)(b).

6 Water Industry Act 1991 s 191(1); Water Resources Act 1991 s 184(1) (s 184 amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

7 Water Industry Act 1991 s 191(2)(a); Water Resources Act 1991 s 184(2)(a) (as amended: see note 6).

8 Water Industry Act 1991 s 191(2)(b); Water Resources Act 1991 s 184(2)(b) (as amended: see note 6). As to local government areas and authorities in Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 37 et seq. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

9 Ie under the Water Industry Act 1991 s 18: see PARA 163.

10 Water Industry Act 1991 s 191(3). The functions under the Water Industry Act 1991 s 191 were originally vested in the Secretary of State and, so far as exercisable in relation to Wales, were subsequently transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

11 See the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg 3(1), (3), Sch 2; and PARA 198 note 4. As to the Water Framework Directive see PARA 7.

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## **11. NAVIGATION**

### **(1) MEANING OF NAVIGATION**

#### **688. Meaning of 'navigation'.**

The right of navigation has been judicially described as 'a right to pass and repass over the whole width and depth of water [in a navigable waterway] and the incidental rights of loading and unloading'<sup>1</sup>. Navigation has also been described as 'passage or transit through navigable waters whether they be tidal or non-tidal, [and] of communication by sea and, in principle, it would appear to follow that it is those activities which are necessarily subservient to that essential purpose which may be exercised as of right in virtue of the recognised and undoubted right of navigation'<sup>2</sup>. The existence and extent of navigation rights differ depending on whether the waters concerned are tidal<sup>3</sup> or non-tidal<sup>4</sup>.

Navigation on the high seas is subject to maritime law<sup>5</sup>.

<sup>1</sup> *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 at 537, [1983] 1 All ER 1159 at 1170, HL, per Lord Templeman.

<sup>2</sup> *Crown Estate Comrs v Fairlie Yacht Slip Ltd* 1979 SC 156 at 182 per Lord Cameron.

<sup>3</sup> As to rights of navigation in tidal waters see PARA 689 et seq.

<sup>4</sup> As to rights of navigation in non-tidal waters see PARA 701 et seq.

<sup>5</sup> As to the high seas see PARA 31. As to maritime law see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 1 et seq.

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## (2) RIGHTS OF NAVIGATION IN TIDAL WATERS

### 689. General public right of navigation.

Prima facie all waters which are tidal<sup>1</sup>, and in which navigation is possible, are subject to a public right of navigation<sup>2</sup> since the soil of such waterways belongs to the Crown<sup>3</sup>. For this right to exist it is essential that the waters should be subject to the ebb and flow of ordinary or mean tides<sup>4</sup>; but although the fact that they are subject to the flow of the tides is strong prima facie evidence of the existence of a public right of navigation<sup>5</sup>, it is not conclusive, since not every creek, river or channel into which the tide flows is on that account necessarily a public navigable channel, even if it is sufficiently large for that purpose<sup>6</sup>. However, once a waterway is subject to the public right of navigation, no act by a private person, however long continued, will destroy the public right<sup>7</sup>, nor will it be lost by disuse<sup>8</sup>. The right is, however, capable of being extinguished<sup>9</sup>.

It is a question of fact whether a public right of navigation exists in any particular case<sup>10</sup>.

1 As to the meaning of 'tidal waters' see PARA 71 note 1. In *Kingsway Furniture (Dartford) Ltd v Harpglow Ltd and Kylefield Ltd* [1991] Water Law 10 (Official Referee's Business), 'tidal waters' were defined to include those where there was a real and perceptible ebb and flow of the tide, whether saline or not and whether horizontal or vertical.

2 *Miles v Rose* (1814) 5 Taunt 705. This right of navigation exists even where at certain states of the tide the water disappears from the place where the navigation is taking place: *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668. As to the nature and extent of the public right of navigation see PARAS 690-691. As to local navigation rules affecting particular rivers see PARAS 708, 712. The right of the public to navigate on the sea has been unchallenged from the earliest times: see *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171 at 198, CA. As to navigation on the high seas and maritime law see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 1 et seq. As to the high seas see PARA 31.

3 *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; and see PARA 71.

4 *Murphy v Ryan* (1868) IR 2 CL 143; and see note 1. The fact that a creek which is not affected by the ebb and flow of the tide can be traversed by small boats does not make it navigable (ie by the public) in the legal sense of the term: *Earl of Ilchester v Raishleigh* (1889) 61 LT 477.

5 *Miles v Rose* (1814) 5 Taunt 705; *Sim E Bak v Ang Yong Huat* [1923] AC 429, PC.

6 *R v Montague* (1825) 4 B & C 598. If the river is broad and deep, calculated for the purposes of commerce, it may be assumed to be a public navigation, but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it may be presumed that it never has been a public navigable river: *R v Montague* (above) at 602 per Bayley J; *Sim E Bak v Ang Yong Huat* [1923] AC 429, PC. See also *Dawood Hashim Esoof v Tuck Sein* (1931) LR 58 Ind App 80, PC (public right of navigation in India confined to land covered at ordinary high tides, ie the mean between the spring and neap tides).

7 *Vooght v Winch* (1819) 2 B & Ald 662.

8 See *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1, [2004] 2 Lloyd's Rep 55; and PARA 699.

9 See *R v Montague* (1825) 4 B & C 598; and PARA 699.

10 *Vooght v Winch* (1819) 2 B & Ald 662.



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## 690. Nature and extent of right of navigation.

The public right of navigation in tidal waters<sup>1</sup> is a right given by the common law which extends to the whole space over which the tide flows, and is not suspended when the tide is too low for vessels to float<sup>2</sup>. It is not a right of property<sup>3</sup> but a right to pass and repass<sup>4</sup> and to remain for a reasonable time<sup>5</sup> and, although it is paramount to any right which the Crown<sup>6</sup> or a subject<sup>7</sup> may have in the waters in question, it must be exercised reasonably<sup>8</sup> and in particular the right must not be abused so as to cause injury to a fishery<sup>9</sup>.

Because the right is paramount to the rights of the Crown, every grant by the Crown in relation to tidal waters must be construed as subject to the public right of navigation<sup>10</sup>. The owner of the foreshore must do nothing which interferes with the right of navigation<sup>11</sup>. However, subject to the public right of navigation, the owners of land on the banks of a tidal navigable river have the same rights and easements as do owners above the flow of the tide<sup>12</sup>.

1 As to the public right of navigation see PARA 689. As to the meaning of 'tidal waters' see PARA 71 note 1; and see also PARA 689 note 1. As to navigation on the high seas and maritime law see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 1 et seq. As to the high seas see PARA 31.

2 *A-G v Terry* (1874) 9 Ch App 423. See also *Williams v Wilcox* (1838) 8 Ad & El 314; *Colchester Corpn v Brooke* (1845) 7 QB 339; *The Octavia Stella* (1887) 57 LT 632; *The Swift* [1901] P 168; *Evans v Godber* [1974] 3 All ER 341, [1974] 1 WLR 1317, DC; *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL. The public right of navigation is not a public right of way for the purposes of the National Parks and Access to the Countryside Act 1949 s 20(2) proviso (which provides that byelaws are not to interfere with the exercise of any public right of way: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 672); *Evans v Godber* (above).

3 *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL.

4 The right of passage is for any reasonable purpose including recreation: see PARA 703 note 5. Cf the public right of passage over a highway: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 197.

5 *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713. See also *Anon* (1808) 1 Camp 517n; *Colchester Corpn v Brooke* (1845) 7 QB 339.

6 *Williams v Wilcox* (1838) 8 Ad & El 314; *A-G v Wright* [1897] 2 QB 318, CA; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; and see PARA 689.

7 *North Shore Rly Co v Pion* (1889) 14 App Cas 612, PC. Cf the position in non-tidal waters where, if a public right of navigation exists, it is subject to the rights of adjoining landowners: see PARA 703. As to the rights of landowners see PARA 69 et seq.

8 *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713.

9 *The Octavia Stella* (1887) 57 LT 632; *The Swift* [1901] P 168; *The Bien* [1911] P 40. A vessel may, however, ground in a fishery in the ordinary course of navigation: *Colchester Corpn v Brooke* (1845) 7 QB 339; and see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 792.

10 *A-G v Parmeter* (1811) 10 Price 378 (affd sub nom *Parmeter v Gibbs, Re Portsmouth Harbour* (1813) 10 Price 412, HL); *A-G v Johnson* (1819) 2 Wils Ch 87; *A-G v Burridge, Portsmouth Harbour Case* (1822) 10 Price 350; *Williams v Wilcox* (1838) 8 Ad & El 314; *Colchester Corpn v Brooke* (1845) 7 QB 339; *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192.

11 *A-G v Johnson* (1819) 2 Wils Ch 87; *R v Lord Grosvenor* (1819) 2 Stark 511. The owner can only justify a nuisance on the foreshore if it was created under statutory power or (formerly) after a writ of ad quod damnum for, as the Crown has no right to use its title to the foreshore as a nuisance, or to place upon that soil what will

be a nuisance to the Crown's subjects, so, too, the subject as the Crown's grantee cannot do so, as he takes subject to the restriction on the Crown: *A-G v Johnson* (above). The Crown has a right to abate a nuisance notwithstanding that it is on the land of a subject: *A-G v Parmeter* (1811) 10 Price 378 (affd sub nom *Parmeter v Gibbs, Re Portsmouth Harbour* (1813) 10 Price 412, HL); *A-G v Burrridge, Portsmouth Harbour Case* (1822) 10 Price 350; *A-G v Terry* (1874) 9 Ch App 423; *A-G v Tomline* (1880) 14 ChD 58, CA. As to fisheries in relation to navigation see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 792 et seq.

12 See *Lyon v Fishmongers Co* (1876) 1 App Cas 662, HL; *North Shore Railway Co v Pion* (1889) 14 App Cas 612, PC. As to such rights and easements see PARAS 81 et seq, 691 note 5, 703.

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## 691. Incidental rights.

The public right of navigation<sup>1</sup> includes the rights, in the ordinary course of navigation, to anchor<sup>2</sup>, to remain for a convenient time<sup>3</sup>, to load and unload<sup>4</sup>, to moor and fix temporary moorings in the waterway or on the foreshore<sup>5</sup>, and to ground<sup>6</sup>. Such rights may be exercised without liability for payment of tolls or other acknowledgment to the owner of the soil, except in a port or harbour<sup>7</sup> or where such an owner otherwise has the right to demand some acknowledgment for the use of the soil in return for some benefit conferred<sup>8</sup>. A vessel is also entitled to remain temporarily in one place until the wind or weather permits it to leave or until it has obtained a cargo or completed repairs, but not to remain permanently moored since this would violate the rights of the public to free passage<sup>9</sup>. The rights of all vessels on a navigable river are not co-extensive since while a small boat may be entitled to go up to the furthest point it can reach, so as to give the public the benefit of the public way<sup>10</sup>, the same right does not exist for a large vessel which is not entitled to proceed to a place where large vessels are not accustomed to go and where there is no accommodation for unloading them<sup>11</sup>.

Since the public right of navigation is simply a right of way limited to the waterway it does not, in general, include the right to land persons or goods on the foreshore or banks<sup>12</sup>, unless the person purporting to do so is the owner of the foreshore or banks, or has the owner's permission<sup>13</sup>. Such a right, however, may exist at places which necessity or usage<sup>14</sup> has appropriated to that purpose, or in cases of peril or necessity<sup>15</sup>, or in ports at places where landing is permitted without payment or on payment of the lawful dues<sup>16</sup>.

The public right of navigation similarly does not include the right of towing along the banks of the waterway<sup>17</sup> except where that right exists by custom<sup>18</sup> or statute<sup>19</sup> or by grant from the owner of the bank<sup>20</sup>.

1 As to the public right of navigation see PARA 689. As to the nature and extent of the right see PARA 690. The right has been said to be analogous to the public rights on a highway: see eg *Earl of Iveagh v Martin* [1961] 1 QB 232 at 272, [1960] 2 All ER 668 at 683, per Paull J. As to the public right of passage over a highway: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 197.

2 *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192.

3 See *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668; and PARA 689.

4 *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668; *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL.

5 There is no right in general to lay or maintain permanent moorings in another person's land without his permission (*Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808, [1967] 2 All ER 472; revsd on another point [1968] 2 QB 618, [1968] 1 All ER 979, CA), and it is doubtful whether there is any right to have a permanent mooring where the bed or foreshore is owned by the Crown (*Evans v Godber* [1974] 3 All ER 341, [1974] 1 WLR 1317, DC (Pagham Harbour); *Crown Estate Comrs v Fairlie Yacht Slip Ltd* 1979 SC 156). The right to have a permanent mooring may, however, arise from custom or be given by statute: *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668; *Fowley Marine (Emsworth) Ltd v Gafford* (above). See also *Wyatt v Thompson* (1794) 1 Esp 252 (custom for barges to moor to posts off wharves in the Thames for one tide). As to the ownership of moorings and the origin of the right to have moorings see *A-G v Wright* [1897] 2 QB 318, CA. The public right of navigation does not include the right to moor a hulk from which to supply coal to other vessels: *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171, CA. As to the statutory mooring rights of vessels engaged in the prevention of smuggling see PARA 48. As to the need to obtain planning permission for the establishment of a floating heliport and similar operation see *Thames Heliport plc v Tower Hamlets London Borough Council* (1996) 74 P & CR 164, [1997] JPL 448, CA; and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 222.

6 *Colchester Corpn v Brooke* (1845) 7 QB 339. If damage is caused by negligence, and thus not in the ordinary course of navigation, owners of a vessel will be liable: *The Swift* [1901] P 168. It is not in the ordinary course of navigation to ground on the bank of a dredged channel, and grounding on the soil or bottom of a river is not normally permissible as being in the ordinary course of navigation: *The Carlgarth, The Otarama* [1927] P 93 at 107, CA, per Scrutton LJ, explaining *Colchester Corpn v Brooke* (above).

7 As to a harbour authority's powers to charge fees and to grant harbour licences see eg *Dart Harbour and Navigation Authority v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 1494 (Admin), [2003] 2 Lloyd's Rep 607, [2003] All ER (D) 339 (Jun). The safe and efficient management of a harbour does not require the authority to have control over installations outside the harbour: *Dart Harbour and Navigation Authority v Secretary of State for Transport, Local Government and the Regions* (above). As to harbour charges generally see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 666 et seq.

8 *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192; *Foreman v Free Fishers and Dredgers of Whitstable* (1869) LR 4 HL 266. As to the incidental rights to anchor, moor or remain stationary in the River Thames and the power of the Environment Agency to charge for the use of its own moorings see the Thames Conservancy Act 1932 ss 66, 79(2), 136; and **LONDON GOVERNMENT**.

9 *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171, CA; *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668.

10 See PARA 689.

11 *The Swift* [1901] P 168.

12 *Ball v Herbert* (1789) 3 Term Rep 253, where it was held that the Crown may not grant a liberty to unload on the bank without the consent of the owner unless custom has made the liberty free to all; *Blundell v Catterall* (1821) 5 B & Ald 268; *Brinckman v Matley* [1904] 2 Ch 313, CA; *Behrens v Richards* [1905] 2 Ch 614.

13 *Marshall v Ulleswater Steam Navigation Co* (1863) 3 B & S 732; *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668; *Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808 at 823, [1967] 2 All ER 472 at 480 per Megaw J (revsd on another point [1968] 2 QB 618, [1968] 1 All ER 979, CA). See also PARA 82.

14 *Drinkwater v Porter* (1835) 7 C & P 181, NP; *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668, where it was a custom, confirmed by charter, for a limited class of persons to moor, embark and disembark for limited purposes.

15 Hale's De Portibus Maris c 6 (Hargrave's Law Tracts 72); *Blundell v Catterall* (1821) 5 B & Ald 268. There is a right to pass over adjoining land in the case of a vessel in distress: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 995.

16 Where the Harbours, Docks, and Piers Clauses Act 1847 s 33 applies, any harbour, dock or pier must be open to the public on payment of the rates: see **PORTS AND HARBOURS** vol 36(1) (2007 reissue) PARA 616. As to the procedure for the appointment of ports and the approval of places there for the loading and unloading of goods see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 935. Where, situate on the foreshore of tidal waters which is vested in the lord of a manor of ancient demesne of the Crown, there is a quay from which there is free access to a public road, the public right, as part of the rights of navigation, to use the quay on payment of a reasonable fee extends only to use in the ordinary course of embarking or disembarking or loading or unloading a vessel, or in the course of carrying out repairs to a vessel, if she had arrived in the ordinary course of navigation and if her repairing was necessary and desirable before she could resume her voyage: *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668.

17 *Ball v Herbert* (1789) 3 Term Rep 253.

18 Hale's De Portibus Maris c 6 (Hargrave's Law Tracts 72 et seq); *Ipswich Inhabitants v Browne* (1581) Sav 11 at 14; *Pierse v Lord Fauconberg* (1757) 1 Burr 292 (track on each side of the River Tees for towing); *Winch v Thames Conservators* (1872) LR 7 CP 458 (affd (1874) LR 9 CP 378), where conservators had acquired land formerly used as a towpath and charged tolls for such use, and it was held that they were bound to take reasonable care that it was in a fit condition for that purpose. Perhaps small evidence of usage would establish a right of towing by custom on the ground of public convenience: see *Ball v Herbert* (1789) 3 Term Rep 253 at 262 per Lord Kenyon CJ. See also **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 8.

19 Eg by 23 Hen 8 c 12 (Severn Tolls) (1531) (repealed) it was declared that for time out of mind there had been a towing path on each side of the River Severn, one and a half feet (half a metre) broad, and a penalty of 40 shillings (£2) was imposed for obstructing persons using the path. For instances of rights of towage on the Bristol Avon, Tyne and Trent see Hale's De Portibus Maris c 67 (Hargrave's Law Tracts 72 et seq); and for such an instance on the Thames see the Thames Conservancy Act 1932 s 77.

20 Dedication of a towing path as a highway may be presumed: *Grand Junction Canal Co v Petty* (1888) 21 QBD 273, CA. The soil of a towpath may be vested in a navigation authority or that authority may simply have rights over it: *Badger v South Yorks Rly and River Dun Co* (1858) 1 E & E 359; *Bruce v Willis* (1840) 11 Ad & El 463. Where the soil of a towpath is owned by the adjoining landowners subject to the right of towing, they may use the towpath as they wish, provided that no interference, injury or obstruction is caused: *Thames Conservators v Kent* [1918] 2 KB 272, CA. As to the liability of a navigation authority to maintain a towpath see *Winch v Thames Conservators* (1872) LR 7 CP 458 (affd (1874) LR 9 CP 378). As to whether a navigation authority can dedicate portions of the towpath as a public right of way see *Thames Conservators v Kent* (above). See also **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 117.

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## **692. Obstruction of right of navigation.**

Neither the Crown nor a subject may use the soil of tidal waters in which a public right of navigation exists for any purpose amounting to an obstruction or a nuisance to navigation<sup>1</sup>. Accordingly it is unlawful, except with statutory authority<sup>2</sup>, to place in such waters, or to maintain there, anything which is an obstruction to navigation; and any such action is a public nuisance<sup>3</sup>, in respect of which it is no defence that the obstruction occurs only at certain states of the tide<sup>4</sup>. A public nuisance also arises where materials are stacked so that they fall into a navigable river<sup>5</sup> or when ballast or other materials are cast from a vessel into a navigable waterway to the prejudice of the navigation<sup>6</sup>. To constitute a nuisance, however, there must be some actual obstruction of a navigable river<sup>7</sup> which produces inconvenience for the public in the use of the river for the purpose of the navigation<sup>8</sup>. The question is whether an obstruction occasions any hindrance to the navigation of the river by vessels of any description and not as to the effect on the navigation in general<sup>9</sup>. It is no defence to an obstruction to say that the inconvenience occasioned is counterbalanced by some public benefit<sup>10</sup>. No right to obstruct may be acquired by any length of time, although it would seem that user without complaint for a great many years may be evidence that there is no obstruction in fact<sup>11</sup>. However, the fact that an erection has been authorised by a body purporting to have power to do so is some evidence that it is not an obstruction to the public right of navigation<sup>12</sup> and something which was not a nuisance at the time it was made cannot become so by length of time<sup>13</sup>. On the other hand, a weir built under a grant from the Crown in a river where the public right of navigation extends to the whole width, and which originally obstructed part of the river, will become a nuisance and thus illegal if the rest of the river becomes choked and cannot be used, the right of the Crown to make such a grant being subject to the public right of navigation<sup>14</sup>.

The owner of a wreck sunk in the fairway of a navigable river or which is otherwise a danger to navigation is under a duty to take precautions to prevent other vessels striking it, and to warn them of its position unless and until he abandons it or some authority has undertaken that duty<sup>15</sup>. He is liable for damage to another vessel if the damage could have been prevented by reasonable care and skill on his part<sup>16</sup>. Where a vessel is sunk by misfortune or accident, the owner is not liable for not removing it<sup>17</sup>, but if the sinking is caused by the negligence of the owner of the vessel and thereby obstructs the navigation, the owner is liable for any damage caused by the obstruction and cannot escape such liability by abandoning the wreck<sup>18</sup>. Apart from negligence, the owner may also be personally liable by special Act to the authority empowered to remove the wreck<sup>19</sup> for the expenses of its removal<sup>20</sup>.

1 *A-G v Johnson* (1819) 2 Wils Ch 87; *R v Lord Grosvenor* (1819) 2 Stark 511, where it was held that conservators in whom the soil between high and low-water mark was vested could not authorise the erection there by the lessee of a wharf which caused inconvenience to the public in the use of the river for navigation; *A-G v Terry* (1874) 9 Ch App 423. As to the public right of navigation see PARAS 689-691.

2 Where Parliament has expressly or by necessary implication authorised the carrying out of works, the undertakers will be immune from any claim in nuisance provided they have paid all reasonable regard and care for the interests of public navigation and of any persons liable to suffer particular damage from any interference with the public right of navigation: *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL, following dicta of Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011, [1981] 1 All ER 353 at 356, HL. See also *Priestley v Manchester and Leeds Rly Co* (1840) 4 Y & C Ex 63, where a temporary bridge claimed to be a nuisance to navigation was held to be authorised by statute; *Kearns v Cordwainers' Co* (1859) 6 CBNS 388; *A-G v Thames Conservators* (1862) 1 Hem & M 1 (concerning the powers of what is now the Environment Agency to license obstructions); *Jolliffe v Wallasey Local Board* (1873) LR 9 CP 62; *Lyon v Fishmongers' Co* (1876) 1 App Cas 662, HL, where it was held that a licence by conservators for the

erection of an embankment affecting the public right of navigation would not protect the licensee if it obstructed the right of access of another riparian owner. As to the power of a highway authority to divert navigable watercourses see the Highways Act 1980 s 108; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 879. Railway undertakers whose powers include those contained in the Railways Clauses Consolidation Act 1845 may execute works in navigable tidal rivers as well as non-navigable rivers, but not so as to divert or alter the entire course of the river or obstruct the whole navigation: see *Abraham v Great Northern Ry Co* (1851) 16 QB 586. The Environment Agency, local authorities and internal drainage boards exercising powers under the Land Drainage Act 1991 or the Water Resources Act 1991 may not do any work which, whether directly or indirectly, interferes with the works or property of a navigation, harbour or conservancy authority or with the use of such property so as to injuriously affect it or their undertaking without the consent of that authority: see the Water Resources Act 1991 s 178, Sch 22; the Land Drainage Act 1991 s 67(1), Sch 6; and PARA 576. As to ministerial power to vary navigation rights under local Acts see the Land Drainage Act 1991 s 35; and PARA 594. As to restrictions on works of a coast protection authority under the Coast Protection Act 1949 which may be detrimental to navigation see PARA 533 et seq. See also the Food and Environment Protection Act 1985 s 5 et seq; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 525. For the procedure when an improvement in respect of which an application for a charge under the Improvement of Land Act 1864 has been made will interfere with any navigable river or canal see **AGRICULTURAL LAND** vol 1 (2008) PARA 626.

Subject to the provisions of the Public Health Act 1936 s 333(2)-(4), nothing in that Act authorises a local authority without the consent of the dock undertakers concerned: (1) to interfere with any river, canal, dock, harbour, basin, lock or reservoir so as injuriously to affect navigation thereon or the use thereof or the access thereto, or to interfere with any towing path, so as to interrupt the traffic thereon; (2) to interfere with any bridges crossing any river, canal, dock, harbour or basin; (3) to execute any works in, across or under any dock, harbour, basin, wharf, quay or lock, or any land which belongs to dock undertakers and is held or used by them for the purposes of their undertaking; (4) to execute any works which will interfere with the improvement of, or the access to, any river, canal, dock, harbour, basin, lock, reservoir, or towing path, or with any works appurtenant thereto or any land necessary for the enjoyment or improvement thereof; or without the consent of the railway company concerned, to execute any works along, across or under any railway of a railway company; provided that such consent must not be unreasonably withheld, and if any question arises as to whether or not consent is unreasonably withheld, either party may require that it must be referred to an arbitrator to be appointed, in default of agreement, by the President of the Institution of Civil Engineers: s 333(1). Upon such an arbitration, the arbitrator must determine: (a) whether any works which the local authority proposes to execute are such works as under s 333(1) it is not entitled to execute without the consent of the statutory undertakers; and (b) if they are such works, whether the injury, if any, to the undertakers will be of such a nature as to admit of being fully compensated by money; and (c) if the works are of such a nature, the conditions subject to which the local authority may execute the works, including the amount of the compensation, if any, to be paid by the authority to the undertakers; and if the arbitrator should determine that the proposed works are such works as the local authority is not entitled to execute without the consent of the undertakers and that the works would cause injury to the undertakers of such a nature as not to admit of being fully compensated by money, the local authority may not proceed to execute the works, but in any other case may execute the works subject to compliance with such conditions, including the payment of such compensation, as the arbitrator may have determined: s 333(2). For these purposes, dock undertakers are to be deemed to be concerned with any river, canal, dock, harbour, basin, lock, reservoir, towing path, wharf, quay or land if it belongs to them and forms part of their undertaking, or if they have statutory rights of navigating on or using it, or of demanding tolls or dues in respect of navigation thereon or the use thereof: s 333(3). Nothing in s 333 is to be construed as limiting the powers of a local authority under any of the foregoing provisions of that Act in respect of the opening and the breaking up of streets and bridges for the purpose of constructing, laying and maintaining sewers, drains and pipes: s 333(4). As to the meaning of 'local authority' see PARA 51 note 1.

3 'Nuisance' is here used to include both an invasion of the *jus privatum* of the Crown, ie a purpresture (being a house erected, or an enclosure made, upon any part of the Crown's demesnes, or of a highway or common street, or public water, or such public things) and a violation of the *jus publicum*, ie a public nuisance. As to the meaning of 'public nuisance' see **NUISANCE** vol 78 (2010) PARA 105; and as to nuisances in respect of waterways see **NUISANCE** vol 78 (2010) PARA 141.

4 *A-G v Terry* (1874) 9 Ch App 423.

5 *R v Stephens* (1866) LR 1 QB 702.

6 *Michell v Brown* (1858) 23 JP 548; *United Alkali Co Ltd v Simpson* [1894] 2 QB 116, DC.

7 *R v Betts* (1850) 16 QB 1022.

8 *R v Shepard* (1822) 1 LJOS 45.

9 *R v Randall* (1842) Car & M 496.

10 *R v Ward* (1836) 4 Ad & El 384.

11 *Vooght v Winch* (1819) 2 B & Ald 662; *Booth v Ratté* (1890) 15 App Cas 188, PC.

12 *A-G v Johnson* (1819) 2 Wils Ch 87. See also *A-G v Parmeter* (1811) 10 Price 378 (affd sub nom *Parmeter v Gibbs, Re Portsmouth Harbour* (1813) 10 Price 412, HL); *R v Lord Grosvenor* (1819) 2 Stark 511; *A-G v Burridge, Portsmouth Harbour Case* (1822) 10 Price 350.

13 *R v Bell* (1822) 1 LJOS 42; *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock UDC* [1968] Ch 605, [1968] 2 All ER 59, CA.

14 *Williams v Wilcox* (1838) 8 Ad & El 314, where it was held that since it could be inferred from the evidence that the weir in question had existed before the commencement of the reign of Edward I it was legalised by 25 Edw 3 stat 2 (1350-1) (repealed), and that therefore its removal was a trespass. See further **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 793. The requirement of 25 Edw I (Magna Carta) (1297) c 23, that all fish weirs (kidelli) should be completely removed from the Thames and the Medway and throughout all England, except those along the sea coast, was not entirely effective, and in the Hundred Rolls of Edward I there are numerous presentations concerning weirs which obstruct navigation. By subsequent statutes, bodies of commissioners were appointed to survey navigable rivers and restrict weirs: see Moore *History and Law of Fisheries* (1903) pp 24, 171 et seq. As to the effect of the construction of a lock on a navigable river otherwise than under statutory powers see *R v Clark* (1702) 12 Mod Rep 615.

15 See eg *Harmond v Pearson* (1808) 1 Camp 515, where it was held that to station a watchman near the spot to point out the danger is insufficient.

16 *The Douglas* (1882) 46 LT 488; *The Snark* [1900] P 105, CA.

17 *R v Watts* (1798) 2 Esp 675.

18 *Dee Conservancy Board v McConnell* [1928] 2 KB 159, CA. The damages recoverable are the reasonable costs of removing the wreck: *The Harrington* (1888) 13 PD 48.

19 As to such authorities see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 884 et seq. Such powers have been granted eg under the predecessor provisions of the Merchant Shipping Act 1995 ss 252, 253.

20 See **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 691; **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1008 et seq. As to the removal of unsafe craft and objects from inland waterways under the control of the British Waterways Board see PARAS 793-794.



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### **693. Protection of right of navigation.**

The remedies for the protection of the public right of navigation are: (1) abatement<sup>1</sup>; (2) civil proceedings, which may take the form of a claim for damages by a private individual<sup>2</sup>, proceedings by the Attorney General on behalf of the Crown in respect of its prerogative right of conserving navigation<sup>3</sup>, a relator action in the name of the Attorney General<sup>4</sup> or proceedings by a local authority for the protection of the interests of the inhabitants of its area<sup>5</sup>; or (3) criminal proceedings<sup>6</sup>.

Before authorisation of the construction of a bridge over, or a tunnel under, any navigable waters, the reasonable requirements of navigation over the waters must be taken into consideration<sup>7</sup>.

1 As to abatement see PARA 694. As to the public right of navigation see PARAS 689-691. As to obstruction of the right see PARA 692.

2 As to proceedings by individuals see PARA 695.

3 See eg *A-G v Richards* (1795) 2 Anst 603. As to the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529.

4 As to relator actions see **CIVIL PROCEDURE** vol 11 (2009) PARAS 236-237.

5 As to such proceedings see the Local Government Act 1972 s 222(1); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 573.

6 For examples of obstructions which have been the subject of criminal proceedings see PARA 697.

7 See the Highways Act 1980 ss 106(8), 107(1), (4); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 878. Provision is made by the Channel Tunnel Act 1987 s 45, Sch 7 Pt III for the protection of navigation in relation to authorised tidal works for the construction of the tunnel on the surface of lands below the level of mean high water springs.

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#### **694. Abatement of obstructions.**

Where a private person sustains special damage by reason of an obstruction to the public right of navigation<sup>1</sup>, he may abate it without recourse to legal proceedings<sup>2</sup>, but only in so far as is necessary to enable him to exercise his right; and he is not justified in doing so if he is not injured otherwise than as a member of the public<sup>3</sup>.

1 As to the public right of navigation see PARAS 689-691. As to obstruction of the right see PARA 692. As to special damage see **DAMAGES** vol 12(1) (Reissue) PARA 812.

2 See *Williams v Wilcox* (1838) 8 Ad & El 314; *Colchester Corp v Brooke* (1845) 7 QB 339; *Dimes v Petley* (1850) 15 QB 276; and **NUISANCE** vol 78 (2010) PARA 181. As to legal proceedings by private individuals see PARA 695.

3 *Colchester Corp v Brooke* (1845) 7 QB 339.

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### 695. Proceedings by private individuals.

Instead of his remedy by abatement<sup>1</sup>, the person who sustains special damage<sup>2</sup> by reason of an obstruction to the public right of navigation may bring a claim for nuisance in respect of the obstruction<sup>3</sup>. Examples of obstructions which have given rise to claims of this nature are complete obstruction of a channel by another vessel necessitating transport of cargo over land<sup>4</sup>; a structure of piles and planks on the foreshore presenting a dangerous and hidden obstruction<sup>5</sup>; an inadequately buoyed anchor to a floating landing stage<sup>6</sup>; a pile negligently placed on the foreshore<sup>7</sup>; a bridge causing obstruction to navigation<sup>8</sup>; a swing bridge operated so as to cause unnecessary delay<sup>9</sup>; piers of a bridge<sup>10</sup>; and siltation of the river bed and foreshore resulting from the construction of ferry terminals<sup>11</sup>.

1 As to abatement see PARA 694.

2 In *Lynn Corp'n v Turner* (1774) 1 Cowp 86 it was held that where a corporation had from time immemorial cleansed and repaired a tidal creek, an action lay against it for failure to do so, even though special damage was not proved. As to special damage see **DAMAGES** vol 12(1) (Reissue) PARA 812.

3 See eg *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL. See also **NUISANCE** vol 78 (2010) PARAS 180, 195 et seq. As to the public right of navigation see PARAS 689-691. As to obstruction of the right see PARA 692. As to determining whether an obstruction is a nuisance see PARA 698.

4 *Rose v Miles* (1815) 4 M & S 101.

5 *White v Phillips* (1863) 15 CBNS 245.

6 *Jolliffe v Wallasey Local Board* (1873) LR 9 CP 62. Anchors in shallow waters should be buoyed: *The Harkaway* [1928] P 199. Mooring chains lying under water are not necessarily a nuisance: *The Carlgarth, The Otarama* [1927] P 93, CA.

7 *Brownlow v Metropolitan Board of Works* (1863) 13 CBNS 768; affd (1864) 16 CBNS 546.

8 *North Staffordshire Rly Co v Hanley Corp'n* (1909) 73 JP 477. See also *Priestley v Manchester and Leeds Rly Co* (1840) 4 Y & C Ex 63, where a temporary bridge, although an obstruction to navigation, was held to be authorised by statute; and *York Bros (Trading) Pty Ltd v Main Roads Comr* [1983] 1 NSWLR 391, where it was held that a bridge, if constructed as designed, would constitute a substantial and material obstruction of the plaintiff's right of navigation and also a public nuisance, and an injunction was granted.

9 *Wiggins v Boddington* (1828) 3 C & P 544.

10 *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL, where the works complained of were held not to be an obstruction. In *Liverpool and North Wales Steamship Co Ltd v Mersey Trading Co Ltd* [1908] 2 Ch 460 (affd on other grounds [1909] 1 Ch 209, CA), an injunction to restrain the owners and lessees of a pier from excluding the plaintiffs' ships and passengers from using the pier was refused because it was a public nuisance. In *Duke of Newcastle v Clark* (1818) 2 Moore CP 665, it was held that commissioners of sewers had no remedy against harbour commissioners for the removal by the harbour commissioners of drainage works which were an obstruction to navigation. An oyster bed placed in the bed of a public navigable river may constitute a nuisance: *Colchester Corp'n v Brooke* (1845) 7 QB 339.

11 *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL, where the defendant council was not liable for siltation that was inevitable, but was liable in respect of additional siltation resulting from the particular design chosen for the terminals.

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#### **696. Proceedings by the Attorney General.**

Obstructions to the public right of navigation<sup>1</sup> alleged to be nuisances<sup>2</sup> which have been the subject of proceedings by the Attorney General<sup>3</sup> include buildings, erections and enclosures between high and low-water marks in a harbour<sup>4</sup>; a jetty or piles in the bed of a river<sup>5</sup>; moorings in the foreshore<sup>6</sup>; and an excavation undermining the bank of a public navigable river and bricks placed on the river bed<sup>7</sup>.

1 As to the public right of navigation see PARAS 689-691. As to obstruction of the right see PARA 692.

2 Nuisance or preposterous: see PARA 692 note 3. As to determining whether an obstruction is a nuisance see PARA 698.

3 As to the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529.

4 *A-G v Richards* (1795) 2 Anst 603; *A-G v Parmeter* (1811) 10 Price 378 (affd sub nom *Parmeter v Gibbs, Re Portsmouth Harbour* (1813) 10 Price 412, HL); *A-G v Burridge, Portsmouth Harbour Case* (1822) 10 Price 350 (information).

5 *A-G v Terry* (1874) 9 Ch App 423 (relator action).

6 *A-G v Wright* [1897] 2 QB 318, CA (relator action), where the right to fix moorings was upheld.

7 *A-G v Johnson* (1819) 2 Wils Ch 87.

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### **697. Criminal proceedings.**

The obstruction of the freedom of passage in a port or in a public navigable river is prima facie a nuisance and as such is properly the subject of criminal proceedings<sup>1</sup>. Examples of obstructions in tidal waters and navigable rivers which have been the subject of criminal proceedings are locks<sup>2</sup>, staithes for loading ships with coal<sup>3</sup>, wharves erected between high and low-water mark<sup>4</sup>, a pier<sup>5</sup>, refuse allowed to fall into and obstruct a navigable river<sup>6</sup>, and piles and planking in a harbour<sup>7</sup>.

An encroachment on the banks is not, however, necessarily a nuisance<sup>8</sup>. Neither is a bridge which is partly in the bed of a navigable river<sup>9</sup>. Furthermore, criminal proceedings do not lie against the owner of a vessel which has sunk in a navigable river owing to accident or misfortune<sup>10</sup>.

1 As to criminal proceedings in respect of a public nuisance see **NUISANCE** vol 78 (2010) PARA 174. As to the public right of navigation see PARAS 689-691. As to obstruction of the right see PARA 692. As to determining whether an obstruction is a nuisance see PARA 698.

2 *R v Clark* (1702) 12 Mod Rep 615.

3 *R v Russell* (1827) 6 B & C 566.

4 *R v Lord Grosvenor* (1819) 2 Stark 511; *R v Randall* (1842) Car & M 496.

5 *R v Ward* (1836) 4 Ad & El 384, where a verdict was entered for the Crown notwithstanding that the inconvenience occasioned was more than counterbalanced by the advantages of the pier to the public.

6 *R v Stephens* (1866) LR 1 QB 702.

7 *R v Tindall* (1837) 6 Ad & El 143.

8 *R v Shepard* (1822) 1 LJOS 45.

9 *R v Betts* (1850) 16 QB 1022. Cf *Priestley v Manchester and Leeds Rly Co* (1840) 4 Y & C Ex 63; *North Staffordshire Rly Co v Hanley Corpn* (1909) 73 JP 477, CA; and see PARA 695 note 8.

10 *R v Watts* (1798) 2 Esp 675. Similarly, an owner will not be liable to a claim at the suit of a party sustaining special damage if the owner has not retained possession and control of the vessel: *Brown v Mallett* (1848) 5 CB 599; and see PARA 692.

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### **698. Determining whether an obstruction is a nuisance.**

Whether an obstruction of the public right of navigation is a nuisance or not is a question of fact<sup>1</sup>. The general question to be decided is whether it is a hindrance to navigation by vessels of any description rather than whether it is of benefit to the public in general<sup>2</sup>. It will not, therefore, be a defence that the inconvenience occasioned is counterbalanced by some benefit conferred<sup>3</sup>, particularly where the channel is narrow and every part is required for navigation<sup>4</sup>. However, the court will not interfere if the obstruction is of a trifling nature<sup>5</sup>, or if it merely renders a harbour less secure under extreme circumstances<sup>6</sup>. Where an obstruction has existed from time immemorial the court will not presume that it was a nuisance to navigation at the time when it was placed in the river<sup>7</sup>.

1 *R v Russell* (1827) 6 B & C 566; *R v Randall* (1842) Car & M 496; *R v Shepard* (1822) 1 LJOS 45. As to the public right of navigation see PARAS 689-691. As to obstruction of the right see PARA 692.

2 *R v Randall* (1842) Car & M 496.

3 *R v Ward* (1836) 4 Ad & El 384; *R v Tindall* (1837) 6 Ad & El 143; *A-G v Terry* (1874) 9 Ch App 423, disapproving the decision in *R v Russell* (1827) 6 B & C 566 that a direction to a jury to acquit if it thought that the obstruction was for a public purpose and produced a public benefit was correct.

4 *A-G v Terry* (1874) 9 Ch App 423 (extension of wharf so as to occupy a further one metre of a total width of just under 20 metres).

5 *Hale's De Portibus Maris* c 7 (Hargrave's Law Tracts 83); *R v Shepard* (1822) 1 LJOS 45; *R v Betts* (1850) 16 QB 1022.

6 *R v Tindall* (1837) 6 Ad & El 143; *R v Russell* (1854) 3 E & B 942.

7 *R v Bell* (1822) 1 LJOS 42 (heaps of stones for landing nets). Cf, however, *Williams v Wilcox* (1838) 8 Ad & El 314; and PARA 692 note 14.

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### **699. Extinguishment of public right of navigation.**

The public right of navigation<sup>1</sup> can be extinguished: (1) by Act of Parliament; (2) in certain circumstances, by an order under the Transport Act 1968<sup>2</sup> or the Transport and Works Act 1992<sup>3</sup> or by an order on the application of the Environment Agency or an internal drainage board under the Land Drainage Act 1991<sup>4</sup>; or (3) by natural causes, such as the recession of the sea or an accumulation of mud rendering navigation impossible<sup>5</sup>. If a river is obstructed, for example with mud, this does not however give the public the right to cut another passage through adjoining lands<sup>6</sup>. When a navigable river has been obstructed for a long time and there is nothing to show how the obstruction came to be there, it may be presumed that the public right of navigation has ceased for one or other of the above reasons, and the obstruction may not be removed<sup>7</sup>. If, however, the obstruction is lawfully removed, the right of navigation revives<sup>8</sup>; and the right is not lost if the river changes its course, since it will be exercisable over the new channel<sup>9</sup> or, provided the right of navigation extends to the whole river, if the main channel becomes choked so that the only navigable part is a side channel<sup>10</sup>.

The public right of navigation is not lost by mere disuse<sup>11</sup>.

1 As to the public right of navigation see PARA 689.

2 Ie under the Transport Act 1968 s 112: see PARA 828.

3 See the Transport and Works Act 1992 ss 1, 3, 5, Sch 1; and PARA 802.

4 Ie under the Land Drainage Act 1991 s 35: see PARA 594. As to ministerial powers to repeal, amend or adapt local enactments by order under the Water Resources Act 1991 see PARA 14.

5 *R v Montague* (1825) 4 B & C 598. Cf *Fitz Nat Brev* 225; *Isle of Ely Case* (1609) 10 Co Rep 141a.

6 *Ball v Herbert* (1789) 3 Term Rep 253.

7 *R v Montague* (1825) 4 B & C 598 at 604-605 per Holroyd J.

8 *Vooght v Winch* (1819) 2 B & Ald 662.

9 *Carlisle Corpn v Graham* (1869) LR 4 Exch 361.

10 See *Williams v Wilcox* (1838) 8 Ad & El 314; and PARAS 692, 705 note 4.

11 See *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1, [2004] 3 WLR 249.

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### **700. Jurisdiction over tidal navigable rivers.**

When they are between headlands<sup>1</sup> tidal navigable rivers form part of the adjoining county for both civil and criminal purposes; and as regards offences committed on ships in tidal waters in the United Kingdom, the Crown Court has jurisdiction to try accused persons<sup>2</sup>. For local government purposes the seashore between high and low-water mark, which was not within any parish, is annexed to and incorporated with the adjoining parish or parishes or, in Wales, with the adjoining community or communities<sup>3</sup>.

1    le inter fauces terrae; literally, between the jaws of the land.

2    See PARA 36.

3    See PARA 37. As to local government boundaries on rivers see PARA 76.



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### **(3) RIGHTS OF NAVIGATION IN NON-TIDAL WATERS**

#### **701. General absence of public right of navigation.**

The public right of navigation that exists on tidal waters<sup>1</sup> does not apply to non-tidal waters and in consequence, there is no general common law right of public navigation either in non-tidal rivers<sup>2</sup> or on inland lakes<sup>3</sup>. The soil there is not vested in the Crown but prima facie, in the case of non-tidal rivers, is vested in the riparian owners<sup>4</sup>, and in the case of inland lakes in the adjoining proprietors<sup>5</sup>. Furthermore it cannot be implied from the mere fact that a person, at his own expense, has made his private stream navigable by making locks or cuts or drawing together other streams, that the public has any rights of navigation over it, for he may destroy it or apply it to his own private use<sup>6</sup>.

1 As to this right see PARA 689. As to the meaning of 'tidal waters' see PARA 71 note 1; and see also PARA 689 note 1.

2 Woolrych on Waters c 3; *Murphy v Ryan* (1868) IR 2 CL 143; *Hargreaves v Diddams* (1875) LR 10 QB 582. The part of a river which is affected by the tide in unusual circumstances only is not 'tidal': *Reece v Miller* (1882) 8 QBD 626, DC; but see PARA 689 note 1.

3 In *Bourke v Davis* (1889) 44 ChD 110, the question was raised, but left undecided, as to whether a lake which was touched by a public road could become subject to a public right of navigation.

4 As to the ownership of the soil of non-tidal rivers see PARA 74 et seq. As to riparian owners see PARA 81; and as to the ownership of tidal rivers by the Crown see PARA 689.

5 As to the ownership of the soil of inland lakes see PARA 80.

6 Hale's De Jure Maris c 3 (Hargrave's Law Tracts 8). See also *Simpson v A-G* [1904] AC 476, HL.

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## 702. Establishment of public right of navigation.

Despite the general rule<sup>1</sup>, a public right of navigation may exist in the case of certain non-tidal rivers<sup>2</sup> and inland lakes<sup>3</sup>, and the existence of the right is established by evidence similar to that which is required to establish a public right of way over land<sup>4</sup>. Therefore it can arise only (1) by immemorial usage<sup>5</sup>; (2) by Act of Parliament<sup>6</sup> or by order made under the authority of an Act of Parliament; or (3) by express grant or dedication by the owner of the soil of the river<sup>7</sup>. Furthermore, it would seem that if a river or channel is made navigable at public expense or by a public authority, or has been freely devoted to the public use for a long time, or has been made to replace a channel over which there was a public right of navigation but which has been stopped for the owner's convenience, then the navigation is public<sup>8</sup>. If, however, under authority of the Crown, a subject provides a navigable channel through his land, including locks the repair of which is subsequently authorised by statute, and tolls are charged for passage through them, a subsequent owner is under no duty to repair the locks and, in the absence of evidence that they had been dedicated to the public, there is no public right of navigation through them<sup>9</sup>.

1 As to the general rule see PARA 701.

2 See eg **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 792.

3 Eg there is a public right of navigation on Ullswater (*Marshall v Ulleswater Steam Navigation Co Ltd* (1863) 3 B & S 732), Lough Neagh, Northern Ireland (*Johnston v O'Neill* [1911] AC 552, HL), a part, known as 'the channel', of Hickling Broad, Norfolk, and, elsewhere on that water (*Micklethwait v Vincent* (1892) 67 LT 225) ('It is not necessary for me to decide how far the right extends beyond the channel': *Micklethwait v Vincent* (above) at 230 per Romer J). As to the question of whether an enclosed sheet of water is water which can be used by vessels and ships for navigation within the purposes of what is now the Merchant Shipping Act 1995 see *Curtis v Wild* [1991] 4 All ER 172.

4 Woolrych on Waters c 3. As to the creation of highways generally see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 107 et seq. It seems, however, that the analogy between a public right of navigation and a public right of way on land is not complete, and that it is not necessary that a public right of navigation should be between two public termini: *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* 1976 SLT 162 at 191-192, HL, per Lord Wilberforce, and at 215 per Lord Fraser of Tullybelton. In the Highways Act 1980 s 31, 'land' includes land covered with water: s 31(11). Cf the definition of 'highway' in s 328(1): see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 7. However, no right of navigation exists or can be created on a non-tidal river simply under the provisions of the Highways Act 1980 s 31: *A-G (ex rel Yorkshire Derwent Trust Ltd) v Brotherton* [1992] 1 AC 425, [1992] 1 All ER 230, HL.

5 *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL; *Bourke v Davis* (1889) 44 ChD 110 (insufficient user to establish public right); *Rawson v Peters* (1972) 225 Estates Gazette 89, CA; and see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 601 et seq. It has been inferred from the sweeping requirement of 25 Edw I (Magna Carta) (1297) c 23, that all fish weirs (kidelli) should be completely removed from the Thames and Medway and throughout all England except those along the sea coast, that certain rivers were common highways or public streams from time immemorial.

6 *R v Betts* (1850) 16 QB 1022 (a new cut for the river Witham the obstruction of which would be an indictable offence; however, the act complained of was found not to be an obstruction). Numerous statutes have been passed concerning public rights of navigation on particular rivers. An exhaustive classification of these statutes is impracticable, but very generally speaking they may be divided into: (1) statutes containing recitals of immemorial rights and prescribing penalties for interference with those rights; (2) statutes authorising works for the improvement of rivers subject to immemorial rights and authorising the charging of tolls; (3) statutes authorising works for the improvement of rivers not subject to immemorial rights and authorising the charging of tolls together with an express declaration of public rights of navigation; and (4) statutes authorising works for the improvement of rivers not subject to immemorial rights and authorising the

charging of tolls from which public rights of navigation may be inferred (it seems that upon completion of the works the undertakers came under an obligation to apply future profits for the benefit of the public). However, any local enactment passed with respect to an inland waterway which on 18 November 1968 was or subsequently becomes comprised in the undertaking of the British Waterways Board ceased to have effect so far as it conferred any public or private right of navigation over the waterway or imposed any duty to maintain the waterway for navigation purposes: see the Transport Act 1968 ss 105(5)(a), (b), (6), 166(2); Transport Act 1968 (Commencement No 1) Order 1968, SI 1968/1822; and PARA 741. In the case of a canal not comprised in the board's undertaking, the Secretary of State may by order direct that any such local enactment is to cease to have effect so far as it confers any such right of navigation or imposes any such duty to maintain: see the Transport Act 1968 s 112(1)(a), (b); and PARA 828. References in ss 105, 112, to any right of navigation over a waterway or canal include references to any right to use or keep any vessel or craft on the waterway or canal: s 115(1)(a). Nothing in s 105 or in any order under s 112 is to be construed as abrogating any navigation rights which subsist otherwise than by virtue of any such local enactment, and references to rights conferred by an enactment do not include references to rights already existing and merely confirmed by the enactment: s 115(2). As to rules of navigation generally, including local rules, see **SHIPPING AND MARITIME LAW**; and as to fisheries in relation to navigation see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 792 et seq. As to the powers of the Secretary of State to make further orders in respect of inland waterways see the Transport and Works Act 1992 s 3 et seq; and PARA 801 et seq.

7 As to the creation of public rights of way by dedication and acceptance see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 582. As to the ownership of the soil of non-tidal rivers see PARA 74 et seq.

8 Hale's *De Jure Maris* c 3 (Hargrave's Law Tracts 9-10), which continues: 'If he purchaseth the King's charter to take a reasonable toll for the passage of the King's subjects and puts it in use these seem to be devoting, and as it were, consecrating of it to the common use . . . For no man can take a settled or constant toll even in his own private land for a common passage without the King's licence'. As to tolls see further **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 210. As to the powers of the Environment Agency and internal drainage boards to levy navigation tolls see PARA 710.

9 *Simpson v A-G* [1904] AC 476, HL. As to canals and other artificial waterways see PARA 713 et seq.

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### 703. Nature and extent of right of navigation.

When acquired by the public, the right of navigation in non-tidal waters is similar in character to the public right of navigation in tidal waters<sup>1</sup> although the former is confined to the extent of the user or grant acquired<sup>2</sup>. It is simply a right of way similar to a right of way on land<sup>3</sup> to be used in a reasonable manner<sup>4</sup> and for reasonable purposes<sup>5</sup>, and it may extend over the whole width of the waterway or be restricted to a particular part of it<sup>6</sup>. Except as provided by the Act of Parliament or deed of grant by which the right may be conferred, it is subservient to the rights of the landowners<sup>7</sup> and their assignees<sup>8</sup>, and it carries with it no right to the soil<sup>9</sup> or any right of fishing or fowling or of recreation over the soil<sup>10</sup>.

If a waterway over which a public right of navigation is exercisable changes its course, the right is exercisable over the new channel<sup>11</sup>.

1 As to the public rights of navigation in tidal waters see PARA 689 et seq.

2 *Williams v Wilcox* (1838) 8 Ad & El 314.

3 *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL. However, if a river becomes choked, the public has no right to make another passage through adjoining land: *Ball v Herbert* (1789) 3 Term Rep 253 at 263 per Buller J; and see *A-G (ex rel Yorkshire Derwent Trust Ltd) v Brotherton* [1992] 1 AC 425, [1992] 1 All ER 230, HL. As to the public right of passage over a highway see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 197.

4 *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713, where it was held that one user of the navigation, even though a riparian owner, must not moor his vessel so as to interfere with the entrance to a dock by other vessels.

5 The public right of navigation is not limited to commercial use; it includes navigation for recreational purposes such as canoeing: *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* 1976 SLT 162 at 191, HL, per Lord Wilberforce, at 203 per Lord Hailsham of St Marylebone, at 207 per Lord Salmon and at 214 per Lord Fraser of Tullybelton (decided under Scottish law, which probably does not differ from English law on this point). Nevertheless, the public right of navigation does not extend to every kind of user which physical prowess or exorbitant technology makes possible: *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* (above) at 191 per Lord Wilberforce and at 216 per Lord Fraser of Tullybelton. Subject to statutory restrictions, the public may navigate the River Thames for either pleasure or profit: see **LONDON GOVERNMENT**. For a decision, however, that navigation within the meaning of what is now the Merchant Shipping Act 1995 connoted planned or ordered movement from one place to another, and not recreational use, see *Steedman v Scofield* [1992] 2 Lloyd's Rep 163.

6 *Williams v Wilcox* (1838) 8 Ad & El 314, where it was held that the navigable channel in the River Severn extends from bank to bank; *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL, where it was held that public navigation in the River Leven was restricted to part only; *Micklethwait v Vincent* (1892) 67 LT 225, where it was not established that the public right of navigation in Hickling Broad was restricted to part only of the broad.

7 *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713, where it was held that a user of a public navigation, even though a riparian owner, must not moor his vessel so as to interfere with access to a neighbour's wharfs. Cf the position of the public right of navigation in tidal waters, which is paramount to any rights of the Crown or of a subject in the soil: see PARA 689. As to the rights of landowners see PARA 81 et seq.

8 *Rawson v Peters* (1972) 225 Estates Gazette 89, CA, where it was held on the facts that a canoeist had no right without permission to navigate on a part of the River Wharfe in which fishing rights had been sold to an angling club, even though nobody was fishing at the time, and where Lord Denning MR added (although he was not reported on this point) that there are many cases in which a canoeist has a right to navigate; the right may be acquired by long user or by grant or reservation, and if the canoeist has the right the owners of the fishing rights must allow the navigation and put up with the disturbance of the fishing.

9     *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL.

10     *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL; *Bourke v Davis* (1889) 44 ChD 110; *Smith v Andrews* [1891] 2 Ch 678; *Blount v Layard* (1888) reported [1891] 2 Ch 681n, CA; *Micklethwait v Vincent* (1892) 67 LT 225.

11     *Carlisle Corpn v Graham* (1869) LR 4 Exch 361; *Foster v Wright* (1878) 4 CPD 438; *Thakurain Ritraj Koer v Thakurain Sarfaraz Koer* (1905) 21 TLR 637, PC.

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#### **704. Incidental rights.**

Except as may be provided by the statute or deed of grant conferring the right, the public right of navigation in a non-tidal waterway<sup>1</sup> does not include the rights to moor a vessel to, or land on, the banks of the waterway, since the banks belong prima facie to the adjoining landowners. Such rights are therefore not exercisable unless the person purporting to do so is the owner of the bank or has the owner's permission<sup>2</sup>, but, as in the case of tidal waters<sup>3</sup>, such a right may exist at places which necessity or usage has appropriated to that purpose or in cases of peril or necessity<sup>4</sup>. The public right of navigation does not include the right of towing along the banks<sup>5</sup>, but, as in the case of tidal waters<sup>6</sup>, such a right may arise by custom or be created by statute or grant<sup>7</sup>.

There is probably no right of anchoring or of placing fixed moorings, except in cases of necessity or at such places where such a right has arisen by custom<sup>8</sup>, and in Scottish Law it has been held that the public as a whole could not acquire by prescription the right to embark and disembark on private ground<sup>9</sup>.

The owners of land on the banks of a non-tidal navigable river have, however, a number of rights and easements which they may enjoy<sup>10</sup>. Such an owner may moor vessels of ordinary size alongside a wharf on his land for the purpose of loading or unloading at reasonable times and for a reasonable duration and the owner of adjoining premises will be restrained by injunction from interfering with the vessel, even though it may overlap on to his frontage<sup>11</sup>. Such a vessel may not, however, interfere with the proper access to the neighbouring premises if used as a wharf or dock<sup>12</sup>. The owner of the bank may also moor a floating wharf alongside his premises, providing that in so doing he does not obstruct the navigation<sup>13</sup>. The erection of such works as jetties and piles on the bed of a navigable river is generally permissible unless the works actually interfere with the navigation<sup>14</sup>, but the owner of a structure on the bank or foreshore of a navigable river which presents a dangerous hidden obstruction to the river is responsible for any damage occasioned due to it without default on the part of the person sustaining the damage and must either keep the structure in repair or give adequate notice of its presence<sup>15</sup>. Equally, a wharf must be kept in a fit and proper condition to receive a vessel<sup>16</sup>.

1 As to this right see PARAS 701-703.

2 *Marshall v Ulleswater Steam Navigation Co* (1863) 3 B & S 732; *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713. As to the ownership of the soil of non-tidal rivers see PARA 74 et seq.

3 As to the meaning of 'tidal waters' see PARA 71 note 1; and see also PARA 689 note 1.

4 See PARA 691.

5 *Ball v Herbert* (1789) 3 Term Rep 253.

6 See PARA 691.

7 Towing paths along non-tidal navigable rivers have been created by various local Acts. In *Simpson v Scales* (1801) 2 Bos & P 496, it was held that an ancient towing path which was not set out as a public or private road by commissioners acting under an Inclosure Act did not form part of the inclosed land.

8 *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL. Where the right of navigation owes its origin to dedication there is no right to delay longer than is reasonably necessary. See also PARA 691 note 5.

9 *Leith-Buchanan v Hogg* 1931 SC 204.

10 The owners of land on the banks of a tidal navigable river have generally speaking the same rights and easements but subject to the Crown's presumed ownership of the bed of tidal rivers and to the public right of navigation: *Lyon v Fishmongers' Co* (1876) 1 App Cas 662, HL; *North Shore Railway Co v Pion* (1889) 14 App Cas 612, PC. See also PARA 690. As to such rights and easements see also PARA 81 et seq. As to Crown ownership of tidal rivers, and as to the public right of navigation on tidal rivers, see PARA 689.

11 *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713; *A-G v Thames Conservators* (1862) 1 Hem & M 1; *Dalton v Denton* (1857) 1 CBNS 672; *Temple Pier Co Ltd v Metropolitan Board of Works* (1865) 34 LJ Ch 262.

12 *Original Hartlepool Collieries Co v Gibb* (1877) 5 ChD 713; *Land Securities Co Ltd v Commercial Gas Co* (1902) 18 TLR 405.

13 *Booth v Ratté* (1890) 15 App Cas 188, PC.

14 *A-G v Terry* (1874) 9 Ch App 423.

15 *White v Phillips* (1863) 15 CBNS 245; *Curling v Wood* (1847) 16 M & W 628; *The Grit* (1924) 132 LT 638.

16 *The Ville de St Nazaire* (1903) 51 WR 590.

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### **705. Obstruction, protection and extinguishment of right of navigation.**

Once the right of navigation exists over a particular waterway<sup>1</sup>, except with statutory authority no one may place anything there which is a nuisance to the navigation<sup>2</sup>. However, obstructions which existed when the right of navigation originated may not be removed, for the right to navigate must have been acquired subject to the continuance of those obstructions<sup>3</sup>.

Obstructions placed in a non-tidal waterway subsequent to the coming into existence of a public right of navigation there are remedied in the same way as obstructions to the public right of navigation in tidal waters<sup>4</sup>.

The public right of navigation in a non-tidal waterway may be extinguished in the same ways as the public right of navigation in tidal waters may be extinguished<sup>5</sup>. It is not lost by mere disuse<sup>6</sup>.

1 As to when the public right of navigation arises see PARA 702.

2 *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL; *A-G v Earl Lonsdale* (1868) LR 7 Eq 377; *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL.

3 See *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL.

4 See PARAS 693-698. Where the public right of navigation extends to part only of a river and that part becomes blocked, there is no right to have abated an obstruction in any other part of the river the removal of which would enable the navigation of the river to be continued over that other part (*Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL); but where the public right of navigation extends to the whole width of a river and it is necessary to use a part of the river because the remainder has become choked, a weir in that part which is an obstruction is illegal and may be abated (see *Williams v Wilcox* (1838) 8 Ad & El 314; and PARA 692). The fact that a river becomes choked does not give the public a right to cut another passage through adjoining land: *Ball v Herbert* (1789) 3 Term Rep 253 at 263 per Buller J.

5 See PARA 699. As to the closing of canals for navigation and the filling in of canal basins see PARA 741 et seq.

6 See *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1, [2004] 3 WLR 249.



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#### **(4) WORKS INTERFERING WITH RIGHTS OF NAVIGATION**

##### **706. In general.**

The Secretary of State for Transport may make a works order under the Transport and Works Act 1992 relating to, or to matters ancillary to: (1) the construction or operation of an inland waterway in England and Wales<sup>1</sup>; and (2) the carrying out of works which interfere with rights of navigation in waters within or adjacent to England and Wales, up to the seaward limits of the territorial sea<sup>2</sup>, and are of a description as prescribed by order made by the Secretary of State<sup>3</sup>. Such orders are discussed in detail elsewhere in this title<sup>4</sup>.

1 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2 As to the territorial sea see PARA 31.

3 See the Transport and Works Act 1992 s 3.

4 See PARA 801.

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## **(5) CONTROL OF NAVIGATION**

### **707. Maintenance of navigable rivers at common law.**

At common law the owner of the bed of a navigable river<sup>1</sup> is not obliged to clear the channel of natural obstructions such as weed and silt and is not liable for any damage which in consequence results to adjoining owners<sup>2</sup>. Likewise a navigation authority, subject to the particular statutory provisions applicable to it, is not under a duty to cut weeds and dredge silt, unless required for the purposes of the navigation<sup>3</sup>. Where, however, a navigation authority chooses to keep the navigation open to the public and take tolls for its use, it must take reasonable care that the public may navigate without danger to life or property and this may include the necessity to regulate traffic<sup>4</sup>.

1 As to the ownership of the bed of a tidal river see PARA 71. As to the ownership of the bed of a non-tidal river see PARA 74 et seq.

2 *Normile v Ruddle* (1912) 47 ILT 179; cf *Cracknell v Thetford Corpn* (1869) LR 4 CP 629; *Hodgson v York Corpn* (1873) 28 LT 836; and see PARAS 101, 665. See also *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 526, [1980] 1 All ER 17 at 37, CA, per Megaw LJ where it was stated, obiter, that a failure by a landowner through whose land a stream flows to take reasonable steps to keep the stream free from blockage with the result that flooding is caused to neighbouring land, would be a breach of duty for which that landowner would be liable.

3 *Parrett Navigation Co v Robins* (1842) 10 M & W 593.

4 *Boxes Ltd v British Waterways Board* [1971] 2 Lloyd's Rep 183, CA. See also *Tamar Manure Navigation Co v Wagstaffe* (1863) 4 B & S 288; *Cracknell v Thetford Corpn* (1869) LR 4 CP 629.

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## **708. Control of navigation generally.**

The Crown under the royal prerogative<sup>1</sup> exercised from the earliest times a jurisdiction over ports, harbours, rivers, creeks and arms of the sea and their navigation. This jurisdiction has over time devolved on a variety of public bodies<sup>2</sup>. The particular degree of control exercised by, and the rights, powers and duties of, these various navigation bodies depend very much on the particular statutes governing the navigation. Generally, however, such statutes contain provisions providing for the maintenance and improvement of the navigation and associated structures and for the making of byelaws to control activities in, or adjacent to, the navigable waterways and the imposition of charges on users of the navigation. Unless the relevant statute provides to the contrary the ownership of the bed and banks does not vest in the navigation authority<sup>3</sup>.

Navigation on the River Thames up to Teddington<sup>4</sup> is subject to the control of the Port of London Authority<sup>5</sup>, and above Teddington to the control of the Environment Agency<sup>6</sup>.

The British Waterways Board<sup>7</sup> has power to make byelaws for regulating the use of canals including the express power of excluding any vessel from its canals, or prohibiting the use by any vessel of canals, or prohibiting the use of its canals except in accordance with such conditions as the board may prescribe, save that the last mentioned byelaws do not apply to tidal waters<sup>8</sup>.

The Environment Agency has power to make byelaws in relation to certain recreational waterways for any matter falling within its functions as the authority responsible for maintaining and improving those waterways for the purposes of recreation and leisure and for controlling the navigation of those waterways<sup>9</sup>. The Agency also has certain general navigation powers where navigable waters are not under the control of a navigation, harbour or conservancy authority<sup>10</sup>. Certain other authorities also have power to make byelaws in relation to the navigation of rivers<sup>11</sup>; and there are powers to make byelaws in respect of pleasure boats<sup>12</sup>.

1 As to the Royal prerogative see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 367 et seq; **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 46.

2 As to legislation relating to ports and harbours see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 602. As to maritime law see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 1 et seq.

3 *R v Weaver River Navigation Trustees* (1827) 7 B & C 70n.

4 The boundary, called 'the landward limit', is a line drawn across the river from a stone pillar erected on the Surrey bank at grid coordinates TQ 16361 71912: see the Port of London Act 1968 s 2(1), Sch 1 para 1.

5 As to the Port of London Authority see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 623 et seq.

6 As to navigation on the River Thames see PARA 712; and **LONDON GOVERNMENT**. The Agency has, however, certain powers exercisable below Teddington: see further **LONDON GOVERNMENT**. As to the Environment Agency see PARA 17.

7 As to the British Waterways Board see PARA 725 et seq.

8 See the British Waterways Act 1971 s 5(1); and PARA 786.

9 See PARA 709.

10 See PARA 709.

11 For a general enabling power see the Transport and Works Act 1992 s 3; and PARA 801. See also the Transport Act 1968 s 113 (PARA 720), and the powers conferred on the Broads Authority under the Norfolk and Suffolk Broads Act 1988 (PARA 735).

12 See PARA 684.

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### **709. General powers of the Environment Agency in relation to navigation.**

The functions of the former National Rivers Authority as a navigation authority, harbour authority or conservancy authority are now vested in the Environment Agency<sup>1</sup>. The Agency may also apply to the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> for an order<sup>4</sup> transferring to it any of the functions or property of a navigation, harbour or conservancy authority<sup>5</sup>; and where, in accordance with this provision, the Agency may apply for an order transferring any functions or property of another body, that body may itself apply for such an order<sup>6</sup>. The Agency has further powers, with a view to improving the drainage of any land, to enter into various arrangements with a navigation authority or conservancy authority<sup>7</sup>.

Where it appears necessary or expedient to do so for the purposes of its relevant statutory functions<sup>8</sup>, the Agency may make byelaws prohibiting specified inland waters<sup>9</sup> from being used for boating, whether with mechanically propelled boats or otherwise, swimming or other recreational purposes<sup>10</sup>, or regulating the way in which the waters may be used for those purposes<sup>11</sup>. Byelaws for this purpose are not, however, to apply to any tidal or discrete waters<sup>12</sup>, any inland waters in relation to which functions are exercisable by a navigation authority, harbour authority or conservancy authority other than the Agency<sup>13</sup>, or any reservoir belonging to, and operated by, a water undertaker<sup>14</sup>. The byelaws may include provision prohibiting the use of the inland waters by boats which are not registered with the Agency in the manner provided by the byelaws<sup>15</sup>, and may authorise the Agency to impose reasonable charges in respect of the registration of boats in pursuance of the byelaws<sup>16</sup>. If any person<sup>17</sup> contravenes<sup>18</sup> any byelaws made by virtue of the above provisions he is guilty of an offence<sup>19</sup>.

With respect to any inland waters in relation to which:

- 1400 (1) there is a public right of navigation<sup>20</sup>; and
- 1401 (2) navigation in those waters:

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- 23. (a) is not subject to the control of any navigation, harbour or conservancy authority<sup>21</sup>; or
- 24. (b) is subject to the control of such an authority as is prescribed<sup>22</sup> for these purposes by reason of its appearing to the Secretary of State<sup>23</sup> to be unable to carry out its functions<sup>24</sup>,

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and with respect to any land<sup>25</sup> associated with such waters, the Agency may make byelaws for a range of specified purposes<sup>26</sup>. The specified purposes are:

- 1402 (i) for the preservation of order in or on any such waters or land<sup>27</sup>;
- 1403 (ii) for the prevention of damage to anything in or on the waters or land or to the land<sup>28</sup>; and
- 1404 (iii) for securing that persons resorting to the waters or land behave so as to avoid undue interference with the enjoyment of the waters or land by others<sup>29</sup>;

and such byelaws include<sup>30</sup> byelaws:

- 1405 (A) for the regulation of sailing, boating<sup>31</sup>, bathing and fishing and other forms of recreation<sup>32</sup>;
- 1406 (B) prohibiting the use of the inland waters in question by boats which are not registered with the Agency in the manner required by the byelaws<sup>33</sup>;
- 1407 (C) requiring the provision of sanitary appliances for the purposes of preventing pollution<sup>34</sup>;
- 1408 (D) authorising the imposition of reasonable charges in respect of the registration of boats for the purposes of the byelaws<sup>35</sup>; and
- 1409 (E) containing provision providing for a contravention of the byelaws to constitute a summary offence<sup>36</sup>.

The Agency has similar powers to make byelaws with respect to any waterways<sup>37</sup> owned or managed by it and with respect to any land held or managed with the waterway<sup>38</sup>.

1 The functions of the former National Rivers Authority as a navigation authority, harbour authority or conservancy authority which were transferred to the Authority by virtue of the Water Act 1989 Pt III Ch V (ss 142-150) (ss 143-150 repealed) or Sch 13 para 23(3) (repealed) or which were transferred to the Authority by any order or agreement under the Water Resources Act 1991 Sch 2 were transferred to the Agency: see the Environment Act 1995 s 2(1)(vi); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 70, 71. The navigations of the former National Rivers Authority were passed to the Authority from the former water authorities when the industry was privatised in 1989. As to the Environment Agency see PARA 17. As to the role of the Agency in relation to inland waterways see PARA 733. Information as to the Agency as navigation authority is available on the Agency's website at [www.environment-agency.gov.uk](http://www.environment-agency.gov.uk).

2 As to the Secretary of State see PARA 15 note 1.

3 The functions of the Secretary of State under the Water Resources Act 1991 Sch 2, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

4 The power to make such an order is exercisable by statutory instrument: Water Resources Act 1991 Sch 2 para 1(2). As to the procedure in relation to such orders see Sch 2 paras 2-12 (Sch 2 paras 1-3, 5, 8, 10 amended by the Environment Act 1995 s 120(1), Sch 22 para 128; Water Resources Act 1991 Sch 2 para 8 further amended by SI 2003/2867). Any transfer of functions or property which could be effected by an order under the Water Resources Act 1991 Sch 2 may, with the consent of the Secretary of State or, as appropriate, the Welsh Ministers be effected by agreement between the Agency and the other body concerned: Sch 2 para 1(3) (as so amended).

5 See the Environment Act 1995 s 2(1)(vii); Water Resources Act 1991 Sch 2 para 1(1). For these purposes the references in Sch 2 para 1(1) to a navigation authority, to a harbour authority and to a conservancy authority each include a reference to a body which no longer has any members but which, if it had members would be such an authority: Sch 2 para 1(5). As to the meaning of 'navigation authority' see PARA 189 note 1. As to the meaning of 'harbour authority' see PARA 189 note 2. As to the meaning of 'conservancy authority' see PARA 189 note 3.

6 Environment Act 1995 Sch 2 para 1(4) (as amended: see note 4).

7 See the Water Resources Act 1991 s 111; and PARA 590.

8 If any of the functions specified in Environment Act 1995 s 2(1)(a)(i), (iii), (v): Water Resources Act 1991 Sch 25 para 1(1) (Sch 25 paras 1-3 amended by the Environment Act 1995 s 120(1), Sch 22 paras 128, 190). Those functions are the Agency's water resources management (see PARA 187 et seq), flood defence and land drainage functions under the Water Resources Act 1991 and the Land Drainage Act 1991 (see PARA 556 et seq) and certain fisheries functions (see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 847). See further **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 70.

9 As to the meaning of 'inland waters' see PARA 187 note 2.

10 Water Resources Act 1991 Sch 25 para 1(1)(a).

- 11 Water Resources Act 1991 Sch 25 para 1(1)(b). As to the procedure for making byelaws and as to proof of byelaws see PARA 606.
- 12 Water Resources Act 1991 Sch 25 para 1(2)(a). As to the meaning of 'discrete waters' see PARA 187 note 4.
- 13 Water Resources Act 1991 Sch 25 para 1(2)(b) (as amended: see note 4).
- 14 Water Resources Act 1991 Sch 25 para 1(2)(c). As to the meaning of 'water undertaker' see PARA 137 note 4. As to reservoirs see PARA 277 et seq.
- 15 Water Resources Act 1991 Sch 25 para 1(3)(a) (as amended: see note 4).
- 16 Water Resources Act 1991 Sch 25 para 1(3)(b) (as amended: see note 4).
- 17 As to the meaning of 'person' see PARA 13 note 29.
- 18 As to the meaning of 'contravene' see PARA 20 note 5.
- 19 Water Resources Act 1991 s 211(1). The penalty for such an offence is, on summary conviction, a fine not exceeding level 1 on the standard scale (s 211(1)(a)); and if the contravention is continued after conviction, a fine not exceeding £5 for each day on which it is so continued (s 211(1)(b)). As to the standard scale see PARA 141 note 18.
- 20 Water Resources Act 1991 Sch 25 para 2(1)(a). As to public rights of navigation see PARAS 689, 701.
- 21 Water Resources Act 1991 Sch 25 para 2(1)(b), (2)(a).
- 22 'Prescribed' means prescribed by regulations: see the Water Industry Act 1991 s 219(1). At the date at which this volume states the law no such regulations had been made.
- 23 The functions of the Secretary of State under the Water Resources Act 1991 Sch 25 para 2 are not transferred to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.
- 24 Water Resources Act 1991 Sch 25 para 2(1)(b), (2)(b).
- 25 As to the meaning of 'land' see PARA 14 note 21.
- 26 See the Water Resources Act 1991 Sch 25 para 2(1) (as amended: see note 4).
- 27 Water Resources Act 1991 Sch 25 para 2(3)(a).
- 28 Water Resources Act 1991 Sch 25 para 2(3)(b).
- 29 Water Resources Act 1991 Sch 25 para 2(3)(c).
- 30 Ie without prejudice to the generality of any of the Water Resources Act 1991 Sch 25 para 2(3)(a)-(c) (see heads (i)-(iii) in the text) or to the power conferred on the Agency by virtue of Sch 25 para 4 (byelaws for controlling certain forms of pollution: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 333): Sch 25 para 2(4) (as amended: see note 4).
- 31 For the purposes of the Water Resources Act 1991 Sch 25 paras 2, 3 (see the text to notes 37-38) 'boat' includes a vessel of any description, and 'boating' is to be construed accordingly: Sch 25 paras 2(5), 3(4). As to the meaning of 'vessel' see PARA 224 note 2.
- 32 Water Resources Act 1991 Sch 25 para 2(4)(a).
- 33 Water Resources Act 1991 Sch 25 para 2(4)(b) (as amended: see note 4).
- 34 Water Resources Act 1991 Sch 25 para 2(4)(c).
- 35 Water Resources Act 1991 Sch 25 para 2(4)(d).
- 36 See the Water Resources Act 1991 s 211(2). Such an offence is punishable, on summary conviction, by a fine not exceeding level 5 on the standard scale or such smaller sum as may be specified in the byelaws: s 211(2).

37 'Waterway' means any lake, river, canal or other waters, being, in any case, waters suitable, or which can reasonably be rendered suitable, for sailing, boating, bathing or fishing: National Parks and Access to the Countryside Act 1949 s 114(1) (definition applied by the Water Resources Act 1991 Sch 25 para 3(4)).

38 See the Water Resources Act 1991 s 211(2), Sch 25 para 3(1)-(3) (Sch 25 para 3(1), (3) as amended: see note 4).



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### **710. Powers of the Environment Agency and internal drainage boards to levy navigation tolls.**

Where any navigable waters in England and Wales<sup>1</sup>, or in so much of the territorial sea<sup>2</sup> adjacent to England and Wales as is included in the area of a regional flood defence committee<sup>3</sup>, are not subject to the control of any navigation authority<sup>4</sup>, harbour authority<sup>5</sup> or conservancy authority<sup>6</sup>, the Environment Agency<sup>7</sup> may apply to the Secretary of State<sup>8</sup> or, in relation to Wales, to the Welsh Ministers<sup>9</sup> for an order imposing tolls in respect of the navigation of vessels<sup>10</sup> in those waters<sup>11</sup>. Such an order may not be made<sup>12</sup> unless the Secretary of State or, as the case may be, the Welsh Ministers are satisfied that the cost of the maintenance or works in connection with the waters to which the order relates has been or will be increased as a result of the use of those waters for purposes of navigation<sup>13</sup>.

The Secretary of State or the Welsh Ministers may hold inquiries for these purposes<sup>14</sup>, and may make such order as to the payment of costs incurred by them in connection with any such inquiry as they think just<sup>15</sup>. After the Secretary of State or the Welsh Ministers have made such an order, the order must be published in such manner as they think best adapted for informing the persons affected<sup>16</sup>. In the case of an order made by the Secretary of State, a notice must also be published with the order<sup>17</sup>.

The power of the Agency to make an application under the above provisions for the imposition of tolls in respect of navigation are, in the case of waters within an internal drainage district<sup>18</sup> which do not form part of a main river<sup>19</sup>, exercisable by the drainage board<sup>20</sup> for that district, concurrently with the Agency<sup>21</sup>.

Any tolls payable under an order made under these provisions in respect of the navigation of a vessel in any water may be demanded from the person in charge of the vessel by any person authorised for that purpose by the Agency or the drainage board<sup>22</sup>, and, if not paid on demand, may be recovered from either the person in charge of the vessel or its owner<sup>23</sup>.

1 Water Resources Act 1991s 143(1)(a). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2 As to the territorial sea see PARA 31.

3 Water Resources Act 1991s 143(1)(b). As to regional flood defence committees and their areas see PARA 559 et seq.

4 As to the meaning of 'navigation authority' see PARA 189 note 1.

5 As to the meaning of 'harbour authority' see PARA 189 note 2.

6 As to the meaning of 'conservancy authority' see PARA 189 note 3.

7 As to the Environment Agency see PARA 17.

8 As to the Secretary of State see PARA 15 note 1.

9 The functions of the Secretary of State under the Water Resources Act 1991 s 143, Sch 17, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh

Ministers see PARA 16 note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

10 As to the meaning of 'vessel' see PARA 224 note 2.

11 Water Resources Act 1991 s 143(1) (amended by the Environment Act 1995 s 120(1), Sch 22 para 128).

12 The power to make such an order is exercisable by statutory instrument: Water Resources Act 1991 Sch 17 para 1.

13 Water Resources Act 1991 s 143(2).

14 Water Resources Act 1991 Sch 17 para 2(1). The Ministry of Transport Act 1919 s 20 (repealed) applies to such inquiries: see the Water Resources Act 1991 Sch 17 para 2(1).

15 Water Resources Act 1991 Sch 17 para 2(2).

16 Water Resources Act 1991 Sch 17 para 3(1). As to the meaning of 'person' see PARA 13 note 29.

17 See the Water Resources Act 1991 Sch 17 para 3(1). The notice must state: (1) that the Secretary of State has made the order (Sch 17 para 3(2)(a)); and (2) that the order will become final and have effect unless, within such period of not less than 30 days as may be specified in the notice, a memorial praying that the order be subject to special parliamentary procedure is presented to the Secretary of State, by a person who is affected by the order and has such an interest as may be prescribed as being sufficient for the purpose (Sch 17 para 3(2)(b)). If no such memorial has been presented within the period so mentioned in respect of any order (Sch 17 para 4(1)(a)), or every such memorial has been withdrawn (Sch 17 para 4(1)(b)), the Secretary of State must confirm the order and it thereupon has effect (Sch 17 para 4(1)). If such a memorial has been presented in respect of such an order and has not been withdrawn, the order is subject to special parliamentary procedure: Sch 17 para 4(2). An order is, in any event, subject to special parliamentary procedure if the Secretary of State so directs: Sch 17 para 4(3). The Secretary of State may, at any time before it has been laid before Parliament, revoke, either wholly or partially, any order that is subject to special parliamentary procedure: Sch 17 para 4(4). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq. 'Prescribed' means prescribed by regulations made by the Secretary of State: see s 221(1). The following persons are deemed to have sufficient interest for the purpose of presenting a memorial: (a) the drainage board upon whose application the said order has been made; (b) any person using the navigable waters in respect of which the order has been made and who will be affected by the imposition of the tolls imposed thereby, or any association of traders or freighters or chambers of commerce, shipping or agriculture representing the interests of that person; (c) any harbour authority, conservancy authority or navigation authority whose harbour, conservancy or navigation may be reached by the said navigable waters: Land Drainage Act 1930 (Prescription of Interest) Regulations 1932, SR & O 1932/306, reg 1 (which regulations have effect by virtue of the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 1(1), (2)). As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

18 As to internal drainage districts see PARA 569 et seq.

19 As to the meaning of 'main river' see PARA 574.

20 As to internal drainage boards see PARA 569.

21 Land Drainage Act 1991 s 56(1) (s 56 amended by the Environment Act 1995 Sch 22 para 191).

22 Water Resources Act 1991 s 143(4)(a); Land Drainage Act 1991 s 56(2) (as amended: see note 21).

23 Water Resources Act 1991 s 143(4)(b); Land Drainage Act 1991 s 56(2) (as amended: see note 21).

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### **711. Regulation of navigation by water and sewerage undertakers.**

Under the Water Industry Act 1991, every relevant undertaker<sup>1</sup> has powers to regulate navigation by byelaws<sup>2</sup>. These powers are similar to those possessed by the Environment Agency<sup>3</sup>. Byelaws may be made with respect to any waterway<sup>4</sup> owned or managed by the undertakers and with respect to any land<sup>5</sup> held or managed with the waterway<sup>6</sup>, and may be made for any of the following purposes:

- 1410 (1) the preservation of order on or in any such waterway or land<sup>7</sup>;
- 1411 (2) the prevention of damage to anything on or in any such waterway or land or to any such land<sup>8</sup>; and
- 1412 (3) securing that persons<sup>9</sup> resorting to any such waterway or land behave so as to avoid undue interference with the enjoyment of the waterway or land by others<sup>10</sup>.

Such byelaws include byelaws:

- 1413 (a) regulating sailing, boating<sup>11</sup>, bathing and fishing and other forms of recreation<sup>12</sup>;
- 1414 (b) prohibiting the use of the waterway in question by boats which are not registered with the undertaker making the byelaws in the manner required by those byelaws<sup>13</sup>;
- 1415 (c) requiring the provision of such sanitary appliances as may be necessary for the purpose of preventing pollution<sup>14</sup>;
- 1416 (d) providing for a contravention<sup>15</sup> of the byelaws to constitute a summary offence<sup>16</sup>; and
- 1417 (e) authorising the imposition of reasonable charges in respect of the registration of boats for the purposes of the byelaws<sup>17</sup>.

No such byelaw has effect until confirmed by the Secretary of State<sup>18</sup> or, in relation to Wales, the Welsh Ministers<sup>19</sup>. At least one month<sup>20</sup> before it applies for the confirmation of any such byelaw, the undertaker concerned must cause a notice of its intention to make the application to be published in the London Gazette and in such other manner as it considers appropriate for the purpose of bringing the proposed byelaw to the attention of persons likely to be affected by it<sup>21</sup>. Copies of the notice must be served<sup>22</sup> on any persons carrying out functions under any enactment<sup>23</sup> who appear to the undertaker to be concerned<sup>24</sup>; and a copy of the byelaw must be deposited, for at least one month before the application is made, at one or more of the undertaker's offices, including, if there is one, an office in the area to which the byelaw would apply<sup>25</sup>.

With or without a local inquiry<sup>26</sup>, the Secretary of State or, as the case may be, the Welsh Ministers may refuse to confirm any byelaw submitted for confirmation by a relevant undertaker, or may confirm the byelaw either without or, if the undertaker consents, with modifications<sup>27</sup>. The Secretary of State or the Welsh Ministers may fix the date on which any byelaw as confirmed is to come into force<sup>28</sup>, and if no date is fixed, the byelaw comes into force at the end of the period of one month beginning with the date of confirmation<sup>29</sup>.

Every byelaw made by a relevant undertaker and confirmed under these provisions must be printed and deposited at one or more of the undertaker's offices, including, if there is one, an office in the area to which the byelaw applies, and copies of the byelaw must be available at those offices, at all reasonable times, for inspection by the public free of charge<sup>30</sup>.

Byelaws made under these provisions cease to have effect at the end of the period of ten years beginning with the day when they were made unless extended by the Secretary of State or, as appropriate, the Welsh Ministers<sup>31</sup>. If it appears to the Secretary of State or the Welsh Ministers that the revocation of a byelaw is necessary or expedient, the Secretary of State or, as the case may be, the Welsh Ministers may<sup>32</sup> revoke that byelaw after giving notice<sup>33</sup> to the undertaker which made it<sup>34</sup> and considering any representations or objections made by that undertaker<sup>35</sup> and, if the undertaker so requires, holding a local inquiry<sup>36</sup>.

The production of a printed copy of a byelaw purporting to be made by a relevant undertaker upon which is indorsed a certificate, purporting to be signed on its behalf and giving the specified information<sup>37</sup> is prima facie evidence of the facts stated in the certificate, without proof of the handwriting or official position of any person purporting to sign the certificate<sup>38</sup>.

1 As to the meaning of 'relevant undertaker' see PARA 137 note 8.

2 See the Water Industry Act 1991 s 157(1).

3 As to the powers of the Environment Agency in this respect see PARA 709. As to the Environment Agency see PARA 17.

4 'Waterway' has the same meaning as in the National Parks and Access to the Countryside Act 1949 (see PARA 709 note 37): Water Industry Act 1991 s 157(6).

5 As to the meaning of 'land' see PARA 14 note 21.

6 Water Industry Act 1991 s 157(1).

7 Water Industry Act 1991 s 157(2)(a).

8 Water Industry Act 1991 s 157(2)(b).

9 As to the meaning of 'person' see PARA 13 note 29.

10 Water Industry Act 1991 s 157(2)(c).

11 'Boat' includes a vessel of any description, and 'boating' is to be construed accordingly: Water Industry Act 1991 s 157(6). As to the meaning of 'vessel' see PARA 224 note 2.

12 Water Industry Act 1991 s 157(3)(a).

13 Water Industry Act 1991 s 157(3)(b).

14 Water Industry Act 1991 s 157(3)(c).

15 As to the meaning of 'contravention' see PARA 20 note 5.

16 Water Industry Act 1991 s 157(3)(d). Such offence is punishable, on summary conviction, by a fine not exceeding level 5 on the standard scale or such smaller sum as may be specified in the byelaws: s 157(3)(d). As to the standard scale see PARA 141 note 18.

17 Water Industry Act 1991 s 157(3)(e).

18 As to the Secretary of State see PARA 15 note 1.

19 Water Industry Act 1991 s 157(4), Sch 10 para 1(1). The functions of the Secretary of State under the Water Industry Act 1991 Sch 10, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16

note 5. As to the power of the Secretary of State to intervene in relation to functions exercisable by the Welsh Ministers where any particular case might have a serious adverse impact on water resources, water supply, or the quality of water in England see PARA 16.

20 As to the meaning of 'month' see PARA 23 note 10.

21 Water Industry Act 1991 Sch 10 para 1(2)(a).

22 As to the service of documents see PARA 22.

23 As to the meaning of 'enactment' see PARA 14 note 31.

24 See the Water Industry Act 1991 Sch 10 para 1(2)(b).

25 Water Industry Act 1991 Sch 10 para 1(3). The undertaker must provide reasonable facilities for the inspection free of charge of a byelaw so deposited (Sch 10 para 1(4)), and every person is entitled, on application to the undertaker, to be furnished free of charge with a printed copy of it (Sch 10 para 1(5)).

26 The provisions of the Local Government Act 1972 s 250(2)-(5) (powers in relation to local inquiries: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) apply to local inquiries under any provision of the Water Industry Act 1991 as they apply to inquiries under that section: see the Water Industry Act 1991 s 215(2).

27 Water Industry Act 1991 Sch 10 para 2(1). As to the meaning of 'modifications' see PARA 141 note 20. If so directed by the Secretary of State or the Welsh Ministers, the undertaker which submitted the byelaw must cause notice of any proposed modifications to be given as directed: see Sch 10 para 2(2).

28 Water Industry Act 1991 Sch 10 para 3(1).

29 Water Industry Act 1991 Sch 10 para 3(2).

30 Water Industry Act 1991 Sch 10 para 4(1). Every person is entitled, on application to a relevant undertaker and on payment of such reasonable sum as the undertaker may determine, to be furnished with a copy of any byelaw so deposited by that undertaker: Sch 10 para 4(2).

31 See the Water Industry Act 1991 s 157(5). The Secretary of State or the Welsh Ministers may, by order made by statutory instrument, make provision in relation to any particular byelaws for those byelaws to continue to have effect for such period after the time when they would otherwise cease to have effect as may be specified in the order: s 157(5). Such orders are not recorded in this work.

32 Ie without prejudice to the Water Industry Act 1991 s 157(5) (see the text to note 31) and subject to the Water Consolidation (Consequential Provisions) Act 1991 s 2(2), Sch 2 para 4(4): Water Industry Act 1991 Sch 10 para 5.

33 As to the meaning of 'notice' see PARA 22 note 1.

34 Water Industry Act 1991 Sch 10 para 5(a).

35 Water Industry Act 1991 Sch 10 para 5(b).

36 Water Industry Act 1991 Sch 10 para 5(c). See also note 26.

37 The certificate must state: (1) that the byelaw was made by that undertaker (Water Industry Act 1991 Sch 10 para 6(a)); (2) that the copy is a true copy of the byelaw (Sch 10 para 6(b)); (3) that on a specified date the byelaw was confirmed under Sch 10 (Sch 10 para 6(c)); and (4) the date, if any, fixed under Sch 10 para 3 (see the text to note 28) for the coming into operation of the byelaw (Sch 10 para 6(d)).

38 Water Industry Act 1991 Sch 10 para 6.

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## (6) THE RIVER THAMES

### 712. Navigation on the River Thames.

Navigation on the River Thames up to Teddington<sup>1</sup> is subject to the control of the Port of London Authority<sup>2</sup>. Statutory provision is made as to the regulation of navigation and vessels in this part of the river<sup>3</sup>, the removal of obstructions and hazards to navigation<sup>4</sup>, and works on and control of the river<sup>5</sup>. The authority has powers to make byelaws for conservation and improvement of the Thames as a navigable waterway, for the regulation of vessels in the river, and for various purposes to promote safety and to regulate the use of the river and its facilities<sup>6</sup>.

Navigation on the River Thames above Teddington<sup>7</sup> is subject to the control of the Environment Agency<sup>8</sup>. The principal legislation is the Thames Conservancy Acts<sup>9</sup> and these make provision as to rights of navigation<sup>10</sup>, the carrying out of works for navigation, the removal of obstructions and general works powers<sup>11</sup>. The Agency has powers to make byelaws regulating the use of the river and its facilities<sup>12</sup>.

1 The boundary, called 'the landward limit', is a line drawn across the river from a stone pillar erected on the Surrey bank at grid coordinates TQ 16361 71912: see the Port of London Act 1968 s 2(1), Sch 1 para 1.

2 See the Port of London Act 1968 s 5. As to the Port of London Authority see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 623 et seq.

3 See the Port of London Act 1968 ss 108-119, 124-129; and **LONDON GOVERNMENT**.

4 See the Port of London Act 1968 ss 120-123; and **LONDON GOVERNMENT**.

5 See the Port of London Act 1968 Pt V (ss 60-93); and **LONDON GOVERNMENT**.

6 See the Port of London Act 1968 ss 162, 167; and **LONDON GOVERNMENT**.

7 For most purposes of the Thames Conservancy Acts 1932 to 1972, 'Thames' means so much of the Rivers Thames and Isis as is between the east side of the Town Bridge at Cricklade and the landward limit of the Port of London and so much of the River Kennet as is between a line drawn across the river 70 yards (64 metres) eastward of the east side of the High Bridge at Reading and the River Thames, and all locks, cuts and works within those portions of those rivers: Thames Conservancy Act 1932 s 4 (amended by the Thames Conservancy Act 1950 s 3). However, for the purposes of the statutory provisions relating to rights of navigation and the removal of obstructions and dangerous erections, certain parts of the rivers are excluded; while the Environment Agency has certain powers under the Thames Conservancy Act 1932 which are exercisable in the Thames below Teddington Lock: see further **LONDON GOVERNMENT**.

8 As to navigation on the River Thames above Teddington see **LONDON GOVERNMENT**. The Agency also has certain powers exercisable below Teddington: see further **LONDON GOVERNMENT**. As to the Environment Agency see PARA 17.

9 See the Thames Conservancy Acts 1932 to 1972.

10 See **LONDON GOVERNMENT**.

11 See **LONDON GOVERNMENT**.

12 See **LONDON GOVERNMENT**.

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## **12. INLAND WATERWAYS**

### **(1) INTRODUCTION**

#### **(i) Waters and Waterways**

##### **713. Inland waterways and inland waters.**

This part of this title sets out the law relating to inland waterways<sup>1</sup>. The treatment of inland waterways focuses on the law which establishes the navigation authorities<sup>2</sup> and which provides for certain aspects of the inland waterways system to be regulated and managed<sup>3</sup>.

The law relating to inland waters is discussed elsewhere in this title<sup>4</sup>, as is the public right of navigation in both tidal<sup>5</sup> and non-tidal waters<sup>6</sup>.

1 See PARA 714 et seq. For these purposes, inland waterways include the canals (narrow, broad and ship), the Norfolk and Suffolk Broads, the naturally navigable parts of tidal rivers (such as the Thames and the Severn) and many smaller rivers, as well as the rivers which have been made navigable, and the navigable drains of the Fens.

2 Ie principally the British Waterways Board, the Environment Agency, and the Broads Authority: see PARA 717 et seq.

3 See PARA 784 et seq.

4 See PARA 63 et seq.

5 See PARA 689 et seq.

6 See PARA 701 et seq.

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## **(ii) Legislation**

### **A. LEGISLATIVE SCHEME**

#### **714. Development of the law of inland waterways.**

Although parts of the law relating to interests in and rights over inland waters may be ancient<sup>1</sup>, the law relating to inland waterways has its modern origins in the special provision made in the second half of the 18th century and early 19th century in relation to canal companies and their running of the canals<sup>2</sup>.

With effect from 1 January 1948, canals were nationalised as part of the general scheme of the Transport Act 1947<sup>3</sup>, which also established the British Transport Commission<sup>4</sup>. However, only specified undertakings were vested in the Commission and some of the previous canal companies and corporations continued in existence<sup>5</sup>. With effect from 1 January 1963, the Transport Act 1962 reorganised the nationalised transport undertakings carried on by the British Transport Commission and, to this end, established four new boards as public authorities, together with a holding company, among which the functions and the property of the British Transport Commission were divided<sup>6</sup>. The British Waterways Board assumed responsibility for the nationalised part of the inland waterways system<sup>7</sup>.

The British Waterways Board is now but the largest of dozens of navigation authorities (some of which are public bodies, but others, such as the surviving canal companies, are private) that manage the inland waterways system, and the modern law relating to inland waterways set out in this title comprises a matrix of the law (mostly institutional and regulatory) that is relevant to each<sup>8</sup>.

1 As to the law relating to inland waters see PARA 63 et seq.

2 Inland waterways were developed primarily as a freight transport system when the navigable rivers were supplemented by purpose-built canals built by promoters who obtained an Act of Parliament in each case, a procedure later used in the development of the railway system and works associated with it: see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 291 et seq. (Note, however, that there is no Clauses Consolidation legislation as there is with railways: see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 291). The legislation that regulated the canal companies and the canal system continues to have some residual relevance: see PARA 780 et seq. It should be noted also that, notwithstanding the powers and duties applicable to the British Waterways Board under general and local legislation (see PARA 725), the board remains subject to, and has the benefit of, over 500 special Acts under which the waterways it is now responsible for were created (see PARA 780 et seq).

3 As to which see the Transport Act 1947 s 12, Sch 3 (repealed).

4 The British Transport Commission was established under the Transport Act 1947 s 1 (repealed) with the general duty under s 3 (repealed) to provide an efficient, adequate, economical and properly integrated system of public inland transport and port facilities within Great Britain. As to the meaning of 'Great Britain' see PARA 22 note 5.

5 Approximately half of the inland waterway system's capacity was brought under the control of the British Transport Commission as a result of nationalisation and some original canal companies, eg the Chelmer and Blackwater Navigation, still exist today as navigation authorities: see PARA 714.



6 The British Railways Board, the London Transport Board, the British Transport Docks Board and the British Waterways Board, together with the Transport Holding Company, were established as successors to the Commission: see the Transport Act 1962 ss 1, 29 (both as originally enacted). All the property, rights and liabilities of the Commission were transferred to and vested in the boards and the holding company: see Pt II (ss 31-42) (as originally enacted). See further **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 4.

7 See the Transport Act 1962 s 10; and PARA 738.

8 See generally PARA 717 et seq. As to cognate law and legislation see PARA 715; and as to European Community law see PARA 716.

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## 715. Cognate law and legislation.

In the absence of specific statutory authority<sup>1</sup>, the statutory provisions governing the development of land generally<sup>2</sup> apply to the statutory canal undertakers<sup>3</sup>. However, in respect of the development of operational land<sup>4</sup>, special provisions apply<sup>5</sup>, and certain developments of operational land required in connection with the carrying out of statutory undertakings are expressly permitted and may be carried out without planning permission<sup>6</sup>. A number of European Directives which are concerned with the environment have an overriding impact on the development of land<sup>7</sup>.

Numerous provisions in the legislation relating to the improvement of highways make express provision for the protection of canal and inland navigation undertakings<sup>8</sup>, and transport authorities<sup>9</sup> are entitled to special protection under the New Roads and Street Works Act 1991<sup>10</sup>.

Although special provision is not made, Part I of the Health and Safety at Work etc Act 1974 applies to work and work places in and around inland waterways as it applies generally<sup>11</sup>. Any inland waterway in England and Wales<sup>12</sup> comprised in the undertaking of the British Waterways Board<sup>13</sup> which is not a commercial waterway or cruising waterway<sup>14</sup> is deemed to be a watercourse for the purpose of the provisions of the Public Health Act 1936<sup>15</sup> and is deemed to be land in relation to which the power<sup>16</sup> to require proper maintenance applies<sup>17</sup>.

1 Eg authority conferred by an authorising provision: see PARA 799 et seq.

2 As to the control of development and the planning system and legislation in England and Wales see generally **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 1.

3 For the purposes of the Town and Country Planning Act 1990, 'statutory undertakers' means persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power and a relevant airport operator (within the meaning of the Airports Act 1986 Pt V (ss 57-62)): see the Town and Country Planning Act 1990 s 262(1); and **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1009. As to the meaning of 'person' see PARA 13 note 29. As to duties imposed on statutory undertakers regarding litter see the Environmental Protection Act 1990 Pt IV (ss 86-99); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 721 et seq.

4 In the Town and Country Planning Act 1990, 'operational land' means, in relation to statutory undertakers, land which is used for the purpose of carrying on their undertaking and land in which an interest is held for that purpose: see s 263(1); and **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1010. This definition is subject to s 263(2)-(4) (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1010) and to s 264 (cases in which land is to be treated as not being operational land: see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1011).

5 See the Town and Country Planning Act 1990 ss 262-283; and **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1009 et seq.

6 See the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, art 3, Sch 2 Pt 17 (development by statutory undertakers) Class B (development on operational land by statutory undertakers or their lessees in respect of dock, pier, harbour, water transport, or canal or inland navigation undertakings), Class C (improvement, maintenance or repair of an inland waterway), Class D (the use of land by statutory undertakers in respect of dock, pier, harbour, water transport, canal or inland navigation undertakings for the spreading of any dredged material); and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 333-334.

7 See especially EC Council Directive 85/337 of 27 June 1985 (OJ L175, 05.07.85, p 40) on the assessment of the effects of certain public and private projects on the environment, and EC Council Directive 92/43 of 21 May

1992 on the conservation of natural habitats and of wild fauna and flora (OJ L206, 22.07.92, p 7), which are considered in the discussion of orders under the Transport and Works Act 1992: see PARA 801 et seq. See generally **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 10. As to the possible impact of domestic conservation legislation for the operation of inland waterways see *R (on the application of Triller and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580, [2005] 1 P & CR 495, [2004] All ER (D) 274 (Dec).

8 See the Highways Act 1980 Pt V (ss 62-105); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 484 et seq.

9 For the purposes of the New Roads and Street Works Act 1991 Pt III (ss 48-106) (carrying out of street works by undertakers acting in pursuance of statutory powers: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 406-483), 'transport authority' means the authority, body or person having the control or management of a transport undertaking; and 'transport undertaking' means a railway, tramway, dock, harbour, pier, canal or inland navigation undertaking of which the activities, or some of the activities, are carried on under statutory authority: s 91(1).

10 See the New Roads and Street Works Act 1991 Pt III (ss 48-106); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 406-483.

11 See the Health and Safety at Work etc Act 1974 Pt I (ss 1-54); and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 303.

12 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

13 As to the British Waterways Board see PARA 725 et seq.

14 As to the commercial and cruising waterways see PARA 741.

15 See for the purposes of the Public Health Act 1936 s 259(1) (see **NUISANCE** vol 78 (2010) PARA 156): see the Transport Act 1968 s 108(1)(a). As to public health regulations with regard to canal boats see the Public Health (Control of Diseases) Act 1984 Pt IV (ss 49-53); the Canal Boat Regulations 1878; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 967 et seq.

16 See the power conferred by the Town and Country Planning Act 1990 s 215: see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 887.

17 Transport Act 1968 s 108(1)(b) (amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 22(2)).

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## ***B. EUROPEAN COMMUNITY LAW***

### **716. European Community legislation affecting inland waterways.**

Although specific provision is made in the EC Treaty<sup>1</sup> for matters relating to inland waterways, the emphasis in that provision is on transport by inland waterway<sup>2</sup>. Given the geographical isolation of the network in Great Britain<sup>3</sup> from that of the other member states, the law so made has quite a limited application, notwithstanding its effect within certain areas of activity<sup>4</sup>.

Pursuant to the EC Treaty provisions which govern transport by inland waterway<sup>5</sup>, the following Regulations have been made:

- 1418 (1) the Regulation applying rules of competition to transport by rail, road and inland waterway<sup>6</sup>;
- 1419 (2) the Regulation on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway<sup>7</sup>;
- 1420 (3) the Regulation on the granting of aids for transport by rail, road and inland waterway<sup>8</sup>;
- 1421 (4) the Regulation introducing an accounting system for expenditure on infrastructure in respect of transport by rail, road and inland waterway<sup>9</sup>;
- 1422 (5) the Regulation on structural improvements in inland waterway transport<sup>10</sup>;
- 1423 (6) the Regulation on the elimination of controls performed at the frontiers of member states in the field of road and inland waterway transport<sup>11</sup>;
- 1424 (7) the Regulation laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a member state<sup>12</sup>;
- 1425 (8) the Regulation on controls carried out within the Community in the field of road and inland waterway transport in respect of means of transport registered or put into circulation in a third country<sup>13</sup>;
- 1426 (9) the Regulation on common rules applicable to the transport of goods or passengers by inland waterway between member states with a view to establishing freedom to provide such transport services<sup>14</sup>; and
- 1427 (10) the Regulation on a Community-fleet capacity policy to promote inland waterway transport<sup>15</sup>.

The following Directives have been also been made pursuant to those Treaty provisions<sup>16</sup>:

- 1428 (a) the Directive on reciprocal recognition of navigability licences for inland waterway vessels<sup>17</sup>;
- 1429 (b) the Directive on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway<sup>18</sup>;
- 1430 (c) the Directive on the appointment and vocational qualification of safety advisers for the transport of dangerous goods by road, rail and inland waterway<sup>19</sup>;
- 1431 (d) the Directive on the harmonisation of the conditions for obtaining national boatmasters' certificates for the carriage of goods and passengers by inland waterway in the Community<sup>20</sup>;

- 1432 (e) the Directive on the systems of chartering and pricing in national and international inland waterway transport in the Community<sup>21</sup>;
- 1433 (f) the Directive laying down technical requirements for inland waterway vessels<sup>22</sup>.

The Working Time Directive is also relevant to the extent that it applies to mobile workers on inland waterways<sup>23</sup>.

1    I.e. the Treaty Establishing the European Economic Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179).

2    See the provisions of the EC Treaty Pt 3 Title V (arts 70-80) (arts 70-80 formerly arts 74-84; renumbered by virtue of the Treaty of Amsterdam (OJ C340, 10.11.97, p 1): see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). The provisions of the EC Treaty Pt 3 Title V apply to transport by road, rail and inland waterway: see art 80(1) (as so renumbered).

3    As to the meaning of 'Great Britain' see PARA 22 note 5.

4    The provisions mentioned in this paragraph are referred to mostly for the sake of completeness, with the exception of the Directive laying down technical requirements for inland waterway vessels (see head (f) in the text), which, as implemented by the Recreational Craft Regulations 2004, SI 2004/1464 (see note 22), has had a significant impact on the inland boating business. The employment-related measures cited in notes 20, 23 should also be noted for their effect.

5    See note 2.

6    I.e. EC Council Regulation 1017/68 (OJ L175, 23.07.1968, p 1 (S Edn 1968 (I) p 302)) of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (amended by EC Council Regulation 1/2003 (OJ L1, 04.01.2003, p 1)).

7    I.e. EC Council Regulation 1191/69 (OJ L156, 28.06.1969, p 1 (S Edn 1952-1972 p 33)) of 26 June 1969 on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (amended by EC Council Regulation 3572/90 (OJ L353, 17.12.1990, p 12); and EC Council Regulation 1893/91 (OJ L169, 29.06.1991, p 1)). EC Council Regulation 1191/69 is repealed as of 3 December 2009: see European Parliament and Council Regulation 1370/2007 (OJ L315, 3.12.2007, p 1) arts 10.1, 12. European Parliament and Council Regulation 1370/2007 does not cover the award of public service contracts in relation to public passenger transport services by inland waterway; and, therefore, the organisation of public passenger transport services by inland waterway and, in so far as they are not covered by specific Community law, by national sea water will be subject, from 3 December 2009, to compliance with the general principles of the Treaty, unless member states choose to apply the Regulation to those specific sectors: see Preamble para (10), art 12.

8    I.e. EC Council Regulation 1107/70 (OJ L130, 15.06.1970, p 1 (S Edn 1970(II) p 360)) of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (amended by EC Council Regulation 1473/75 (OJ L152, 12.06.1975, p 1); EC Council Regulation 1658/82 (OJ L184, 29.06.1982, p 1); EC Council Regulation 1100/89 (OJ L116, 28.04.1989, p 24); EC Council Regulation 3578/92 (OJ L364, 12.12.1992, p 11); EC Council Regulation 2255/96 (OJ L304, 27.11.1996, p 3); EC Council Regulation 543/97 (OJ L84, 26.03.1997, p 6)). EC Council Regulation 1107/70 is repealed as of 3 December 2009: see European Parliament and Council Regulation 1370/2007 (OJ L315, 3.12.2007, p 1) arts 10.2, 12.

9    I.e. EC Council Regulation 1108/70 (OJ L130, 15.06.1970, p 4 (S Edn 1970(II) p 363)) of 4 June 1970 introducing an accounting system for expenditure on infrastructure in respect of transport by rail, road and inland waterway (amended by EC Council Regulation 1384/79 (OJ L167, 05.07.1979, p 1)). See also EC Commission Regulation 851/2006 (OJ L158, 10.06.2006, p 3) of 9 June 2006 specifying the items to be included under the various headings in the forms of accounts shown in EC Council Regulation 1108/70 Annex I.

10   I.e. EC Council Regulation 1101/89 (OJ L116, 28.04.89, p 25) of 27 April 1989 on structural improvements in inland waterway transport (amended by EC Council Regulation 3572/90 (OJ L353, 17.12.1990, p 12); EC Council Regulation 844/94 (OJ L98, 16.04.94, p 1); EC Commission Regulation 2812/94 (OJ L298, 19.11.94, p 22); EC Council Regulation 3314/94 (OJ L350, 31.12.94, p 8); EC Council Regulation 2819/95 (OJ L292, 07.12.95, p 7); EC Council Regulation 2254/96 (OJ L304, 27.11.96, p 1); EC Commission Regulation 2310/96 (OJ L313, 03.12.96, p 8); EC Commission Regulation 742/98 (OJ L103, 03.04.98, p 3)).

11    le European Parliament and Council Regulation 1100/2008 (OJ L304, 14.11.2008, p 63) of 22 October 2008 on the elimination of controls performed at the frontiers of member states in the field of road and inland waterway transport.

12    le EC Council Regulation 3921/91 (OJ L373, 31.12.91, p 1) of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a member state.

13    le EC Council Regulation 3912/92 (OJ L395, 31.12.92, p 6) of 17 December 1992 on controls carried out within the Community in the field of road and inland waterway transport in respect of means of transport registered or put into circulation in a third country.

14    le EC Council Regulation 1356/96 (OJ L175, 13.07.96, p 7) of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between member states with a view to establishing freedom to provide such transport services.

15    le EC Council Regulation 718/1999 (OJ L90, 02.04.99, p 1) of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport. See further EC Commission Regulation 805/1999 (OJ L102, 17.04.99, p 64) of 16 April 1999 laying down certain measures for implementing EC Council Regulation 718/1999 (amended by EC Commission Regulation 1532/2000 (OJ L175, 14.07.2000, p 74); EC Commission Regulation 997/2001 (OJ L139, 23.05.2001, p 11); EC Commission Regulation 336/2002 (OJ L53, 23.02.2002, p 11); EC Commission Regulation 411/2003 (OJ L62, 06.03.2003, p 18)); and EC Commission Regulation 181/2008 (OJ L56, 29.2.2008, p 8) of 28 February 2008 laying down certain measures for implementing EC Council Regulation 718/1999.

16    See note 2.

17    le EC Council Directive 76/135 (OJ L21, 29.01.76, p 10) of 20 January 1976 on reciprocal recognition of navigability licences for inland waterway vessels (amended by EC Council Directive 78/1016 (OJ L349, 13.12.78, p 31)).

18    le EC Council Directive 91/672 (OJ L373, 31.12.91, p 29) of 16 December 1991 on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway (amended by European Parliament and Council Regulation 1882/2003 (OJ L284, 31.10.2003, p 1)).

19    le EC Council Directive 96/35 (OJ L145, 19.06.1996, p 10) of 3 June 1996 on the appointment and vocational qualification of safety advisers for the transport of dangerous goods by road, rail and inland waterway. Directive 96/35 is repealed as from 30 June 2009 (see European Parliament and Council Directive 2008/68 (OJ L260, 30.9.2008, p 13) art 12(1)) and is replaced by European Parliament and Council Directive 2008/68 of 24 September 2008 on the inland transport of dangerous goods. See further **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 303, 342.

20    le EC Council Directive 96/50 (OJ L235, 17.09.96, p 31) of 23 July 1996 on the harmonization of the conditions for obtaining national boatmasters' certificates for the carriage of goods and passengers by inland waterway in the Community (amended by European Parliament and Council Regulation 1882/2003 (OJ L284, 31.10.2003, p 1)). The Merchant Shipping (Inland Waterway and Limited Coastal Operations) (Boatmasters' Qualifications and Hours of Work) Regulations 2006, SI 2006/3223, have been made for the purpose of implementing EC Council Directive 96/50 in Great Britain: see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 499.

21    le EC Council Directive 96/75 (OJ L304, 27.11.96, p 12) of 19 November 1996 on the systems of chartering and pricing in national and international inland waterway transport in the Community.

22    le European Parliament and Council Directive 2006/87 (OJ L389, 30.12.2006, p 1) of 12 December 2006 laying down technical requirements for inland waterway vessels (amended by European Parliament and Council Directive 2006/137 (OJ L389, 30.12.2006, p 261); EC Council Directive 2008/59 (OJ L166, 27.6.2008, p 31); EC Commission Directive 2008/87 (OJ L255, 23.9.2008, p 5)). See the Recreational Craft Regulations 2004, SI 2004/1464 (amended by SI 2004/3201); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 866. The measures provided for in Council Directive 76/135/EEC of 20 January 1976 (OJ L21, 29.01.76, p 10) (see head (a) in the text) remain in force for those vessels not covered by Directive 2006/87/EC.

23    le European Parliament and Council Directive 2003/88 (OJ L299, 18.11.2003, p 9) of 4 November 2003 concerning certain aspects of the organisation of working time. The Merchant Shipping (Working Time: Inland Waterways) Regulations 2003, SI 2003/3049 (amended by SI 2006/3223), have been made for the purpose of implementing the Directive: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 625. In relation to boatmasters see note 20.

## UPDATE

## **716. European Community legislation affecting inland waterways**

NOTE 6--Regulation 1017/68 replaced: EC Council Regulation 169/2009 (OJ L61, 5.3.2009, p 1); references to the repealed regulation should be construed as references to Regulation 169/2009 and read in accordance with the correlation table in Annex II: art 4.

NOTE 17--Directive 76/135 replaced: European Parliament and Council Directive 2009/100 (OJ L259, 2.10.2009, p 8).

NOTE 22--Directive 2006/87 further amended: European Parliament and Council Directive 2008/68 (OJ L260, 30.9.2008, p 13), EC Commission Directive 2008/126 (OJ L32, 31.1.2009, p 1), EC Commission Directive 2009/46 (OJ L109, 30.4.2009, p 14).

NOTE 23--SI 2003/3049 further amended: SI 2009/3348.

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## **(2) SUPERVISION OF INLAND WATERWAYS**

### **(i) In general**

#### **717. Control of waterways, etc.**

The jurisdiction over ports, harbours, rivers, creeks and arms of the sea and their navigation, exercised from the earliest times by the Crown under the royal prerogative, has devolved over time on a variety of bodies<sup>1</sup>.

Accordingly, control and ownership of the modern inland waterways system is diverse, being shared by more than 30 navigation authorities<sup>2</sup> (some public bodies, others private) and the particular degree of control they exercise, and the rights, powers and duties conferred on them, depend very much on the particular statutes which govern the waterways under their control<sup>3</sup>. The largest navigation authority, the British Waterways Board<sup>4</sup>, has power to make byelaws for regulating the use of canals<sup>5</sup> including the express power of excluding any vessel from its canals, or prohibiting the use by any vessel of canals, or prohibiting the use of its canals except in accordance with such conditions as the board may prescribe, save that the last mentioned byelaws do not apply to tidal waters<sup>6</sup>. The Environment Agency<sup>7</sup> also has power to make byelaws in relation to certain recreational waterways for any matter falling within its functions as the authority responsible for maintaining and improving those waterways for the purposes of recreation and leisure and for controlling the navigation of those waterways<sup>8</sup>. Certain other authorities also have powers to make byelaws in relation to the navigation of their rivers<sup>9</sup>; and there are powers to make byelaws in respect of pleasure boats<sup>10</sup>.

The International Regulations for Preventing Collisions at Sea 1972<sup>11</sup> apply to all vessels upon the high seas and in all waters connected with the high seas and navigable by seagoing vessels<sup>12</sup>, except that those rules do not interfere with the operation of a special local rule as to the navigation of any harbour, river, lake or inland water<sup>13</sup>.

1 See PARA 708. As to provision made for Crown rights in the British Waterways Acts see PARA 725.

2 As to navigation authorities see PARA 718.

3 Generally, however, such statutes contain provisions providing for the maintenance and improvement of the navigation and associated structures, for the making of byelaws to control activities in, or adjacent to, the navigable waterways, and the imposition of charges on users of the navigation: see PARA 708.

4 As to the British Waterways Board see PARA 725 et seq.

5 As to canal byelaws, regulations and offences see PARA 784 et seq.

6 See the British Waterways Act 1971 s 5; and PARA 786. As to tidal inland waters see PARA 71 et seq.

7 As to the Environment Agency see PARA 17.

8 See PARA 709. The Environment Agency also has certain general navigation powers where navigable waters are not under the control of a navigation, harbour or conservancy authority: see PARA 710.

9 Most notable of these is the Broads Authority under the Norfolk and Suffolk Broads Act 1988: see PARA 734 et seq.



10 See PARA 684 et seq.

11 See the International Regulations for Preventing Collisions at Sea (London, 20 October 1972; TS 77 (1977); Cmnd 6962) rr 1-36, Annexes I-III: see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 715 et seq.

12 As respects United Kingdom ships and other ships in United Kingdom waters, see the International Regulations for Preventing Collisions at Sea 1972 reg 1(a); the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996, SI 1996/75; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 720.

13 See the International Regulations for Preventing Collisions at Sea 1972 reg 1(b); the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996, SI 1996/75; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 720.

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### **718. The navigation authorities.**

The identity of the navigation authority responsible for a particular waterway is often a matter of historical accident and each authority tends to govern through its own legislative regime<sup>1</sup>. The three largest of the navigation authorities are:

- 1434 (1) the British Waterways Board, whose system consists largely of canals and river navigations which were nationalised in 1948<sup>2</sup>;
- 1435 (2) the Environment Agency, whose navigations were passed to it from the former National Rivers Authority which in turn had inherited them from the former water authorities when the industry was privatised in 1989<sup>3</sup>;
- 1436 (3) the Broads Authority, which was made the navigation authority for the Norfolk and Suffolk Broads when it was created in 1988<sup>4</sup>.

Both the British Waterways Board and the Environment Agency receive government grants towards the cost of meeting their navigation obligations; the Broads Authority receives grant aid from central and local government for its conservation work and recreational management but finances its navigation responsibilities entirely from tolls<sup>5</sup>.

Other waterways have stayed in the hands of<sup>6</sup>, or have passed into the control of, a wide variety of other bodies, many of them in the private sector and for whom navigation may not be the prime concern<sup>7</sup>.

However, this position is not static. The British Waterways Board has power to apply to the Secretary of State<sup>8</sup> for an order transferring all or part of the undertaking of any navigation authority and any functions or property of such authority<sup>9</sup>; and the Environment Agency may apply to the Secretary of State or, in relation to Wales, the Welsh Ministers for an order transferring to it the functions of a navigation, harbour or conservancy authority<sup>10</sup>.

Navigation on the River Thames up to Teddington<sup>11</sup> is subject to the control of the Port of London Authority<sup>12</sup>, and above Teddington to the control of the Environment Agency<sup>13</sup>.

1 The most commonly cited statutory definition of 'navigation authority' is that in the Water Resources Act 1991 (which also provides the common statutory definitions of 'harbour authority' and 'conservancy authority'): see PARA 189 notes 1-3. However, as to the meaning of 'navigation authority' under the British Waterways Act 1983 see PARA 731 note 3. A list of navigation authorities is available on the British Waterways Board website [www.britishwaterways.co.uk](http://www.britishwaterways.co.uk).

2 As to the nationalisation of canals and rivers etc see PARA 714. As to the British Waterways Board see PARA 725 et seq.

3 See PARA 733. As to the Environment Agency see PARA 17. Historically, most of the navigations referred to in head (2) in the text had been controlled by river boards or conservancies mainly concerned with land drainage. As to the transfer of functions of the National Rivers Authority to the Environment Agency see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 70.

4 See PARA 734 et seq.

5 As to the general duties and powers of the British Waterways Board see PARA 738 et seq; and as to navigation authorities other than the British Waterways Board see PARA 772 et seq.

6 Eg in the case of original canal companies which have survived: see PARA 714.

7 This category of bodies includes property development companies (eg in the case of the Manchester Ship Canal); drainage commissioners (eg in the case of the Middle Level Navigation); the National Trust (in the case of the River Wey Navigations); port authorities (eg in the case of the tidal Thames: see also the text to notes 11-12); and local authorities (eg in the case of the Basingstoke Canal). Charitable trusts (such as the Upper Avon Navigation, for whom navigation is the primary concern) may also be a navigation authority, the improvement and operation of public inland navigation being a legitimate charitable object: see eg the definition of 'qualified body' in the Transport Act 1968 s 113; and PARA 720 note 2.

The standards applied by this category of navigation authority may be defined, for example, by reference to the depth of water to be maintained through the system, or by the main type of user, but, in some cases, there may be no statutory requirement to maintain standards.

8 As to the Secretary of State (which may include references to the Welsh Ministers in relation to Wales) see PARA 719.

9 See PARA 731. British Waterways has taken over a number of waterways including the south Stratford-upon-Avon Canal (strictly speaking, a transfer back from the National Trust, it having previously been in the ownership and control of the British Transport Commission), the Yorkshire Ouse, the Linton Lock Navigation, and the Tees Navigation.

10 See the Water Resources Act 1991 Sch 2; and PARA 709.

11 Ie where the river becomes tidal.

12 As to the Port of London Authority see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 623 et seq.

13 See PARA 712. Historically, the Thames Conservancy was responsible for the management of the upper Thames from its source to Teddington and had far-reaching powers concerning the navigation etc of the river, which were contained in the Thames Conservancy Acts 1932 to 1972. These are local provisions outside the scope of this work but they were applied to the Thames Water Authority (now the Environment Agency) by virtue of the Water Act 1973 s 34(2), Sch 6 Pt II (repealed): see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 342.

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### **719. The Secretary of State and Welsh Ministers.**

The Minister of Transport is named in the Transport Acts of 1962 and 1968 as the minister responsible for dealing with the matters under those Acts<sup>1</sup> and that minister's functions are now vested in the Secretary of State for Transport<sup>2</sup>. More recent enactments refer simply to the 'Secretary of State'<sup>3</sup>. Amongst other duties, it is the duty of the Secretary of State to promote a national policy for the use of inland waterways for commercial transport<sup>4</sup>.

The control and management of the inland waterways system in England and Wales<sup>5</sup> rests with the various navigation authorities (both public and private)<sup>6</sup>. The biggest of the public bodies, namely the British Waterways Board and the Environment Agency<sup>7</sup>, both fall within the remit of the Secretary of State for Environment, Food and Rural Affairs<sup>8</sup>.

Many statutory functions vested in a Minister of the Crown, so far as exercisable in relation to Wales, have been transferred to the Welsh Ministers<sup>9</sup>.

1 See definition of 'the minister' in the Transport Act 1962 s 92(1) and the Transport Act 1968 s 159(1) (definition amended by the Railways Act 1993 s 152, Sch 14). The origins of this line of responsibility can be traced to when the inland waterways were regarded mainly as a transport asset: see PARA 714.

2 The Secretary of State for the Environment Order 1970, SI 1970/1681, abolished the Ministry of Transport and, subject to limited exceptions not relevant to the Transport Acts of 1962 and 1968, transferred to the Secretary of State (in effect the Secretary of State for the Environment) the functions of the Minister of Transport. The Secretary of State for Transport Order 1976, SI 1976/1775, created a separate Department of Transport and all the transport functions of the Secretary of State for the Environment were transferred to the Secretary of State for Transport. In 1979, by virtue of the Minister of Transport Order 1979, SI 1979/571, a Ministry of Transport was again formed and the functions of the Secretary of State for Transport were transferred to the Minister of Transport. This situation continued until 1981, when, by virtue of the Transfer of Functions (Transport) Order 1981, SI 1981/238, the functions of the Minister of Transport were again transferred to the Secretary of State for Transport. The Secretary of State for the Environment, Transport and the Regions Order 1997, SI 1997/2971, arts 3-6, transferred the functions of the Secretary of State for Transport to the Secretary of State for the Environment, Transport and the Regions. By virtue of the Transfer of Functions (Transport, Local Government and the Regions) Order 2002, SI 2002/2626, those functions were again transferred to the Secretary of State for Transport.

3 See eg the Transport Act 1978. As to the Secretary of State see PARA 15 note 1.

4 See the Transport Act 1978 s 13.

5 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

6 As to the bodies which act as navigation authorities in England and Wales see PARA 718.

7 See PARA 717.

8 As to the Secretary of State for Environment, Food and Rural Affairs see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 452 et seq; **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 58 et seq.

9 These functions were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 3, Sch 1 and are now vested in the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. Where such transfer has taken place this is referred to in the paragraph in question.

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## **720. Power conferred on navigation authorities to make waterways byelaws.**

The Secretary of State<sup>1</sup> may, on the application of any qualified body<sup>2</sup> which owns or manages an inland waterway<sup>3</sup> and after consultation<sup>4</sup> with the relevant authority<sup>5</sup>, by order confer on that body power to make byelaws in relation to that waterway for such purposes as may be specified in the order<sup>6</sup>. Byelaws made by virtue of such an order do not have effect until confirmed by the Secretary of State, and before applying to the Secretary of State for the confirmation of any byelaws the body concerned must take such steps as may be specified in the order for securing that persons<sup>7</sup> affected by the byelaws have an opportunity of making representations thereon to the Secretary of State<sup>8</sup>.

If any person contravenes, or fails to comply with, any byelaws made by virtue of such an order he is guilty of an offence<sup>9</sup>. Such an order may contain such supplementary provisions as the Secretary of State thinks necessary or expedient<sup>10</sup>.

1 The Secretary of State for Transport: see PARA 719. Functions in relation to Wales under the Transport Act 1968 s 113 are not transferred to the Welsh Ministers.

2 'Qualified body' means any navigation authority as defined in the Water Resources Act 1991 s 221(1) (see PARA 189 note 1), a body mentioned in the Transport Act 1968 s 109(2) (except in s 109(2)(c)) (see PARA 743) and any other body having public or charitable objects: s 113(5); Interpretation Act 1978 s 17(2)(a). As to the navigation authorities generally see PARA 718. As to the power conferred on the British Waterways Board to make canal byelaws under the British Transport Commission Act 1954 s 16 see PARA 770. As to byelaws made by canal companies see PARA 780.

3 'Inland waterway' includes every such waterway whether natural or artificial: Transport Act 1962 s 92(1); Transport Act 1968 s 159(1).

4 As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

5 'Relevant authority', in relation to any order, means, except in a case where it is itself the applicant for the order, the Environment Agency or any local authority in whose area the waterway in question is wholly or partly situated: Transport Act 1968 s 113(5) (amended by the Water Act 1989 s 190, Sch 25 para 38; and by virtue of SI 1996/593). As to the Environment Agency see PARA 17. 'Local authority' means as respects England and Wales, the council of a county, county district or London borough, and the Common Council of the City of London: Transport Act 1968 s 115(3) (definition amended by the Local Government Act 1972 s 272(1), Sch 30; Local Government Act 1985 s 102, Sch 17). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

6 Transport Act 1968 s 113(1). As to the making of orders see PARA 724. Such orders, being of local effect, are not recorded in this work.

7 As to the meaning of 'person' see PARA 13 note 29.

8 Transport Act 1968 s 113(2).

9 Transport Act 1968 s 113(3). The penalty for such an offence is, on summary conviction, a fine not exceeding level 1 on the standard scale; and if the contravention or failure to comply is continued after the conviction, the person is guilty of a further offence and liable on summary conviction to a fine not exceeding £5 for each day on which it is so continued: s 113(3) (amended by virtue of the Criminal Justice Act 1982 ss 37, 38, 46). As to the standard scale see PARA 141 note 18.

10 Transport Act 1968 s 113(4). The Railway and Canal Traffic Act 1888 s 40 (which makes provision as to the byelaws of canal companies: see *PARA 780*) does not apply to byelaws made by virtue of an order under the Transport Act 1968 s 113: s 113(6).

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## **721. Financial assistance for inland waterway and sea freight.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may make grants or other payments for the purpose of securing or encouraging the carriage of goods by inland waterway or by sea rather than by road where satisfied that that is in the public interest<sup>3</sup>. Such grants or payments may in particular be made in respect of facilities for or in connection with the carriage of goods by inland waterway or by sea (including facilities for loading or unloading goods)<sup>4</sup>; and must be of such amount and subject to such conditions (including conditions requiring their repayment in specified circumstances) as the Secretary of State or, as appropriate, the Welsh Ministers may determine<sup>5</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 So far as it relates to inland waterways in Wales the power conferred by the Transport Act 2000 s 272 is a power of the Welsh Ministers: s 272(4); Government of Wales Act 2006 Sch 11 para 32. Functions under the Transport Act 2000 s 272 were originally vested in the National Assembly for Wales and are now exercisable by the Welsh Ministers by virtue of the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2. 'Inland waterway' includes both a natural and an artificial inland waterway: Transport Act 2000 s 272(6). As to exercise of the power conferred by s 272 in or as regards Scotland see s 272(5).

3 Transport Act 2000 s 272(1).

4 Transport Act 2000 s 272(2).

5 Transport Act 2000 s 272(3).

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## **722. Grants for research or development in connection with transport services.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> have power (in the case of the Secretary of State with the approval of the Treasury<sup>3</sup>) to make grants upon such terms and conditions as they think fit to any person<sup>4</sup> towards expenditure incurred or to be incurred by that person: (1) in carrying out research in connection with the provision or improvement of transport services by land<sup>5</sup> or inland waterway<sup>6</sup> or of harbour<sup>7</sup> facilities<sup>8</sup>; or (2) in developing for the purposes of the provision or improvement of such services or facilities the results of any research carried out by, or any invention or idea of, that or any other person<sup>9</sup>.

1    le the Secretary of State for Transport: see PARA 719.

2    The functions of the Secretary of State under the Transport Act 1968 s 57, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales to be exercisable by the Assembly concurrently with the Secretary of State but free from the requirement for Treasury approval: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Treasury' see PARA 108 note 6.

3    In the case of the Welsh Ministers see note 2.

4    As to the meaning of 'person' see PARA 13 note 29.

5    'Land' includes land covered by water and any interest or right in, over or under land: Transport Act 1968 s 159(1).

6    As to the meaning of 'inland waterway' see PARA 720 note 3. As to grants for research or development in connection with transport services by inland waterways in Scotland see the Transport Act 1968 s 57A (added by SI 2000/3251).

7    As to the meaning of 'harbour' see PARA 737 note 8: definition applied by the Transport Act 1968 s 159(1).

8    Transport Act 1968 s 57(a). As to the duty of the British Waterways Board to promote research and development see PARA 746.

9    Transport Act 1968 s 57(b).



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**723. Secretary of State's powers over canals not comprised in the British Waterways Board's network.**

In respect of any canal<sup>1</sup> which is not comprised in the undertaking of the British Waterways Board<sup>2</sup>, the Secretary of State<sup>3</sup> may by order direct: (1) that any local enactment passed with respect to the canal is to cease to have effect so far as it confers any public or private right of navigation over it<sup>4</sup>; (2) that any such enactment is to cease to have effect in so far as it imposes a duty to maintain the canal for the purpose of navigation, including any duty to supply, or maintain a supply of, water for the canal for that purpose<sup>5</sup>; (3) that the statutory provisions relating to the maintenance of canals by railway companies<sup>6</sup> are to cease to apply to that canal<sup>7</sup>.

1 As to the meaning of 'canal' see PARA 828 note 1.

2 As to the bodies which act as navigation authorities in England and Wales generally see PARA 718; and as to the British Waterways Board see PARA 725 et seq.

3 I.e. the Secretary of State for Transport: see PARA 719.

4 See the Transport Act 1968 s 112(1)(a).

5 See the Transport Act 1968 s 112(1)(b).

6 I.e. the Regulation of Railways Act 1873 s 17: see PARA 826.

7 See the Transport Act 1968 s 112(1)(c). As to orders under s 112 see further PARA 828.

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#### **724. Orders, regulations and directions.**

Any power to make orders or regulations conferred on any minister by any provision of the Transport Act 1968 is exercisable by statutory instrument; and any power to make an order under any provision of that Act includes power to make such an order varying or revoking any previous order under that provision<sup>1</sup>.

Any direction given by the Secretary of State<sup>2</sup> under the Transport Act 1962 or the Transport Act 1968<sup>3</sup> must be in writing<sup>4</sup>; and it is the duty of the British Waterways Board<sup>5</sup> or of any other person<sup>6</sup> to whom the Secretary of State<sup>7</sup> or any other authority gives directions under that Act to give effect to those directions<sup>8</sup>.

1 Transport Act 1968 s 157 (amended by the Statute Law (Repeals) Act 2004).

2 I.e. the Secretary of State for Transport (see PARA 719) or, as the case may be, the Scottish Ministers. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 The Transport Act 1962 s 89 also applies to the Transport Act 1968: see s 52(3).

4 Transport Act 1962 s 89(2) (s 89 amended by SI 2000/3251). As to the meaning of 'writing' see PARA 22 note 1.

5 As to the British Waterways Board see PARA 725 et seq.

6 As to the meaning of 'person' see PARA 13 note 29.

7 I.e. or, as the case may be, the Scottish Ministers.

8 Transport Act 1962 s 89(1) (as amended: see note 3). The reference in s 28 to ss 1-27 also includes reference to the Transport Act 1968: see s 52(3).

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## **(ii) The British Waterways Board**

### **A. CONSTITUTION, MEMBERSHIP AND PROCEDURE**

#### **725. The British Waterways Board.**

The undertakings that had been brought under the control of the British Transport Commission by virtue of the Transport Act 1947<sup>1</sup> were reorganised under the Transport Act 1962<sup>2</sup> so that the Commission's inland waterway undertaking and certain harbours<sup>3</sup> came to rest with the British Waterways Board, a public authority established by that same statute<sup>4</sup>. The British Waterways Board's strategy for the nationalised part of the inland waterways system led to a Government White Paper<sup>5</sup> the proposals of which were put into effect by the Transport Act 1968, thereby giving the British Waterways Board a new remit to develop its waterways' potential for leisure, envisaging that the bulk of the system should be kept for pleasure cruising<sup>6</sup>.

The board's statutory powers conferred by the various Transport Acts have been supplemented by the British Waterways Acts 1963 to 1995<sup>7</sup>. Nothing in the British Waterways Act 1995 affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown<sup>8</sup>, or prejudices or derogates from the jurisdiction or authority or any of the rights or privileges of the Corporation of Trinity House of Deptford Strond<sup>9</sup>. Provision is made under the British Waterways Act 1995 for certain matters to be referred to arbitration<sup>10</sup>; and for certain legal proceedings to be instituted in the county court rather than in the High Court<sup>11</sup>.

1 As to the effect of the Transport Act 1947 (now wholly repealed) and the creation of the British Transport Commission under its provisions see PARA 714.

2 As to the effect of the Transport Act 1962 and the dissolution of the British Transport Commission under it see PARA 714.

3 See the Transport Act 1962 s 31(5)(b), Sch 3 Pt III (repealed); and see the Transport Act 1962 (Vesting Date) Order 1962, SI 1962/2634.

4 See the Transport Act 1962 s 1(1) (amended by the Transport (London) Act 1969 s 47(2), Sch 6; Transport Act 2000 s 274, Sch 31 Pt IV); and PARA 727. As to the constitution of the British Waterways Board see PARA 726. Information about the British Waterways Board and its functions is available on the board's website at [www.britishwaterways.co.uk](http://www.britishwaterways.co.uk).

5 See White Paper *British Waterways: Recreation and Amenity* (Cmnd 3401) (1967), the content of which reflected on the decline in freight traffic on the waterways and recognised the recreational purpose of the nationalised system.

6 See PARA 738 et seq. As to the duty of the Secretary of State to promote a national policy for the use of inland waterways for commercial transport see PARA 719.

7 The British Waterways Acts 1963 to 1988 and the British Waterways Act 1995 may be cited together as the British Waterways Acts 1963 to 1995: see the British Waterways Act 1995 s 1(2). Being local Acts these are usually outside the scope of this work. However, the British Waterways Act 1995 is set out in some detail in this title. The Act confers powers on the British Waterways Board to secure the safety of the waterway users and of owners and occupiers of adjoining land by providing for it to enter land and repair or maintain (or to carry out other operations with respect to) the waterways and undertakings owned or managed by it, as well as other works: see Pt II (ss 3-14); and PARA 762 et seq. The British Waterways Act 1995 also provides for the regulation

and management of the board's waterways (see Pt III (ss 16-21); and PARA 786 et seq), imposes general environmental and recreational duties on the board (see PARA 745), and enables the board to establish undertakings on request (see PARA 748). Some provisions of the Act have local application only and are not covered: see ss 25-30. The British Waterways Acts 1963 to 1988 are not set out in detail but are referred to where this is considered appropriate: see principally PARA 762 et seq; also PARAS 731-732.

8 Nothing in the British Waterways Board Act 1995 affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown including (without prejudice to the general law concerning the applicability of statutes to the Duchy of Cornwall) the Duchy of Cornwall and, in particular and without prejudice to the generality of the foregoing, nothing in the Act authorises the British Waterways Board to take, use, enter upon or in any manner interfere with, any land or hereditaments or any rights of whatsoever description (including any portion of the shore or bed of the sea or of any river, channel, creek, bay or estuary):

- 35 (1) belonging to Her Majesty in right of Her Crown and under the management of the Crown Estate Commissioners, without the consent in writing of those commissioners (s 34(1)(a));
- 36 (2) belonging to the Duchy of Cornwall or enjoyed by the possessor for the time being of the Duchy of Cornwall without the consent in writing of the Duke of Cornwall testified in writing under the seal of the Duchy or, as the case may be, the consent in writing of two or more of such of the regular officers of the Duchy or of such other persons as may be duly authorised under the Duchy of Cornwall Management Act 1863 s 39 (see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 322) (British Waterways Act 1995 s 34(1)(b)); or
- 37 (3) belonging to a government department, or held in trust for Her Majesty for the purposes of a government department, without the consent in writing of that government department (s 34(1)(c)).

A consent under s 34(1) may be given unconditionally or subject to such conditions and on such terms as are considered necessary or appropriate: s 34(2). As to Crown rights under the British Waterways Act 1983 see s 18. As to the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq. As to the meaning of 'land' see PARA 14 note 21. As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 280 et seq. As to the meaning of 'writing' see PARA 22 note 1.

9 See the British Waterways Act 1995 s 35. As to the Corporation of Trinity House of Deptford Strond see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1069.

10 Where under any provision of the British Waterways Act 1995 any difference (other than a difference as to the meaning or construction of that provision) is to be determined by arbitration, then such difference must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after notice in writing to the other), by the President of the Institution of Civil Engineers: British Waterways Act 1995 s 32. The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

11 Notwithstanding anything in any other enactment or rule of law, where but for this provision any proceedings in respect of any provision of the British Waterways Act 1995 could be instituted in the High Court, those proceedings may be instituted in the County Court: s 33. As to the meaning of 'enactment' see PARA 14 note 31. As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

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## **726. Constitution of the British Waterways Board.**

The British Waterways Board<sup>1</sup> consists of a chairman, a vice chairman and not more than nine nor less than four other members<sup>2</sup>. The chairman of the board is appointed by the Secretary of State<sup>3</sup>, and the other members of the board (including any vice chairman) are appointed by the Secretary of State after consultation with the chairman of the board<sup>4</sup>. The chairmen and other members of the board are appointed from among persons who appear to the Secretary of State to have had wide experience of, and to have shown capacity in, the operation, management or administration of inland navigations or related matters or who appear to him to have special knowledge relating to some important aspect of the board's work or to have had wide experience of, and to have shown capacity in, transport, industrial, commercial or financial matters, administration, applied science or the organisation of workers<sup>5</sup>. In appointing persons to the British Waterways Board, the Secretary of State must have regard to the desirability of having members who are familiar with the special requirements and circumstances of particular regions and areas served by the board in England and Wales<sup>6</sup>.

Before appointing a person to be a member of the board, the Secretary of State must satisfy himself that that person will have no such financial or other interest as is likely to affect prejudicially the discharge by him of his functions<sup>7</sup> as a member of the board, and the Secretary of State must also satisfy himself from time to time with respect to every member of the board that he has no such interest; and any person who is, or whom the Secretary of State proposes to appoint to be, a member of the board must, whenever requested by the Secretary of State to do so, furnish to him such information as the Secretary of State considers necessary for the performance by the Secretary of State of his duties with regard to members' interests<sup>8</sup>.

A member of the British Waterways Board holds and vacates his office in accordance with the terms of his appointment and is, on ceasing to be a member, eligible for re-appointment<sup>9</sup>. Any member appointed by the Secretary of State may at any time by notice in writing<sup>10</sup> to the Secretary of State resign that member's office<sup>11</sup>. The board must pay to its members such salaries or fees, and such allowances, as the Secretary of State may, with the approval of the Treasury<sup>12</sup>, determine<sup>13</sup>. If a person ceases to be a member of the board, otherwise than on the expiration of his term of office, and it appears to the Secretary of State that there are special circumstances which make it right that that person should receive compensation the Secretary of State may, with the approval of the Treasury, require the board to pay to that person a sum of such amount as the Secretary of State may with the approval of the Treasury determine<sup>14</sup>.

The Secretary of State must, as soon as possible after the first appointment by him of any person as a member of the board, lay before each House of Parliament<sup>15</sup> a statement of the salary or fees and of the allowances that are or will be payable under the above provisions; and, if any subsequent determination by him under those provisions involves a departure from the terms of that statement, or if such a determination by him relates to the payment of, or of payment towards the provision of, a pension to or in respect of, a member of the board, the Secretary of State must, as soon as possible after the determination, lay a statement thereof before each House of Parliament<sup>16</sup>.

Members of the British Waterways Board are disqualified for membership of the House of Commons<sup>17</sup>.

- 1 As to the establishment of the British Waterways Board see PARA 725.
- 2 Transport Act 1962 s 1(6).
- 3 le the Secretary of State for Transport: see PARA 719. However, before appointing the chairman, the Secretary of State must consult the Scottish Ministers: Transport Act 1962 s 1(2A)(a) (s 1(2A) added by SI 2000/3251). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 4 Transport Act 1962 s 1(2). Two of the members are appointed by the Scottish Ministers after consultation with the Secretary of State and the chairman: s 1(2A)(b) (as added: see note 3).
- 5 Transport Act 1962 s 1(6) (amended by SI 2000/3251).
- 6 Transport Act 1962 s 1(6A)(a) (s 1(6A) added by SI 2000/3251). Likewise, the Scottish Ministers are to have regard to the desirability of having members who appear to them to have special knowledge of Scotland: Transport Act 1962 s 1(6A)(b) (as so added). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.
- 7 'Function' includes powers, duties and obligations: Transport Act 1962 s 92(1).
- 8 Transport Act 1962 Sch 1 para 7(1). This provision also applies to any appointment to the board made by the Scottish Ministers: see Sch 1 para 7(1A) (added by SI 2000/3251). As to members interests see further PARA 727.
- 9 Transport Act 1962 Sch 1 para 6(1).
- 10 As to the meaning of 'writing' see PARA 22 note 1.
- 11 Transport Act 1962 Sch 1 para 6(2) (Sch 1 para 6(2) substituted, (3) added, by SI 2000/3251). Any member appointed by the Scottish Ministers may by notice in writing to them resign that member's office: see the Transport Act 1962 Sch 1 para 6(3) (as so added).
- 12 As to the meaning of 'Treasury' see PARA 108 note 6.
- 13 Transport Act 1962 Sch 1 para 8(1)(a). The references to the approval of the Treasury (which, by virtue of the Minister for the Civil Service Order 1968, SI 1968/1656, art 2(1)(c), 3(2) (lapsed) are to have effect as if they were references to the Minister for the Civil Service) are omitted: Transport Act 1962 Sch 1 para 8(1)(b) (substituted by SI 2000/3251). It is thought this substitution is an error. The Transport Act 1962 Sch 1 para 8(1)(b) as enacted and subsequently amended, read: 'in the case of any of the members as to whom the Secretary of State may, with the approval of the Treasury, determine that such provision should be made, must pay to or in respect of them such pensions as he may determine; (by virtue of the Minister for the Civil Service Order 1968, SI 1968/1656, art 2(1)(c), 3(2), the reference above to the approval of the Treasury is to have effect as if it were a reference to the approval of the Minister for the Civil Service)': Transport Act 1962 Sch 1 para 8(1)(b) (amended by the Transport Act 1968 s 67). 'Pension', in relation to a person, means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of him, and includes a gratuity so payable and a return of contributions to a pension fund, with or without interest thereon or any other addition thereto and any sums payable on or in respect of the death of that person: Transport Act 1962 s 92(1). As to pensions and pension schemes see ss 73, 74 (amended by the Statute Law Revision (Consequential Repeals) Act 1965; Arbitration Act 1996 s 107(1), Sch 3 para 16(2); Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 53, 54); and the Transport Act 1968 s 136 (amended by the Railways Act 1993 s 152, Sch 14).
- 14 Transport Act 1962 Sch 1 para 8(1). As to the application of Sch 1 para 8(1) to appointments made by the Scottish Ministers see Sch 1 para 8(1A) (Sch 1 para 8(1A) added, (3) amended, by SI 2000/3251). So much of Sch 1 para 8(1) as requires that the pensions, if any, which are to be paid in the case of members of the board are to be determined by the Secretary of State with the approval of the Treasury (or in the case of appointments made by them, by the Scottish Ministers) does not apply in relation to any pension payable apart from the provisions of Sch 1 para 8: Sch 1 para 8(3) (as so amended).
- 15 As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.
- 16 Transport Act 1962 Sch 1 para 8(2) (Sch 1 para 8(2) amended, (2A) added, by SI 2000/3251). As to the equivalent provision in relation to appointments made by the Scottish Ministers see Sch 1 para 8(2A) (as so added).
- 17 See the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt II; and **PARLIAMENT** vol 78 (2010) PARA 908.



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## **727. Status and proceedings of the British Waterways Board.**

The British Waterways Board<sup>1</sup> is a public authority<sup>2</sup>, and body corporate with perpetual succession and a common seal<sup>3</sup>. The board may act notwithstanding a vacancy among its members<sup>4</sup>. The quorum of the board is three and, subject as above, the board may regulate its own procedure<sup>5</sup>. The application of the seal of the board must be authenticated by the signature of the secretary of the board or some other person authorised by the board, either generally or specially, to act for that purpose<sup>6</sup>. Every document purporting to be an instrument issued by the board and to be so sealed, or to be signed on behalf of the board, must be received in evidence and is deemed to be such an instrument without further proof unless the contrary is shown<sup>7</sup>.

A member of the board who is in any way directly or indirectly interested in a contract made or proposed to be made by the board must disclose the nature of his interest at a meeting of the board; and the disclosure must be recorded in the minutes of the board, and the member must not take any part in any deliberation or decision of the board with respect to that contract<sup>8</sup>. A member of the board need not attend in person at a meeting of the board in order to make any disclosure which he is so required to make if he takes reasonable steps to secure that the disclosure is made by a notice which is brought up and read at the meeting<sup>9</sup>.

The board is not to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown, or (subject to the express provisions of the Transport Act 1962 relating to stamp duty<sup>10</sup> and income tax) as exempt from any tax, duty, rate, levy or other charge whatsoever, whether general or local, and its property is not to be regarded as property of, or property held on behalf of, the Crown<sup>11</sup>.

1 As to the establishment of the British Waterways Board see PARA 725; and as to the constitution of the board see PARA 726.

2 See the Transport Act 1962 s 1(1).

3 Transport Act 1962 Sch 1 para 1.

4 Transport Act 1962 Sch 1 para 2. As to the appointment of members see PARA 726.

5 See the Transport Act 1962 Sch 1 para 3.

6 Transport Act 1962 Sch 1 para 4 (substituted by the Transport Act 1968 s 52(4)).

7 Transport Act 1962 Sch 1 para 5.

8 Transport Act 1962 Sch 1 para 7(2). As to the duty on the Secretary of State to ascertain, and on members or potential members to inform him of, prejudicial interests see PARA 726.

9 Transport Act 1962 Sch 1 para 7(3). A general notice given at a meeting of the board by a member of the board to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm, is regarded as a sufficient disclosure of his interest in relation to any contract so made: Sch 1 para 7(3).

10 As to exemptions from stamp duty see the Transport Act 1962 s 41 (amended by the Finance Act 1973 s 59(7), Sch 22 Part V; Commissioners for Revenue and Customs Act 2005 s 50).



11 Transport Act 1962 s 30 (amended by SI 1973/338). As to the legal status of such bodies see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 951 et seq. The power of the Comptroller and Auditor General to carry out an examination into the economy, efficiency and effectiveness of a body which has received public funds does not apply to the British Waterways Board: see the National Audit Act 1983 s 7, Sch 4 Pt I; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 717.

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## ***B. CONDUCT OF BUSINESS BY THE BRITISH WATERWAYS BOARD***

### **728. Conduct of its business by the British Waterways Board.**

The Secretary of State<sup>1</sup> may, after consultation with the British Waterways Board<sup>2</sup>, give to that board directions<sup>3</sup> of a general character as to the exercise and performance by the board of its functions<sup>4</sup> (including the exercise of rights conferred by the holding of interests in companies) in relation to matters which appear to him to affect the national interest<sup>5</sup>. The board, in framing and carrying out proposals involving substantial outlay on capital account by the board or by a subsidiary of the board<sup>6</sup>, must act on lines settled from time to time with the approval of the Secretary of State<sup>7</sup>. Similarly, in the exercise and performance of its functions as to training and education, the board must act on lines settled from time to time with the approval of the Secretary of State<sup>8</sup>.

Without prejudice to the above provisions, the Secretary of State may, after consultation with the board, direct it to discontinue any of its activities, dispose of any part of its undertaking, dispose of any assets held by it, call in any loan made by it or exercise any power it may possess to revoke any guarantees given by it<sup>9</sup>. However, the Secretary of State must not give any such directions unless he is satisfied that the carrying on of the activities or the retention of the part of the undertaking or the assets or the continuance of the loan or guarantee, as the case may be, is unnecessary for the proper discharge of the duties of the board under the Transport Act 1962<sup>10</sup>. The Secretary of State may, after consultation with the board, direct it to exercise its control over its subsidiary so as to require the subsidiary to discontinue any of its activities, dispose of any part of its undertaking, dispose of any assets held by it, call in any loan made by it or exercise any power it may possess to revoke any guarantees given by it<sup>11</sup>.

If it appears to the Secretary of State that there is anything which the board ought in the interests of national defence to have power to do, or which the board ought in the interests of national defence to be required to do, and that it would be consistent with the duties imposed on the board by the Transport Act 1962, he may authorise or direct the board to do that thing; and no limitation on the powers of the board contained in the Act or in any local enactment<sup>12</sup> prevents the board from acting in accordance with the authorisation or direction<sup>13</sup>.

The board must furnish the Secretary of State with such returns, accounts and other information with respect to its property and activities, and the property and activities of any company which is its subsidiary, as he may from time to time require<sup>14</sup>. However, the board must, as soon as possible after the end of each of its accounting years, make to the Secretary of State a report on the exercise and performance of its functions during that year and on its policy and programme, and the Secretary of State must lay a copy of every such report before each House of Parliament<sup>15</sup>. The report for any year must set out any direction given by the Secretary of State<sup>16</sup> to the board during that year, unless the Secretary of State has notified to the board his opinion that it is against the interests of national security to do so, and must include a statement of the salaries or fees and of the emoluments of each of the members of the board during that year<sup>17</sup>.

The board must operate a machinery for negotiation and consultation with staff<sup>18</sup>.

1 le the Secretary of State for Transport: see PARA 719. As to the exercise of the functions conferred on the Secretary of State by the Transport Act 1962 s 27(1)-(5) (see the text to notes 1-11) in relation to Scotland see s 27(8A)-(8C) (all added by SI 2000/3251).

2 As to the British Waterways Board see PARA 725 et seq. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

3 As to directions see PARA 724.

4 As to the meaning of 'function' see PARA 726 note 7.

5 Transport Act 1962 s 27(1) (amended by the Transport Act 1968 ss 46(5), 51(3)).

6 As to the meaning of 'subsidiary' see PARA 729 note 2. As to subsidiaries of the British Waterways Board see PARA 729. As to the financial duties of the board see PARA 750 et seq.

7 See the Transport Act 1962 s 27(2).

8 Transport Act 1962 s 27(3) (amended by the Transport Act 1968 ss 46(5), 51(3)).

9 Transport Act 1962 s 27(4).

10 Transport Act 1962 s 27(4) proviso.

11 Transport Act 1962 s 27(5).

12 'Local enactment' means any provision:

38 (1) in any local Act passed before the Transport Act 1962, or in any Act passed before the Transport Act 1962 and confirming a provisional order;

39 (2) in any order or other instrument made under such an Act; and

40 (3) in any order made under the Light Railways Act 1896;

and includes any provision of the Railways Clauses Consolidation Act 1845 or any other public Act as it is incorporated in an Act or instrument falling under head (1), (2) or (3) above: Transport Act 1962 s 92(1).

13 Transport Act 1962 s 27(6).

14 Transport Act 1962 s 27(7) (amended by the Railways Act 1974 s 4(6); and the Transport Act 2000 Sch 31 Pt IV).

15 Transport Act 1962 s 27(8) (amended by the Railways Act 1974 s 4(6); and the Transport Act 2000 Sch 31 Pt IV). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

16 le under the Transport Act 1962.

17 Transport Act 1962 s 27(8) (as amended: see note 15). As to payments to members of the board see PARA 726. As to the audited accounts of the board see PARA 756. Additional requirements are contained in the Transport Act 1968 s 48(6); and see PARA 749.

18 See the Transport Act 1968 s 137 (amended by SI 1970/1537; SI 1973/338; SI 1976/1775; the Railways Act 1993 s 152(1), (3), Sch 12 para 6(1), (7), Sch 14; SI 1997/2971; SI 2002/2626).

## UPDATE

### 728 Conduct of its business by the British Waterways Board

NOTE 18--Transport Act 1968 s 137 further amended: Local Transport Act 2008 Sch 4 para 14.

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## **729. Subsidiaries of the British Waterways Board.**

It is the duty of the British Waterways Board<sup>1</sup> to exercise its control over each of its subsidiaries<sup>2</sup> so as to ensure that the subsidiary:

- 1437 (1) does not engage in activities in which the board has no power to engage (including activities in which the board has no power to engage because the consent of the Secretary of State<sup>3</sup> has not been obtained)<sup>4</sup>;
- 1438 (2) does not do anything which the Secretary of State has directed the board not to do<sup>5</sup>;
- 1439 (3) does not, except with the consent of the Secretary of State, borrow money from any person<sup>6</sup> other than the board<sup>7</sup>; and
- 1440 (4) does not, except with the consent of the Secretary of State, raise money by the issue of shares or stock to any person other than the board<sup>8</sup>.

The Secretary of State may give to the board such directions<sup>9</sup> as appear to him appropriate for ensuring that the board carries out the duty so imposed on it<sup>10</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 'Subsidiary', in relation to any body corporate, means a body corporate which is a subsidiary of the first mentioned body corporate as defined by the Companies Act 1985 s 736: Transport Act 1962 s 92(1) (definition amended by the Companies Consolidation (Consequential Provisions) Act 1985 s 30, Sch 2; Companies Act 1989 s 144(4), Sch 18 para 4; Railways Act 1993 s 152, Sch 14); Transport Act 1968 s 159(1) (definition amended by the Railways Act 1993 s 36(5)). The Transport Act 1962 s 25(1) does not apply in the case of a joint subsidiary: see the Transport Act 1968 s 51(6) (amended by SI 2000/3251). For these purposes, where a company of which two or more authorities to which the Transport Act 1968 s 51 applies are members would, if those authorities were a single body corporate, be a wholly owned subsidiary of that body corporate, then, whether or not that company is apart from s 51(6) a subsidiary of one of those authorities, that company is deemed for the purposes of the Transport Act 1962 and of the provisions of the Transport Act 1968 other than Pt VI (ss 95-103) (drivers' hours) to be a wholly owned subsidiary of each of those authorities; and any such company is referred to in s 51 in relation to each of those authorities as a 'joint subsidiary' of that authority: s 51(5) (amended by the Goods Vehicles (Licensing of Operators) Act 1995 s 60(1), Sch 7 para 3).

3 I.e. the Secretary of State for Transport: see PARA 719. As to general provisions regarding powers exercisable subject to the Secretary of State's consent see PARA 730. As to the application of the Transport Act 1962 s 25 to the exercise by the British Waterways Board of its functions in Scotland see s 25(2A) (added by SI 2000/3251).

4 Transport Act 1962 s 25(1)(a).

5 Transport Act 1962 s 25(1)(b). As to the general powers of the Secretary of State to give directions see PARA 728. See also see the text to notes 9-10.

6 As to the meaning of 'person' see PARA 13 note 29.

7 Transport Act 1962 s 25(1)(c).

8 Transport Act 1962 s 25(1)(d).

9 As to directions see PARA 724.

10 Transport Act 1962 s 25(2).

**UPDATE**

**729 Subsidiaries of the British Waterways Board**

NOTE 2--In definition of 'subsidiary' reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159 (see **COMPANIES** vol 14 (2009) PARA 25): Transport Act 1962 s 92(1) (definition amended by SI 2009/1941).

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### **730. Powers exercisable subject to consent of the Secretary of State.**

Any consent which the Secretary of State<sup>1</sup> is authorised to give<sup>2</sup> may be given for any case or description of cases specified in the consent, or may be general, and may be given subject to conditions<sup>3</sup>. Nothing done by the British Waterways Board<sup>4</sup> is unlawful on the ground that it was done without the necessary consent of the Secretary of State<sup>5</sup>. If it appears to the Secretary of State that the board proposes to do anything, or has done anything, without the consent of the Secretary of State which in his opinion requires his consent, he must, after consultation with the board<sup>6</sup>, give it such directions<sup>7</sup> as appear to him to be appropriate<sup>8</sup>. The directions which the Secretary of State may give under this power in a case where the board has already done anything without his consent may in particular require the board to discontinue any activity or to dispose of any assets, and directions may be so given notwithstanding that they make it necessary for the board to dispose of assets at a loss<sup>9</sup>.

<sup>1</sup> ie the Secretary of State for Transport: see PARA 719.

<sup>2</sup> ie under the Transport Act 1962 ss 1-27 or the Transport Act 1968. The reference in s 28 to ss 1-27 also includes reference to the Transport Act 1968: see s 52(3).

<sup>3</sup> Transport Act 1962 s 28(1) (s 28(1), (2) amended, (5), (6) added, by SI 2000/3251). The Transport Act 1962 s 28(1), (2) (see the text to notes 4-5) also applies to any consent given by the Scottish Ministers: see s 28(1), (2) (as so amended). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

<sup>4</sup> As to the British Waterways Board see PARA 725 et seq.

<sup>5</sup> Transport Act 1962 s 28(2) (as amended: see note 3).

<sup>6</sup> As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

<sup>7</sup> As to directions see PARA 724.

<sup>8</sup> Transport Act 1962 s 28(3). Similar powers are given to the Scottish Ministers: see s 28(5), (6) (both as added: see note 3).

<sup>9</sup> Transport Act 1962 s 28(4).

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### **731. Transfer of undertakings to the British Waterways Board.**

The Secretary of State<sup>1</sup> may on application to him by the British Waterways Board<sup>2</sup> make an order transferring to the board all or part of the undertaking of any navigation authority<sup>3</sup> and any functions<sup>4</sup> or property of such authority<sup>5</sup>.

No such order is to be made if the navigation authority whose undertaking, functions or property are the subject of the order objects to the making of the order<sup>6</sup>. Nor is an order to be made for the transfer to the board of any property forming part of the permanent endowment of a charity or of any land<sup>7</sup> which is held by or in trust for a charity and is or has at any time been occupied for the purposes of the charity, unless an order<sup>8</sup> authorising the transfer has first been made<sup>9</sup>.

An order may contain such transitional, incidental, supplementary and consequential provisions as the Secretary of State considers necessary or expedient including<sup>10</sup> such provisions as he considers necessary or expedient with respect to:

- 1441 (1) the transfer of assets and liabilities, the payment of compensation and other financial adjustments<sup>11</sup>;
- 1442 (2) the amendment, adaptation or repeal of local enactments<sup>12</sup>;
- 1443 (3) the classification of any inland navigation to which the order applies as a commercial or cruising waterway<sup>13</sup> or for the navigation to be dealt with as an inland waterway forming part of the remainder of the board's undertaking<sup>14</sup>;
- 1444 (4) the imposition on the board of the responsibility for maintenance of the inland navigation appropriate to its classification under head (3) above<sup>15</sup>;
- 1445 (5) the inclusion of any such inland navigation in the British Waterways Act 1971<sup>16</sup>.

Nothing contained in the above provisions nor in any order made under them extends to prejudice or derogate from the jurisdiction or authority or any of the rights or privileges of the Corporation of Trinity House of Deptford Strond<sup>17</sup> without its consent<sup>18</sup>.

1 As to the Secretary of State see PARA 15 note 1. See also PARA 719.

2 As to the British Waterways Board see PARA 725 et seq.

3 'Navigation authority' means a person or body of persons (whether corporate or unincorporate) having a duty or power imposed or conferred by or under an enactment to manage or maintain an inland navigation: see the British Waterways Act 1983 s 10(1)(a). References to the undertaking of a navigation authority and to an inland navigation include an inland navigation which at the time of the making of an order under s 10 may no longer be navigable and references to a navigation authority include references to a body which no longer has any members but which, if it had members, would be such an authority: see s 10(1)(b). 'Inland navigation' means a canal or any inland navigation other than a canal, whether natural or artificial and whether tidal or not: see s 10(1)(a). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'enactment' see PARA 14 note 31.

4 'Functions' includes powers and duties: British Waterways Act 1983 s 2.

5 See the British Waterways Act 1983 s 10(2)(a). As to the making of orders under s 10 see PARA 732.

- 6 See the British Waterways Act 1983 s 10(2)(c).
- 7 As to the meaning of 'land' see PARA 14 note 21.
- 8 Ie an order made under the Charities Act 1960 s 29 (repealed): see the British Waterways Act 1983 s 10(2)(d). As to dispositions of charity land see now **CHARITIES** vol 8 (2010) PARA 395 et seq.
- 9 See the British Waterways Act 1983 s 10(2)(d).
- 10 Ie but without prejudice to the generality of the British Waterways Act 1983 s 10(3): see s 10(3).
- 11 See the British Waterways Act 1983 s 10(3)(a).
- 12 See the British Waterways Act 1983 s 10(3)(b). 'Repeal', in relation to a local enactment not contained in an Act, means revoke: see s 10(1)(a). 'Local enactment' means a local or private Act, a public general Act relating to London, an order or scheme made under an Act or confirmed by Parliament or brought into operation in accordance with special parliamentary procedure, or an enactment in a public general Act amending a local or private Act or any such order or scheme: see s 10(1)(a).
- 13 Ie within the meaning of the Transport Act 1968 s 104(1)(a) or (b): see PARA 741.
- 14 See the British Waterways Act 1983 s 10(3)(c). The board's undertaking referred to in the text is such an undertaking for the purposes of the Transport Act 1968 s 104(1)(c) (see PARA 741): see the British Waterways Act 1983 s 10(3)(c).
- 15 See the British Waterways Act 1983 s 10(3)(d).
- 16 See the British Waterways Act 1983 s 10(3)(e). The provision of the British Waterways Act 1971 to which the text refers is Sch 1 to that Act (see PARA 786): see the British Waterways Act 1983 s 10(3)(e). An order under s 10 must not include any provision inconsistent with any order mentioned in the Charities Act 1960 s 29 (repealed): see the British Waterways Act 1983 s 10(3) proviso.
- 17 As to the Corporation of Trinity House of Deptford Strond see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1069.
- 18 See the British Waterways Act 1983 s 10(4).



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### **732. Orders transferring undertakings, functions or property of navigation authorities.**

Before determining whether to make an order on an application under the provisions relating to the transfer of undertakings to the British Waterways Board<sup>1</sup>, the Secretary of State must consult<sup>2</sup>:

- 1446 (1) the navigation authority<sup>3</sup> from whom any functions<sup>4</sup> or property are proposed in the application to be transferred to the board (except where the authority is a body which no longer has any members)<sup>5</sup>;
- 1447 (2) in the case of an order adding to the commercial waterways in the Transport Act 1968<sup>6</sup>, any organisation appearing to him to represent persons<sup>7</sup> operating, or desiring to operate, commercial freight-carrying vessels on the inland navigation<sup>8</sup>; and
- 1448 (3) the Inland Waterways Advisory Council<sup>9</sup>.

If the Secretary of State proposes to make an order on the application, he must prepare a draft order, and must cause notice of his intention to make an order, and of the place where copies of the draft order, and of any map to which it refers, may be inspected and obtained, and of the time (not being less than 28 days) within which, and the manner in which, objections to the draft order may be made:

- 1449 (a) to be published in the London Gazette, and in such other manner as he thinks best adapted for informing persons affected<sup>10</sup>; and
- 1450 (b) to be served on the navigation authority from whom any functions or property are proposed to be transferred (and on any other body, being a navigation authority, conservancy authority, harbour authority, a general lighthouse authority<sup>11</sup>, a water authority or other statutory water undertaker<sup>12</sup>, appearing to the Secretary of State to be affected by the proposals)<sup>13</sup>.

Before making any order on the application the Secretary of State must consider any objections which may be made to the draft order, and may if he thinks fit cause a local inquiry to be held with respect to any such objections; and in making the order the Secretary of State may make such modifications in the terms of the draft as appears to him desirable<sup>14</sup>.

After making such an order, the Secretary of State must, if an objection has been made by any body on whom notice is required to be served<sup>15</sup> and has not been withdrawn, serve notice of the making of the order and its effect on every such body who has made objection which has not been withdrawn<sup>16</sup>. Where a notice is required to be so served the order does not have effect before the expiry of a period of 28 days from the date of service of that notice; and if within that period any such body gives notice to the Secretary of State objecting to the order, and the objection is not withdrawn, the order is subject to special parliamentary procedure<sup>17</sup>.

After making the order, the Secretary of State must publish in the London Gazette, and in such other manner as he thinks best adapted for informing persons affected, a notice stating that

the order has been made, and naming a place where a copy of it may be seen at all reasonable hours<sup>18</sup>.

If any person aggrieved<sup>19</sup> by an order under the British Waterways Act 1983 desires to question its validity on the ground that it is not within the powers of the Act, or that any requirement of the Act has not been complied with in relation to the order, he may, within six weeks after the first publication of the notice of the making of the order<sup>20</sup> make an application for the purpose to the High Court; and if any such application is made, the court, if satisfied that the order is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by any requirements of the Act not having been complied with, may quash the order either generally or in so far as it affects the applicant<sup>21</sup>. Except as so provided<sup>22</sup>, the validity of an order under the British Waterways Act 1983 may not, either before or after the order has been made, be questioned in any legal proceedings whatsoever<sup>23</sup>.

The costs incurred by the Secretary of State in connection with the making and notification of an order under the British Waterways Act 1983<sup>24</sup> are to be paid by the board<sup>25</sup>.

1    Ie an order under the British Waterways Act 1983 s 10: see PARA 731. As to the British Waterways Board see PARA 725 et seq.

2    As to the Secretary of State see PARA 15 note 1. See also PARA 719. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

3    As to the meaning of 'navigation authority' see PARA 731 note 3.

4    As to the meaning of 'functions' see PARA 731 note 4.

5    See the British Waterways Act 1983 Sch 1 para 1(a).

6    Ie the Transport Act 1968 s 104, Sch 12 Pt I: see PARA 741.

7    As to the meaning of 'person' see PARA 13 note 29.

8    See the British Waterways Act 1983 Sch 1 para 1(b). In Sch 1, 'inland navigation' means any inland navigation as defined in s 10(1)(a), (b) (see PARA 731 note 3) in respect of which application is made for an order under the British Waterways Act 1983: see Sch 1 para 8.

9    See the British Waterways Act 1983 Sch 1 para 1(c) (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 2 para 175(1)(a), (2)). As to the constitution and functions of the Inland Waterways Advisory Council (formerly the Inland Waterways Amenity Advisory Council) see PARA 737.

10   See the British Waterways Act 1983 Sch 1 para 2(a).

11   Ie within the meaning of the Merchant Shipping Act 1894 s 634 (repealed): see the British Waterways Act 1983 Sch 1 para 2(b). As to the meaning of 'general lighthouse authority' in the Merchant Shipping Act 1995 see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1068.

12   For these purposes, 'statutory water undertakers' has the meaning assigned to it by the Water Act 1973 s 11(6) (repealed) (see now PARA 134 note 1): see the British Waterways Act 1983 Sch 1 para 8.

13   See the British Waterways Act 1983 Sch 1 para 2(b).

14   See the British Waterways Act 1983 Sch 1 para 3.

15   Ie under the British Waterways Act 1983 Sch 1 para 2: see head (b) in the text.

16   See the British Waterways Act 1983 Sch 1 para 4(1).

17   See the British Waterways Act 1983 Sch 1 para 4(2). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq.

18   See the British Waterways Act 1983 Sch 1 para 5. However, in the case of an order to which Sch 1 para 4(1) (see the text to notes 15-16) applies the notice must not be published until the expiry of the period of 28

days referred to in Sch 1 para 4(2) (see the text to note 17), and must state whether or not the order is to be subject to special parliamentary procedure: see Sch 1 para 5 proviso.

19 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

20 Ie the notice required by the British Waterways Act 1983 Sch 1 para 5: see the text to note 18.

21 See the British Waterways Act 1983 Sch 1 para 6(1). However, Sch 1 para 6(1) does not apply to any order which is confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARA 926), and has effect in relation to any other order which is subject to special parliamentary procedure by virtue of the provisions of the British Waterways Act 1983 Sch 1 as if, for the reference to the first publication of the notice required by Sch 1 para 5, there was substituted a reference to the date on which the order becomes operative under the Statutory Orders (Special Procedure) Act 1945: see the British Waterways Act 1983 Sch 1 para 6(2).

22 Ie except as provided by the British Waterways Act 1983 Sch 1 para 6(1): see the text to notes 19-21.

23 See the British Waterways Act 1983 Sch 1 para 6(3). As to judicial review of decisions expressed in this way to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

24 Ie including any costs incurred in relation to any such order under the Statutory Orders (Special Procedure) Act 1945.

25 See the British Waterways Act 1983 Sch 1 para 7.

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### **(iii) The Environment Agency**

#### **733. Role of the Environment Agency.**

The Environment Agency<sup>1</sup> has functions as a navigation authority, harbour authority or conservancy authority in relation to some inland waterways in England and Wales<sup>2</sup>. The Agency also has duties in relation to the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters, the conservation of flora and fauna which are dependent on an aquatic environment, and the use of such waters and land for recreational purposes<sup>3</sup>. The Environment Agency has power to make byelaws in relation to certain recreational waterways for any matter falling within its functions as the authority responsible for maintaining and improving those waterways for the purposes of recreation and leisure and for controlling the navigation of those waterways<sup>4</sup>. The Agency also has certain general navigation powers where navigable waters are not under the control of a navigation, harbour or conservancy authority<sup>5</sup>.

1 As to the Environment Agency see PARA 17.

2 As to such functions see PARA 709.

3 See the Environment Act 1995 s 6; and PARAS 675, 683. As to general duties as to water amenity and recreation see also PARA 684 et seq.

4 See PARA 709.

5 See PARA 710.

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## **(iv) The Broads Authority**

### **734. The Broads Authority.**

The Broads Authority is a body corporate which performs the functions conferred on it by the Norfolk and Suffolk Broads Act 1988<sup>1</sup>. The Authority consists of nine members appointed by the various local authorities in Norfolk and Suffolk<sup>2</sup>, ten members appointed by the Secretary of State<sup>3</sup>, and two members appointed by the Authority from those members of its navigation committee<sup>4</sup> who are not already members of the Authority<sup>5</sup>.

Every member of the Authority is appointed for such term, not exceeding four years, as the person appointing him may specify<sup>6</sup>, and holds and vacates office in accordance with the terms of his appointment<sup>7</sup>. The appointment of a person to the Authority by a local authority ends if he ceases to be a member of the authority<sup>8</sup>; and a local authority may at any time end the appointment of a person appointed to the Authority by that local authority and appoint another person in his place<sup>9</sup>. The appointment to the Authority of a member of the navigation committee ends if he ceases to be a member of that committee<sup>10</sup>. The appointment of any person to the Authority may be ended by resignation by notice in writing<sup>11</sup> given to the proper officer of the Authority<sup>12</sup>. Where a vacancy among the persons appointed to the Authority occurs for any reason other than one mentioned above, the relevant appointing authority must give notice of that fact to the Authority or (as the case may require) the Authority must give notice of that fact to the relevant authority<sup>13</sup>. The proper officer of the Authority must as soon as practicable publish notice of any appointment to the Authority, or ending of such an appointment, and any such notice must give the name of the person concerned<sup>14</sup>.

The Authority must in every year hold an annual meeting and such other meetings as it thinks fit<sup>15</sup>. The annual meeting of the Authority must be the first meeting held after 1 July in the year in question<sup>16</sup>; and the date and time for any meeting of the Authority must be determined by the Authority<sup>17</sup>. The chairman of the Authority may call a meeting of the Authority at any time<sup>18</sup>; and any five or more members of the Authority may call a meeting of the Authority if they have made a written request to the chairman for such a meeting but the chairman has either refused to call the meeting or has failed to call it before the end of the period of seven days beginning with the date of the making of the request<sup>19</sup>. No business may be transacted at any meeting of the Authority unless more than one quarter of its members are present<sup>20</sup>. If, at any meeting of the Authority, both the chairman and vice-chairman of the Authority are absent, another member, chosen by the members present, must preside<sup>21</sup>.

The Authority must in each year appoint a chairman and vice-chairman from among its members<sup>22</sup>. The Authority must not appoint a person to the office (by whatever name it is known) of chief officer of the Authority, or determine, or vary, any of the terms and conditions on which he is employed by the Authority, without first consulting Natural England<sup>23</sup>.

Provision is made for the alteration of the constitution of the Authority in certain circumstances<sup>24</sup>. The Authority is under a duty to adopt a code of conduct for its members<sup>25</sup>.

1 Norfolk and Suffolk Broads Act 1988 s 1(1). As to the functions of the Authority see PARA 735. Information about the Broads Authority and its functions is available on the Authority's website at [www.broads-authority.gov.uk](http://www.broads-authority.gov.uk).

2 See the Norfolk and Suffolk Broads Act 1988 s 1(3)(a), (4).

3 Norfolk and Suffolk Broads Act 1988 s 1(3)(b). Not less than three of the members appointed by the Secretary of State must be appointed by him after consultation with such bodies appearing to him to represent boating interests as he considers appropriate (s 1(5)); and not less than two of the members appointed by the Secretary of State must be appointed by him after consultation with such bodies appearing to him to represent farming and landowning interests as he considers appropriate (s 1(6)). As to the Secretary of State see PARA 15 note 1. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

4 le the navigation committee established under the Norfolk and Suffolk Broads Act 1988 s 9: see PARA 735.

5 Norfolk and Suffolk Broads Act 1988 s 1(3)(c).

6 Norfolk and Suffolk Broads Act 1988 Sch 1 para 1(1). Any member of the Authority whose term of office has expired is, subject to the provisions of Sch 1, eligible for re-appointment: Sch 1 para 1(3).

7 Norfolk and Suffolk Broads Act 1988 Sch 1 para 1(2). The appointment of any person as a member of the Authority by a local authority or the Secretary of State takes effect on the receipt by the Authority of notification of the appointment, or if later, on the date on which a vacancy among those members of the Authority who were appointed by the person making the appointment in question first occurs after that appointment is made: see Sch 1 para 1(4). The appointment of any person as a member of the Authority by the Authority from the members of its navigation committee takes effect on the date on which the appointment is made, or if later, on the date on which a vacancy among the members of the Authority so appointed first occurs after the appointment is made: see Sch 1 para 1(5). Anyone appointed as a member of the Authority by any person may not, at any time after his appointment has taken effect and before it has ended, be appointed as such a member by any other person: Sch 1 para 1(6). As to the meaning of 'person' see PARA 13 note 29.

8 Norfolk and Suffolk Broads Act 1988 Sch 1 para 2(1). Where a person's appointment ends by virtue of this provision, the local authority must as soon as practicable give notice of that fact to the Authority: Sch 1 para 2(3). Schedule 1 para 2(3), (8) (see the text to note 13) and (9) (see the text to note 14) do not apply in relation to any person who ceases to be a member of the Authority by virtue of his retirement from membership of a local authority, is re-elected to membership of that local authority on the day of that retirement, and is re-appointed as a member of the Authority by that local authority: Sch 1 para 2(10).

9 Norfolk and Suffolk Broads Act 1988 Sch 1 para 2(4). Where an authority exercises its powers under Sch 1 para 2(4) it must give notice of the ending of the appointment to the Authority (Sch 1 para 2(5)(a)), and the new appointment takes effect, and the previous appointment ends, at the end of the period of one month beginning with the date on which the notice is given (Sch 1 para 2(5)(b)).

10 Norfolk and Suffolk Broads Act 1988 Sch 1 para 2(2).

11 As to the meaning of 'writing' see PARA 22 note 1.

12 See the Norfolk and Suffolk Broads Act 1988 Sch 1 para 2(6), (7), (11).

13 Norfolk and Suffolk Broads Act 1988 Sch 1 para 2(8). This provision does not apply in the case of a member appointed by the Authority from the members of its navigation committee: see Sch 1 para 2(11). See also note 8.

14 Norfolk and Suffolk Broads Act 1988 Sch 1 para 2(9). See also note 8.

15 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(1). As to the place, notice and conduct of meetings see Sch 1 para 4.

16 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(2).

17 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(3).

18 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(4).

19 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(5).

20 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(6).

21 Norfolk and Suffolk Broads Act 1988 Sch 1 para 3(7).

22 See the Norfolk and Suffolk Broads Act 1988 Sch 1 para 5.

23 Norfolk and Suffolk Broads Act 1988 Sch 1 para 6 (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 1 para 112(c)). As to Natural England see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

24 See the Norfolk and Suffolk Broads Act 1988 s 7.

25 See the Local Government Act 2000 s 51; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 235. The Secretary of State has issued a model code of conduct, the provisions of which must be included in the code adopted by the Authority: see the Local Authorities (Model Code of Conduct) Order 2007, SI 2007/1159.

## **UPDATE**

### **734 The Broads Authority**

NOTE 3--Norfolk and Suffolk Broads Act 1988 s 1(5) substituted, s 1(6) omitted: Broads Authority Act 2009 Sch 7 para 1, Sch 8 Pt 1.

NOTE 23--Norfolk and Suffolk Broads Act 1988 Sch 1 para 6 further amended: Broads Authority Act 2009 Sch 7 para 10, Sch 8 Pt 1.

Halsbury's Laws of England/WATER AND WATERWAYS (VOLUME 100 (2009) 5TH EDITION, PARAS 1-452; VOLUME 101 (2009) 5TH EDITION, PARAS 453-851)/12. INLAND WATERWAYS/(2) SUPERVISION OF INLAND WATERWAYS/(iv) The Broads Authority/735. Functions of the Broads Authority.

### **735. Functions of the Broads Authority.**

It is the general duty of the Broads Authority<sup>1</sup> to manage the Broads<sup>2</sup> for the purposes of:

- 1451 (1) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads<sup>3</sup>;
- 1452 (2) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public<sup>4</sup>; and
- 1453 (3) protecting the interests of navigation<sup>5</sup>.

In discharging its functions, the Authority must have regard to: (a) the national importance of the Broads as an area of natural beauty and one which affords opportunities for open-air recreation<sup>6</sup>; (b) the desirability of protecting the natural resources of the Broads from damage<sup>7</sup>; and (c) the needs of agriculture and forestry and the economic and social interests of those who live or work in the Broads<sup>8</sup>. The Authority has various miscellaneous functions<sup>9</sup>; and power to do anything which is necessary or expedient for the purpose of enabling it to carry out its functions, or for incidental purposes, including power to acquire, manage, reclaim and dispose of land<sup>10</sup> or other property<sup>11</sup>, to carry out any building or other operations<sup>12</sup>, and to carry on any business or undertaking<sup>13</sup>.

The Authority must prepare and publish a plan (known as 'the Broads Plan') setting out its policy with respect to the exercise of its functions<sup>14</sup>, and review that plan at least once in every five years<sup>15</sup>. The Authority must also prepare a map showing any areas within the Broads whose natural beauty it is, in the opinion of the Authority, particularly important to conserve<sup>16</sup>, and at least once in every five years, review the particulars shown on the map and make such variations (if any) as it considers necessary<sup>17</sup>. The Authority may make byelaws for the purpose of securing that persons resorting to land<sup>18</sup> to which the byelaws apply do no damage to the land or anything in, on or under it, or interfere unduly with the enjoyment of the land by other persons<sup>19</sup>.

The Authority must maintain the navigation area<sup>20</sup> for the purposes of navigation to such standard as appears to it to be reasonably required, and take such steps to improve and develop it as it thinks fit<sup>21</sup>. The Authority may make byelaws for the good management of the navigation area, the conservation of its natural beauty and amenities and the promotion of its use for purposes of recreation<sup>22</sup>. The Authority also has certain additional functions in relation to the navigation area<sup>23</sup>. The Authority has powers to issue works licences in respect of the construction, alteration, renewal or extension any works, or the undertaking of any dredging, within or adjacent to the navigation area, which works are otherwise prohibited<sup>24</sup>.

The Broads Authority is a competent harbour authority for the purposes of the Pilotage Act 1987<sup>25</sup>.

Provision is made as to the finances and accounts of the Authority<sup>26</sup>. The Authority must, as soon as is reasonably practicable after the end of each financial year<sup>27</sup> prepare and publish a report on the discharge of its functions during that financial year<sup>28</sup>.

1 As to the Broads Authority see PARA 734.



2 'The Broads' means, subject to the variations made by the Norfolk and Suffolk Broads Act 1988 Sch 2 Pt I, and any variation made in accordance with the provisions of Sch 2 Pt II, the area coloured pink on the deposited map: s 2(3). 'Deposited map' means the set of maps dated November 1986 deposited in connection with the Norfolk and Suffolk Broads Bill in the office of the Clerk of the Parliaments and the Private Bill Office of the House of Commons: s 25(1). As to the Clerk of the Parliaments see **PARLIAMENT** vol 78 (2010) PARA 855. As to the Private Bill Office see **PARLIAMENT** vol 78 (2010) PARA 943.

3 Norfolk and Suffolk Broads Act 1988 s 2(1)(a) (s 2(1)(a), (b) substituted by the Natural Environment and Rural Communities Act 2006 s 64(1), (2)). References in the Norfolk and Suffolk Broads Act 1988 to conserving the natural beauty of an area include references to conserving its flora, fauna and geological and physiographical features: s 25(2).

4 Norfolk and Suffolk Broads Act 1988 s 2(1)(b) (as substituted: see note 3).

5 Norfolk and Suffolk Broads Act 1988 s 2(1)(c).

6 Norfolk and Suffolk Broads Act 1988 s 2(4)(a).

7 Norfolk and Suffolk Broads Act 1988 s 2(4)(b).

8 Norfolk and Suffolk Broads Act 1988 s 2(4)(c).

9 See the Norfolk and Suffolk Broads Act 1988 s 2(6), Sch 3 Pt II.

10 As to the meaning of 'land' see PARA 14 note 21.

11 Norfolk and Suffolk Broads Act 1988 s 2(7)(a).

12 Norfolk and Suffolk Broads Act 1988 s 2(7)(b).

13 Norfolk and Suffolk Broads Act 1988 s 2(7)(c).

14 Norfolk and Suffolk Broads Act 1988 s 3(1). The Broads Plan is available on the Authority's website at [www.broads-authority.gov.uk](http://www.broads-authority.gov.uk).

15 Norfolk and Suffolk Broads Act 1988 s 3(2).

16 Norfolk and Suffolk Broads Act 1988 s 4(1)(a).

17 Norfolk and Suffolk Broads Act 1988 s 4(1)(b).

18 Byelaws under the Norfolk and Suffolk Broads Act 1988 s 6 may only be made in respect of land within the Broads (1) of which the Authority is the owner or occupier; (2) to which the general public have a right of access; or (3) which is commonly used by the general public: s 6(2).

19 Norfolk and Suffolk Broads Act 1988 s 6(1). Byelaws made by the Authority are available on the Authority's website at [www.broads-authority.gov.uk](http://www.broads-authority.gov.uk).

20 'Navigation area' means, subject to any variation for the time being in force by virtue of an order under the Norfolk and Suffolk Broads Act 1988 s 8(3): (1) those stretches of the rivers Bure, Yare and Waveney, and their tributaries, branches and embayments (including Oulton Broad) which, at the passing of the Norfolk and Suffolk Broads Act 1988, were in use for navigation by virtue of any public right of navigation; (2) the banks of the waterways which make up those stretches; and (3) Haddiscoe New Cut and its banks; but does not include any part of the Haven or any part of any bank which lies above the level of mean high water spring tides (in the case of a tidal waterway) or above the mean water level (in any other case): s 8(1). As to the public right of navigation see PARA 689 et seq. In response to any proposal made to him by the Authority for the variation of the navigation area in a manner which does not affect its boundary with the Haven, the Secretary of State may by order vary the navigation area in accordance with the proposal: see s 8(3), (4). As to the Secretary of State see PARA 15 note 1. Subject to any provisions made by or under the Norfolk and Suffolk Broads Act 1988, the navigation area is open to any person (upon payment by him of all navigation charges) for navigation, the shipping and unshipping of goods, and the embarking and landing of passengers: see s 8(5), (7). However, the navigation area is not open for the navigation of any hovercraft or any other prescribed class or description of craft: see s 8(6), (8). As to the meaning of 'person' see PARA 13 note 29.

21 See the Norfolk and Suffolk Broads Act 1988 s 10(1), (2). The Authority must appoint a committee of the Authority to be known as the navigation committee: see s 9, Sch 4. The Authority must keep under review the extent to which its functions in relation to the navigation area are delegated to the navigation committee: s

9(7). In exercising its functions the Authority must have regard to any representations made to it by the navigation committee on matters relating to the navigation area: s 9(9).

22 See the Norfolk and Suffolk Broads Act 1988 s 10(3), (4).

23 See the Norfolk and Suffolk Broads Act 1988 s 10(5), Sch 5 Pt I.

24 See the Norfolk and Suffolk Broads Act 1988 ss 11, 12.

25 See the Broads Authority (Pilotage Powers) Order 1991, SI 1991/1633. As to the Pilotage Act 1987 see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 562 et seq.

26 See the Norfolk and Suffolk Broads Act 1988 Pt III (ss 13-17).

27 'Financial year' means the period of 12 months ending with 31 March in any year: Norfolk and Suffolk Broads Act 1988 s 25(1).

28 See the Norfolk and Suffolk Broads Act 1988 s 20.

## **UPDATE**

### **735 Functions of the Broads Authority**

TEXT AND NOTES--As to provision for further powers and functions of the Broads Authority see the Broads Authority Act 2009; and PARA 736A.

NOTE 4--Also, head (4) Breydon Water and Lower Bure: Norfolk and Suffolk Broads Act 1988 s 8(1) (amended by the Broads Authority Act 2009 Sch 7 para 3(1)). Norfolk and Suffolk Broads Act 1988 s 8(7) omitted: Broads Authority Act 2009 Sch 7 para 3(2).

NOTE 9--Norfolk and Suffolk Broads Act 1988 Sch 3 Pt II amended: Broads Authority Act 2009 Sch 7 para 11.

TEXT AND NOTE 21--Norfolk and Suffolk Broads Act 1988 s 10(2) omitted: Broads Authority Act 2009 Sch 8 Pt 1. The Authority may carry out works and do other things in relation to any adjacent waters in or over which it has sufficient rights or interest for the improvement or navigation on those waters: Norfolk and Suffolk Broads Act 1988 s 10(2A) (added by the Broads Authority Act 2009 Sch 7 para 5(1)).

NOTE 21--Norfolk and Suffolk Broads Act 1988 s 9 amended: Broads Authority Act 2009 Sch 7 para 4(1), (2), Sch 8 Pt 1. Norfolk and Suffolk Broads Act 1988 s 9(9) substituted: Broads Authority Act 2009 Sch 7 para 4(3).

NOTE 24--Norfolk and Suffolk Broads Act 1988 s 11 amended: Broads Authority Act 2009 Sch 7 para 6.

NOTE 26--Norfolk and Suffolk Broads Act 1988 ss 13, 17 amended: Broads Authority Act 2009 Sch 7 paras 7, 8, Sch 8 Pt 1.

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### **736. General duty of public bodies in relation to the Broads.**

In exercising or performing any functions in relation to, or so as to affect, land<sup>1</sup> in the Broads<sup>2</sup>, a relevant authority must have regard to the purposes of:

- 1454 (1) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads<sup>3</sup>;
- 1455 (2) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public<sup>4</sup>; and
- 1456 (3) protecting the interests of navigation<sup>5</sup>.

The following are relevant authorities for these purposes: (a) any Minister of the Crown<sup>6</sup>; (b) any public body<sup>7</sup>; (c) any statutory undertaker<sup>8</sup>; (d) any person holding public office<sup>9</sup>.

1 As to the meaning of 'land' see PARA 14 note 21.

2 As to the meaning of 'the Broads' see PARA 735 note 2.

3 Norfolk and Suffolk Broads Act 1988 s 17A(1)(a) (s 17A added by the Countryside and Rights of Way Act 2000 s 97; the Norfolk and Suffolk Broads Act 1988 s 17A(1)(a), (b) substituted by the Natural Environment and Rural Communities Act 2006 s 64(1), (3)). As to the meaning of references to conserving the natural beauty of an area see PARA 735 note 3.

4 Norfolk and Suffolk Broads Act 1988 s 17A(1)(b) (as added and substituted: see note 3).

5 Norfolk and Suffolk Broads Act 1988 s 17A(1)(c) (as added: see note 3).

6 Norfolk and Suffolk Broads Act 1988 s 17A(2)(a) (as added: see note 3).

7 Norfolk and Suffolk Broads Act 1988 s 17A(2)(b) (as added: see note 3). 'Public body' includes: (1) a county council, district council or parish council; (2) a joint planning board within the meaning of the Town and Country Planning Act 1990 s 2 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) para 30); (3) a joint committee appointed under the Local Government Act 1972 s 102(1)(b) (**LOCAL GOVERNMENT** vol 69 (2009) PARA 371): Norfolk and Suffolk Broads Act 1988 s 17A(3) (as so added). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

8 Norfolk and Suffolk Broads Act 1988 s 17A(2)(c) (as added: see note 3). 'Statutory undertaker' means: (1) any person who is a statutory undertaker for the purposes of the Town and Country Planning Act 1990 (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1009); (2) any other person who exercises functions under the Land Drainage Act 1991; (3) any water undertaker or sewerage undertaker whose area includes any part of the Broads; and (4) any electronic communications code operator: Norfolk and Suffolk Broads Act 1988 s 25(1) (definition amended by SI 1989/1380; the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 76; Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 47; Communications Act 2003 s 406(1), Sch 17 para 89). As to the meaning of 'person' see PARA 13 note 29. As to land drainage bodies see PARA 569 et seq. As to the meaning of 'water undertaker' see PARA 137 note 4. As to water undertakers' areas see PARA 318. As to electronic communications code operators see **TELECOMMUNICATIONS** vol 97 (2010) PARA 163.

9 Norfolk and Suffolk Broads Act 1988 s 17A(2)(d) (as added: see note 3). 'Public office' means: (1) an office under Her Majesty; (2) an office created or continued in existence by a public general Act; or (3) an office the remuneration in respect of which is paid out of money provided by Parliament: s 17A(3) (as so added).

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### **736A. Regulation and management of navigation area.**

The Broads Authority Act 2009 confers further powers on the Broads Authority, by making provision (1) enabling the Authority to give directions in respect of vessels in the navigation area (see the Broads Authority Act 2009 s 8) for the purpose of promoting or securing conditions conducive to the ease, convenience or safety of navigation and the safety of persons and property in the navigation area (Broads Authority Act 2009 ss 4-10, Sch 1); (2) with respect to the safety of vessels on the Broads, including in relation to registration and the recovery of tolls (Broads Authority Act 2009 s 11), construction and equipment standards (Broads Authority Act 2009 s 12 (in force in part)), the creation of a standards appeal panel (Broads Authority Act 2009 s 13, Sch 2) and insurance requirements (Broads Authority Act 2009 ss 14, 15, Sch 3); (3) empowering an authorised officer to board a vessel or relevant adjacent land in prescribed circumstances (Broads Authority Act 2009 ss 17, 24); (4) in relation to unsafe vessels (Broads Authority Act 2009 ss 18-20); (5) in relation to the information that owners of relevant vessels or land must provide if requested (Broads Authority Act 2009 ss 21-23); (6) allowing the Authority to designate any part of the navigation area as a zone where water skiing or wake boarding is to be permitted, and make various procedural provision relating to this power (Broads Authority Act 2009 ss 25-32 (not yet in force)); (7) concerning Breydon Water, Lower Bure (Broads Authority Act 2009 s 35, Sch 4 (in force in part)) and Haddiscoe Cut (Broads Authority Act 2009 s 36 (in force in part)); (8) permitting the Authority to enter into agreements (Broads Authority Act 2009 s 37); (9) concerning the use by the Authority of information held by it (Broads Authority Act 2009 s 38); (10) authorising the Authority to remove vegetation where appropriate (Broads Authority Act 2009 s 39, Sch 5); and (11) limiting the exercise of the Authority's powers in order to ensure the proper functioning of Network Rail (Broads Authority Act 2009 s 41).

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## **(v) The Inland Waterways Advisory Council**

### **737. Establishment and functions of the Inland Waterways Advisory Council.**

The Inland Waterways Advisory Council<sup>1</sup> consists of a chairman and not less than 12 other members<sup>2</sup>. The chairman is to be appointed by the Secretary of State<sup>3</sup> after consultation with the Scottish Ministers<sup>4</sup>; two of the members are to be appointed by the Scottish Ministers after consultation with the Secretary of State<sup>5</sup>; and the other members of the Council are to be appointed by the Secretary of State<sup>6</sup>. The members must include persons who appear to the person making the appointment to have wide knowledge of, and interest in, inland waterways<sup>7</sup>.

The council must provide the Secretary of State and navigation authorities<sup>8</sup> with such advice as appears to the Council appropriate about matters relevant to inland waterways in England and Wales<sup>9</sup>, and it may provide any other interested person<sup>10</sup> with such advice<sup>11</sup>.

The Council may, with the approval of the Secretary of State and after consulting the Scottish Ministers, appoint such regional committees as it thinks fit, and it may appoint such other committees as it thinks fit<sup>12</sup>. The Council may determine the procedure (including quorum) of the Council or any committee<sup>13</sup>.

1 This body was established by the Transport Act 1968 s 110 (as originally enacted) and known then as the Inland Waterways Amenity Advisory Council: see the Natural Environment and Rural Communities Act 2006 s 73. The Natural Environment and Rural Communities Act 2006 Pt 7 (ss 73-77) severs the administrative connections that this body used to have with the British Waterways Board, establishing it as an independent body, and replacing the Council's former statutory advisory functions with wider terms of reference (see the text to notes 8-11). As to the British Waterways Board see PARA 725 et seq.

2 Transport Act 1968 s 110(1), (2) (s 110 substituted by the Natural Environment and Rural Communities Act 2006 s 74). Information about the Inland Waterways Advisory Council and its functions is available on the Council's website at [www.iwac.org.uk](http://www.iwac.org.uk).

3 As to the Secretary of State see PARA 15 note 1.

4 Transport Act 1968 s 110(3) (as substituted: see note 2). The Secretary of State may pay the chairman of the council such remuneration as the Secretary of State may determine: s 110A(5) (s 110A added by the Natural Environment and Rural Communities Act 2006 s 75). Where the chairman is in receipt of such remuneration he is not to be paid any allowance under the Transport Act 1968 s 110A(4) (see note 7) in respect of loss of remunerative time: s 110A(6) (as so added). The chairman of the Inland Waterways Advisory Council is disqualified for membership of the House of Commons: see the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt III (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 2 para 175(1)(a), (2)); and **PARLIAMENT** vol 78 (2010) PARA 908. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 Transport Act 1968 s 110(4) (as substituted: see note 2). In making those appointments, the Scottish Ministers must have regard to the desirability of appointing persons who appear to them to have specialist knowledge of Scotland: s 110(5) (as so substituted).

6 Transport Act 1968 s 110(6) (as substituted: see note 2).

7 Transport Act 1968 s 110(7) (as substituted: see note 2). As to the meaning of 'inland waterway' see PARA 720 note 3. Persons appointed to be members of the council hold and vacate office in accordance with the terms of their appointment and, on ceasing to hold office, are eligible for reappointment; but any such person may at any time by written notice to the Secretary of State (or, as the case may be, the Scottish Ministers) resign his office: s 110A(1) (as added: see note 4). As to the meaning of 'written' see PARA 22 note 1. The

Secretary of State (or, as the case may be, the Scottish Ministers) may pay the members of the Council travelling and other expenses and allowances for loss of remunerative time: s 110A(4) (as so added).

8 'Navigation authority' means any person who has a duty or power under any enactment to work, maintain, conserve, improve or control any canal or other inland navigation, navigable river, estuary, harbour or dock: Transport Act 1968 s 110B(2) (s 110B added by the Natural Environment and Rural Communities Act 2006 s 76). 'Harbour' means any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships, and any dock, including any pier, jetty or other place at which ships can ship or unship goods or passengers: Transport Act 1962 s 92(1); definition applied by the Transport Act 1968 s 159(1). 'Goods' includes animals: Transport Act 1962 s 92(1). As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'enactment' see PARA 14 note 31.

9 Transport Act 1968 s 110B(1)(a) (as added: see note 8). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Council role in providing advice to the Scottish Ministers, the British Waterways Board and other interested persons about matters relevant to inland waterways in Scotland see s 110C (added by the Natural Environment and Rural Communities Act 2006 s 77).

10 'Interested person', in relation to any matter, means a person appearing to the Council to have a sufficient interest in the matter: Transport Act 1968 s 110B(3) (as added: see note 8).

11 Transport Act 1968 s 110B(1)(b) (as added: see note 8). The Secretary of State (and, as the case may be, the Scottish Ministers) must provide the council with such staff, accommodation, services and other facilities as appear to the Secretary of State (and the Scottish Ministers) to be necessary or expedient for the proper performance of the Council's functions: s 110A(7) (as added: see note 4).

12 Transport Act 1968 s 110A(2) (as added: see note 4).

13 Transport Act 1968 s 110A(3) (as added: see note 4).

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### **(3) DUTIES AND POWERS OF AUTHORITIES**

#### **(i) Duties and Powers of the British Waterways Board**

##### **A. IN GENERAL**

#### **738. General duties and powers of the British Waterways Board under the Transport Acts.**

It is the duty<sup>1</sup> of the British Waterways Board<sup>2</sup> in the exercise of its powers under the Transport Act 1962 to provide to such extent as it may think expedient:

- 1457 (1) services and facilities on the inland waterways<sup>3</sup> owned or managed by it<sup>4</sup>;  
and
- 1458 (2) port facilities<sup>5</sup> at any harbour owned or managed by it<sup>6</sup>,

and to have due regard to efficiency, economy and safety of operation as respects the services and facilities provided by it<sup>7</sup>.

Subject to the provisions of the Transport Act 1962, the board has power:

- 1459 (a) to carry goods and passengers by inland waterway and to provide facilities for traffic on the inland waterways owned or managed by it<sup>8</sup>;
- 1460 (b) to operate the harbours owned or managed by it and to provide port facilities at those harbours<sup>9</sup>;
- 1461 (c) to provide transport services by road<sup>10</sup>: (i) for the carriage of goods which have been or are to be carried by it by inland waterway<sup>11</sup>; and (ii) for the carriage of goods where the use of an inland waterway owned or managed by it has been temporarily interrupted, and to carry goods by those services<sup>12</sup>;
- 1462 (d) to abstract and sell untreated water<sup>13</sup> from any inland waterway owned or managed by the board for any purpose<sup>14</sup>, and to abstract and sell water from any other source, and otherwise to purchase and treat water and to treat and dispose of effluent<sup>15</sup>;
- 1463 (e) to consign goods on behalf of other persons<sup>16</sup> on routes wholly or partly over any of the inland waterways owned or managed by it or to or from, or on routes through, any of the harbours owned or managed by it<sup>17</sup>;
- 1464 (f) to store goods which have been or are to be carried on any of the inland waterways owned or managed by it, or which have been or are to be loaded or unloaded in or carried through any of the harbours owned or managed by it, and, so far as any premises provided for the purposes of that or any other part of its business are not required for those purposes, to use them to provide facilities for the storage of other goods<sup>18</sup>;
- 1465 (g) to enter into and carry out agreements<sup>19</sup>: (i) with carriers outside Great Britain<sup>20</sup> for the through carriage of goods and passengers under one contract or at a through rate or in the same vessels or containers<sup>21</sup>; and (ii) with any person

engaged in coastal shipping<sup>22</sup> for co-ordinating the activities of that person with those of the board and, in particular, for facilitating the through carriage of goods, for the quoting of through rates and for the pooling of receipts or expenses<sup>23</sup>.

1 The Transport Act 1962 s 10(1) is not to be construed as imposing, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court to which the board would not otherwise be subject: s 10(4) (amended by the Transport Act 1968 s 165(a), Sch 18 Pt I). However, this does not exclude common law liability: see *Burnett v British Waterways Board* [1973] 2 All ER 631, [1973] 1 WLR 700, CA.

2 As to the British Waterways Board see PARA 725 et seq.

3 As to the meaning of 'inland waterway' see PARA 720 note 3.

4 Transport Act 1962 s 10(1)(a). The duty of the board under s 10(1) to provide services and facilities on the inland waterways owned or managed by it extends only to the commercial waterways and cruising waterways: Transport Act 1968 s 107(1). It is the duty of the British Waterways Board: (1) to secure that each of the inland waterways comprised in its undertaking which is not a commercial waterway or a cruising waterway is dealt with in the most economical manner possible (consistent, in the case of a waterway which is retained, with the requirements of public health and the preservation of amenity and safety), whether by retaining and managing the waterway, by developing or eliminating it, or by disposing of it (s 107(2)(a)); and (2) to secure that the best possible financial return is obtained from any of its assets which is not an inland waterway or harbour and is not required in connection with the provision of services and facilities by the board, whether by exploiting it, by developing it, or by disposing of it (s 107(2)(b)). The Transport Act 1962 s 10(4) (see note 1) applies also to the duty imposed on the board by the Transport Act 1968 s 107(2): s 107(3). As to commercial waterways and cruising waterways see PARA 741. As to the meaning of 'harbour' see PARA 737 note 8.

5 'Port facilities' means the constructing, improving, maintaining, regulating, managing, marking or lighting of a harbour or any part thereof; the berthing, towing, moving or dry-docking of a ship which is in, or is about to enter, or has recently left, a harbour; the loading or unloading of goods, or embarking or disembarking of passengers, in or from any such ship; the lighterage or the sorting, weighing, warehousing or handling of goods in a harbour; and the movement of goods within a harbour: Transport Act 1962 s 92(1). As to the meaning of 'goods' see PARA 737 note 8.

6 Transport Act 1962 s 10(1)(b).

7 Transport Act 1962 s 10(1). Without prejudice to the powers of the British Waterways Board apart from the Transport Act 1968 s 50(6), the board also has power to provide services and facilities for the use for amenity or recreational purposes (including fishing) of the inland waterways and reservoirs owned or managed by it: see s 50(6); and PARA 748.

8 Transport Act 1962 s 10(3)(a). As to the similar powers that have been conferred on the canal undertakers (which can become common carriers) see PARA 782. The British Waterways Board is not to be regarded as a common carrier by rail or inland waterway: s 43(6) (amended by the Railways Act 2005 s 59(1), Sch 12 paras 1(1), (2)(c)); and see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 5.

9 Transport Act 1962 s 10(3)(b).

10 In addition to the powers of the board to provide the transport services by road authorised by the Transport Act 1962 s 10(3)(c), the board has power, with the consent of the Secretary of State for Transport (or, in connection with the exercise of the British Waterways Board's functions in Scotland, the Scottish Ministers) to provide other transport services by road for the carriage of goods and to carry goods by those services: see the Transport Act 1968 s 50(5) (amended by SI 2000/3251); and PARA 748. In the Transport Act 1968 'goods' includes animals and mails: s 159(1). As to the Secretary of State for Transport see PARA 719. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

11 Transport Act 1962 s 10(3)(c)(i).

12 Transport Act 1962 s 10(3)(c)(ii).

13 As to the power to abstract and sell untreated water see also the Transport Act 1962 s 62(1); and PARA 744. See also the Water Resources Act 1991 s 66; and PARAS 229, 233.

14 Transport Act 1962 s 10(3)(d).

15 Ie, except in Scotland, the British Waterways Board has power:



- 41 (1) to abstract water from any source other than that mentioned in the Transport Act 1962 s 10(3)(d) (see the text to notes 13-14) (s 10(3)(dd)(i) (s 10(3)(dd) added by SI 2003/1545));
- 42 (2) to purchase water (Transport Act 1962 s 10(3)(dd)(ii) (as so added));
- 43 (3) to treat water (s 10(3)(dd)(iii) (as so added));
- 44 (4) to sell any water other than that mentioned in s 10(3)(d) (s 10(3)(dd)(iv) (as so added));
- 45 (5) to treat and dispose of effluent (s 10(3)(dd)(v) (as so added)).

As to the supply of water for canals generally see PARAS 744, 781.

16 As to the meaning of 'person' see PARA 13 note 29.

17 Transport Act 1962 s 10(3)(e).

18 Transport Act 1962 s 10(3)(f). In addition to its power under the provisions of s 10(3)(f) to store certain goods and to use certain premises to provide facilities for the storage of other goods, the British Waterways Board has power, with the consent of the Secretary of State (or, in connection with the exercise of the board's functions in Scotland, the Scottish Ministers), to provide such facilities at any other premises: see the Transport Act 1968 s 50(1) (amended by the Transport Act 1981 s 40(1), Sch 12 Pt I; Transport Act 2000 s 274, Sch 31 Pt IV; SI 2000/3251); and PARA 748.

19 The board may enter into any such agreement notwithstanding that it involves the delegation of the functions of the board under any enactment relating to any part of its undertaking: see the Transport Act 1962 s 16(1), (2). As to the meaning of 'function' see PARA 726 note 7.

20 As to the meaning of 'Great Britain' see PARA 22 note 5.

21 Transport Act 1962 s 10(3)(g)(i).

22 'Coastal shipping' means the carrying of goods or passengers in ships by sea to or from any point in Great Britain from or to any point in the United Kingdom, the Isle of Man, the Channel Islands or the Republic of Ireland, but does not include the carrying of goods or passengers in the exercise of a right of ferry legally established whether by Act of Parliament or otherwise: Transport Act 1962 s 92(1). As to the meaning of 'United Kingdom' see PARA 22 note 5. As to ferries see PARA 832 et seq.

23 Transport Act 1962 s 10(3)(g)(ii).

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### **739. Additional powers of the British Waterways Board under the Transport Acts.**

Subject to the Transport Act 1962, the British Waterways Board<sup>1</sup> has power:

- 1466 (1) to enter into and carry out agreements with any person<sup>2</sup> for the carrying on by that person, whether as agent for the board or otherwise, of any of the activities which the board may itself carry on<sup>3</sup>;
- 1467 (2) without prejudice to head (1) above, to enter into agreements with the other boards<sup>4</sup> and with any subsidiary<sup>5</sup> of any of the boards or of the holding company<sup>6</sup>, for the management, working and use by one party to the agreement of works, land<sup>7</sup> or other property belonging to the other party, and with respect to the rendering of services and the pooling of receipts or expenses<sup>8</sup>;
- 1468 (3) to acquire land for the purposes of its business<sup>9</sup>;
- 1469 (4) in places where those using the services and facilities provided by the board<sup>10</sup> may require it, to provide both for them and for other persons facilities for the purchase and consumption of food and drink, places for refreshment and such other amenities and facilities as it may appear to the board requisite or expedient to provide<sup>11</sup>;
- 1470 (5) to dispose (whether absolutely or for a term of years) of any part of the undertaking of the board or any property which in its opinion is not required by it for the purposes of its business, and, in particular, to dispose of an interest in, or right over, any property, which, subject to the interest or right, is retained by the board<sup>12</sup>;
- 1471 (6) to do anything for the purposes of advancing the skill of persons employed by the board<sup>13</sup> or the efficiency of the equipment of the board<sup>14</sup> or of the manner in which that equipment is operated, including the provision by the board, and the assistance of the provision by others, of facilities for training, education and research<sup>15</sup>;
- 1472 (7) to provide houses, hostels and other like accommodation for persons employed by the board<sup>16</sup>;
- 1473 (8) to make housing loans to persons employed by the board to assist them to acquire housing accommodation and to guarantee loans made by building societies and other bodies to such persons for housing purposes<sup>17</sup>;
- 1474 (9) to invest any sums which are not immediately required by the board for the purposes of its business<sup>18</sup>;
- 1475 (10) to turn its resources to account so far as not required for the purposes of its business<sup>19</sup>; and
- 1476 (11) to do all other things<sup>20</sup> which in its opinion are necessary to facilitate the proper carrying on of its business<sup>21</sup>.

The board has power to acquire any undertaking or part of an undertaking if the assets comprised in the undertaking or the part of the undertaking are wholly or mainly assets which the board require for the purposes of its business<sup>22</sup>. The board has power, for the purposes of its business in England and Wales<sup>23</sup>, with the consent of the Secretary of State<sup>24</sup>, to lend money to, or give a guarantee for the benefit of, any person for the purposes of an undertaking carried on by that person, or, where that person is a body corporate, any undertaking carried on by a

subsidiary of that body corporate<sup>25</sup>. The board has power, for the purposes of its business in England and Wales, with the consent of the Secretary of State<sup>26</sup>, to subscribe for or acquire any securities<sup>27</sup> of a body corporate<sup>28</sup>.

Each of the powers conferred on the board by certain provisions of the Transport Act 1962<sup>29</sup> is deemed to be in addition to, and not in derogation of, any other powers so conferred; and those provisions relate only to the capacity of the board as a statutory corporation, and nothing in them is to be construed as authorising the disregard by the board of any enactment or rule of law<sup>30</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 As to the meaning of 'person' see PARA 13 note 29.

3 Transport Act 1962 s 14(1)(a).

4 The Transport Act 1962 established the British Railways Board, the London Transport Board (now dissolved), the British Transport Docks Board (now dissolved) and the British Waterways Board, together with the Transport Holding Company, as successors to the British Transport Commission see PARA 714. As to the abolition of the British Railways Board see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 5, 44.

5 As to the meaning of 'subsidiary' see PARA 729 note 2.

6 The Transport Act 1962 referred to the Transport Holding Company, whose rights and liabilities have now been transferred to the National Freight Company Limited: see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 4.

7 'Land' includes any interest in land and any right over land: Transport Act 1962 s 92(1).

8 Transport Act 1962 s 14(1)(b). The British Waterways Board may enter into such an agreement notwithstanding that it involves the delegation of its functions under any enactment relating to any part of its undertaking: see s 16(1), (2). As to the meaning of 'function' see PARA 726 note 7. As to the meaning of 'enactment' see PARA 14 note 31.

9 Transport Act 1962 s 14(1)(c). As to the British Waterways Board's powers over land (including powers of compulsory acquisition) see PARA 757 et seq.

10 For the purposes of the Transport Act 1962 s 14(1)(d), s 14(1)(f) (see head (6) in the text), s 14(1)(g) (see head (7) in the text), s 14(1)(h) (see head (8) in the text), services and facilities provided by, persons employed by, or equipment of, a subsidiary of the board, and, for the purposes of s 15(1) (see PARA 757), land required for the purposes of the business of a wholly owned subsidiary of the board, are deemed to be services and facilities provided by, persons employed by, equipment of, or land required for the purposes of the business of, the board; and s 43(1)-(3) (see PARA 785) applies to any subsidiary of the board as it applies to the board: Transport Act 1968 s 51(1), (2). A wholly owned subsidiary of the board is not regarded as a common carrier when carrying on any activity which the board has power to carry on and in carrying on which the board is not to be so regarded: s 51(4). 'Wholly owned subsidiary' means a subsidiary all the securities of which are owned by the body of which it is a subsidiary, or by one or more other wholly owned subsidiaries of that body, or partly by that body and partly by any wholly owned subsidiary of that body: Transport Act 1962 s 92(1); Transport Act 1968 s 159(1) (amended by the Railways Act 1993 s 36(5)). As to common carriers see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 3 et seq.

11 Transport Act 1962 s 14(1)(d).

12 Transport Act 1962 s 14(1)(e).

13 This is deemed to extend to persons employed by a subsidiary: see the Transport Act 1968 s 51(2); and note 10.

14 This is deemed to include equipment of a subsidiary: see the Transport Act 1968 s 51(2); and note 10.

15 Transport Act 1962 s 14(1)(f).

16 Transport Act 1962 s 14(1)(g). This is deemed to extend to persons employed by a subsidiary: see the Transport Act 1968 s 51(2); and note 10.

17 Transport Act 1962 s 14(1)(h). This is deemed to extend to persons employed by a subsidiary: see the Transport Act 1968 s 51(2); and note 10.

18 Transport Act 1962 s 14(1)(j). As to the financial obligation of the board see PARA 750 et seq.

19 Transport Act 1962 s 14(1)(k).

20 As to additional powers see the Transport Act 1968 s 48 (PARA 749) and s 50 (PARA 748).

21 Transport Act 1962 s 14(1)(l).

22 Transport Act 1962 s 14(2).

23 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

24 Ie the Secretary of State for Transport: see PARA 719. As to general provisions regarding powers exercisable subject to the Secretary of State's consent see PARA 730. For the purposes of the board's business in Scotland see the Transport Act 1962 s 14(4B), (4D) (as added: see note 25).

25 Transport Act 1962 s 14(4A), (4B) (s 14(4A)-(4D) added by SI 2000/3251). The Transport Act 1962 s 14(4B) does not affect the power of the board to lend money by way of investment or to subscribe for or acquire securities by way of investment, or to leave outstanding any loan made or guarantee given, or to retain any securities acquired, by the British Transport Commission before the vesting date: s 14(5) (amended by SI 2000/3251). As to the dissolution of the British Transport Commission see note 4.

26 For the purposes of the board's business in Scotland see the Transport Act 1962 s 14(4C), (4D) (as added: see note 25).

27 'Securities', in relation to a body corporate, means any shares, stock, debentures, debenture stock, and any other security of a like nature, of the body corporate: Transport Act 1962 s 92(1); Transport Act 1968 s 159(1).

28 Transport Act 1962 s 14(4C) (as added: see note 25). The Transport Act 1962 s 14(4C) does not affect the power of the board to lend money by way of investment or to subscribe for or acquire securities by way of investment, or to leave outstanding any loan made or guarantee given, or to retain any securities acquired, by the British Transport Commission before the vesting date: s 14(5) (as amended: see note 25).

29 Ie the provisions of the Transport Act 1962 ss 1-13: see s 14(6). The Transport Act 1962 s 14(6) applies to any powers conferred on the board by any provision of the Transport Act 1968 and to the provision of the Transport Act 1968 conferring that power as it applies to the powers and provisions mentioned in the Transport Act 1962 s 14(6): see the Transport Act 1968 s 52(1).

30 Transport Act 1962 s 14(6).

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#### **740. British Waterways Board's duty to act as body engaged in commercial enterprise.**

Where the British Waterways Board<sup>1</sup> engages, either directly or through a subsidiary<sup>2</sup>, in specified activities which are authorised under the Transport Acts<sup>3</sup>, it must, in carrying on those activities, act as if it were a company engaged in a commercial enterprise (or, as the case may be, must exercise its control over that subsidiary so as to ensure that the subsidiary in carrying on those activities acts as a company so engaged)<sup>4</sup>.

1 The Transport Act 1968 s 134 applies to the boards established under the Transport Act 1962 s 1 (see PARA 725): see the Transport Act 1968 s 134(1) (amended by the Transport Act 1985 s 57(6), Sch 3). As to the British Waterways Board see PARA 725 et seq.

2 As to the meaning of 'subsidiary' see PARA 729 note 2.

3 In relation to the British Waterways Board, the specified activities are those authorised by any of the Transport Act 1962 s 11(2)-(4) (which relate to certain development or acquisition of land: see PARA 758) or the Transport Act 1968 s 48(2) (see PARA 749), s 49(1)-(4) (see PARA 759), s 50(1) (so far as it relates to the provision of facilities at additional premises) or s 50(3)-(5) (see PARA 748): see s 134(3) (amended by the Transport Act 1980 s 69, Sch 9 Part III).

4 See the Transport Act 1968 s 134(2).

#### **UPDATE**

#### **740 British Waterways Board's duty to act as body engaged in commercial enterprise**

NOTE 1--Transport Act 1968 s 134(1) further amended: Local Transport Act 2008 Sch 4 para 13.

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#### **741. British Waterways Board's duty to maintain waterways.**

For the purposes of the Transport Act 1968<sup>1</sup>, the inland waterways<sup>2</sup> comprised in the undertaking of the British Waterways Board<sup>3</sup> are classified as:

- 1477 (1) waterways<sup>4</sup> to be principally available for the commercial carriage of freight ('commercial waterways')<sup>5</sup>;
- 1478 (2) waterways<sup>6</sup> to be principally available for cruising, fishing and other recreational purposes ('cruising waterways')<sup>7</sup>; and
- 1479 (3) the remainder<sup>8</sup>.

The Secretary of State<sup>9</sup> may by order<sup>10</sup> amend the Act<sup>11</sup> in so far as it relates to the classification of commercial waterways and cruising waterways<sup>12</sup>.

With a view to securing the general availability of the commercial and cruising waterways for public use, it is the duty of the British Waterways Board: (a) to maintain the commercial waterways in a suitable condition for use by commercial freight-carrying vessels<sup>13</sup>; and (b) to maintain the cruising waterways in a suitable condition for use by cruising craft<sup>14</sup>. However, neither head (a) nor head (b) above imposes on the board any duty to maintain a waterway, or any part of a waterway, in a suitable condition for use by a vessel unless its dimensions<sup>15</sup>: (i) correspond to, or are less than, those of a vessel of that kind which customarily used that waterway or part of it during the nine months preceding 8 December 1967<sup>16</sup>; or (ii) if the waterway, or a part of it, has been restored or improved since that date, are such as to make it suitable for use on that waterway or part of it<sup>17</sup>. Where there has been a change in the size, design or type of vessel customarily using a commercial or cruising waterway, then, after consultation with the board, the Secretary of State<sup>18</sup> may by order substitute for the existing duty on the board such duty in respect of the maintenance of the waterway as he considers appropriate having regard to that change<sup>19</sup>.

It is the duty of the board, in formulating or considering any proposals relating to its functions, to take into account the desirability of protecting for future use as cruising waterways (or as areas appropriate for other public recreational use) remainder waterways with potential for such use<sup>20</sup>.

1    le for the purposes of the Transport Act 1968 ss 105-111.

2    As to the meaning of 'inland waterway' see PARA 720 note 3.

3    As to the British Waterways Board see PARA 725 et seq.

4    le the waterways for the time being specified in the Transport Act 1968 Sch 12 Pt I: see s 104(1)(a). The description contained in Sch 12 of any waterway must be read subject to any order made by the Secretary of State for Transport (or, in the case of a waterway in Scotland, the Scottish Ministers) for giving greater precision to that description by reference to a map: s 104(2) (s 104(2)-(4) amended by SI 2000/3251). As to the Secretary of State for Transport see PARA 719. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5    See the Transport Act 1968 s 104(1)(a).

6    le for the time being specified in the Transport Act 1968 Sch 12 Pt II (amended by SI 1996/2552): see the Transport Act 1968 s 104(1)(b). See also s 104(2); and note 4. The main navigable channel of such lengths of

the waterways as are specified in the British Waterways Act 1983 s 11(1), Sch 2 are deemed to be included in the Transport Act 1968 Sch 12 Pt II: see the British Waterways Act 1983 s 11(1), (2).

7 See the Transport Act 1968 s 104(1)(b).

8 Transport Act 1968 s 104(1)(c). The Countryside Act 1968 s 16(2)-(3) (which enables access agreements and access orders to be made in respect of canals and of certain land held therewith: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 582) applies as respects, and as respects land held with, any canal or part of a canal owned or managed by the British Waterways Board which is not for the time being a commercial waterway or a cruising waterway: Transport Act 1968 s 111 (amended by the Countryside Act 1968 s 16(6)). As to the meaning of 'land' see PARA 722 note 5.

9 I.e. or, in the case of a waterway in Scotland, the Scottish Ministers: see the Transport Act 1968 s 104(3) (as amended: see note 4).

10 The Transport Act 1968 Sch 13 (see note 12) applies to the making of such an order, and any such order is subject to annulment in the case of an order made by the Secretary of State, in pursuance of a resolution of either House of Parliament and, in the case of an order made by the Scottish Ministers, in pursuance of a resolution of the Scottish Parliament: see s 104(4) (as amended: see note 4). As to the making of orders generally see PARA 724. Such orders, being of local effect, are not recorded in this work.

11 I.e. the Transport Act 1968 Sch 12: see notes 4, 6. By virtue of an order made under s 104(3), the Secretary of State may: (1) transfer any waterway from one Part of Sch 12 to the other Part; (2) remove any waterway from either of those Parts; or (3) add to either Part any inland waterway comprised in the undertaking of the British Waterways Board and which is not for the time being a commercial or a cruising waterway: see s 104(3) (as amended: see note 4).

12 See the Transport Act 1968 s 104(3) (as amended: see note 4). For the purposes of the Transport Act 1968 s 104(3), 'waterway' includes any part of that waterway: s 104(5). As to necessary consultation by the Secretary of State with the Inland Waterways Advisory Council and other parties in the case of a proposed order under s 104(3) see Sch 13 para 2 (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 2 para 175(1)(a), (2)). As to the obligation of the Secretary of State to publish notice of his intention to make an such order see Sch 13 para 5(1). The Secretary of State must consider any objection which is made against the proposed order and not withdrawn and, if he has ordered an inquiry to be held, the report of the person holding the inquiry: Sch 13 para 5(1). The Secretary of State is obliged to hold an inquiry:

46 (1) where a proposed order would result in removing a commercial waterway from Sch 12 Pt I, or in removing a cruising waterway from Sch 12 Pt II without adding it to Sch 12 Pt I, provided the objection to the proposed order is made by a local authority or the Environment Agency (Sch 13 para 5(2)(a) (amended by the Water Act 1989 s 190(1), Sch 25 para 38(4); and by virtue of SI 1996/593); and

47 (2) where such an order relates to a waterway used to a significant extent for navigation at the time of publication of notice of the proposed order, if an objection is made by any organisation which appears to the Secretary of State to represent a substantial number of persons using the waterway at that time (Transport Act 1968 Sch 13 para 5(2)(b)).

References in Sch 13, however expressed, to the Secretary of State are to be construed as including a reference to the Scottish Ministers: see Sch 13 para 1(2) (added by SI 2000/3251). As to the Inland Waterways Advisory Council see PARA 737. As to the Environment Agency see PARA 17. As to the meaning of 'person' see PARA 13 note 29.

Where an order under the Transport Act 1968 s 104(3), s 105(3) (classification and maintenance of the British Waterways Board's waterways: see the text to notes 19-20) or s 112 (maintenance and use of other waterways: see PARA 828) is required so as to give effect to any proposal, no provision may be included in an order under the Transport and Works Act 1992 s 1 (railways etc: see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302) or s 3 (inland waterways: see PARA 801) which would remove that requirement, or alter the requirements of the Transport Act 1968 ss 104, 105, 112 or Sch 13 relating to orders under those sections: see the Transport and Works Act 1992 s 5(7); and PARA 802.

13 Transport Act 1968 s 105(1)(a). As to the enforcement of the duty under s 105 see PARA 742. In relation to any inland waterway which on 18 November 1968 was comprised in the undertaking of the British Waterways Board, all local enactments passed with respect to any such inland waterway which conferred any public or private right of navigation over it or imposed any duty to maintain it for the purpose of navigation (including any duty to supply, or maintain a supply of, water for that purpose) are repealed: see the s 105(5). See also *Moore v British Waterways Board* [2009] All ER (D) 161 (Mar). Moreover, all such local enactments conferring such rights or duties are repealed in relation to inland waterways acquired by the British Waterways Board after 18 November 1968: see s 105(6). Any person who suffers loss following the extinguishment of a private right by reason of the operation of s 105(5) or (6) is entitled to be paid by the British Waterways Board compensation, to

be determined in case of dispute by the Lands Tribunal: see ss 105(7), 115(1)(b). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A). Where by virtue of s 105(5) a statutory right of navigation ceases to be exercisable as respects a waterway of which the British Waterways Board is not the owner, the board has power to authorise any use of the waterway which would have been authorised by that statutory right: s 105(8). References in Pt VII (ss 104-115) to any right of navigation over a waterway or canal include references to any right to use or keep any vessel or craft on the waterway or canal: s 115(1)(a). Nothing in s 105 must be construed as abrogating any rights of navigation which subsist otherwise than by virtue of the enactments referred to in s 105(5) and (6); and in those subsections references to rights conferred by an enactment do not include references to rights which are merely confirmed by it and which, if that enactment had not been passed, would subsist otherwise than by virtue of any such enactments as aforesaid: see s 115(2). As to the meaning of 'enactment' see PARA 14 note 31.

14 Transport Act 1968 s 105(1)(b). 'Cruising craft' are vessels constructed or adapted for the carriage of passengers and driven by mechanical power: see s 105(1)(b). See also note 13.

15 le its length, width, height of superstructure and draught: see the Transport Act 1968 s 105(2).

16 Transport Act 1968 s 105(2)(a).

17 Transport Act 1968 s 105(2)(b).

18 As to waterways (or any part thereof) in Scotland see the Transport Act 1968 s 105(3A) (added by SI 2000/3251).

19 See the Transport Act 1968 s 105(3). Schedule 13 has effect in relation to the making of any such order, and any such order is subject to annulment in pursuance of a resolution of either House of Parliament: s 105(4). In the case of a proposed order under s 105(3):

48 (1) in respect of a commercial waterway or any part thereof, the Secretary of State must consult with any organisation appearing to him to represent persons operating commercial freight-carrying vessels on that waterway or part (Sch 13 para 3(a)(i)); and if the waterway or part is to a substantial extent used by cruising craft, with the Inland Waterways Advisory Council as to the effect of the proposed order on such use as aforesaid (Sch 13 para 3(a)(ii));

49 (2) in respect of a cruising waterway or any part thereof, the Secretary of State must consult with the Inland Waterways Advisory Council (Sch 13 para 3(b)).

Notices must be published as required by Sch 13 para 5 and the holding of an inquiry is obligatory in the circumstances specified in that paragraph: see note 12. Such orders, being of local effect, are not recorded in this work.

20 See the British Waterways Act 1995 s 22; and PARA 745.

## UPDATE

### 741 British Waterways Board's duty to maintain waterways

NOTE 13--Reference to the Lands Tribunal is now to the Upper Tribunals: Transport Act 1968 s 115(1)(b) (amended by SI 2009/1307).



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#### **742. Enforcement of British Waterways Board's duty to maintain waterways.**

If, on an application<sup>1</sup> by any person<sup>2</sup> to the High Court, the court determines that there has been a serious and persistent failure by the British Waterways Board<sup>3</sup> to discharge certain of its statutory duties<sup>4</sup> to maintain a waterway, then, subject as provided below, the court may require the board to remedy that failure<sup>5</sup>.

The fact that proceedings on such an application (known as 'enforcement proceedings')<sup>6</sup> are in progress, or that the court has in any such proceedings imposed a requirement on the board, does not prevent the Secretary of State<sup>7</sup> from making an order amending the statutory provisions relating to the classification of waterways<sup>8</sup> or an order<sup>9</sup> substituting a new duty on the board in respect of the maintenance of any waterway<sup>10</sup>; but subject as set out below<sup>11</sup>, where such an order is made while enforcement proceedings are in progress, the court must nevertheless determine those proceedings on the basis of the board's duty as it stood when the proceedings were instituted<sup>12</sup>, and the making of such an order in no case absolves the board from complying with any requirement imposed by the court in the enforcement proceedings<sup>13</sup>. However, if a relevant order<sup>14</sup> is pending<sup>15</sup> when enforcement proceedings are instituted or if, after they have been instituted and before the court has imposed any requirement on the board, the Secretary of State<sup>16</sup> notifies the board that he is considering making a relevant order and gives the court a certificate<sup>17</sup>, then: (1) the court must not impose any requirement in those proceedings on the board so long as the relevant order is pending<sup>18</sup>; and (2) if the relevant order is made, the court must, in determining in those proceedings whether the board has failed to discharge its duty, have regard only to the duty, if any, to which the board is subject in consequence of the order having been made<sup>19</sup>.

1 Proceedings are started in the usual way when the court issues a claim form at the request of the claimant: see CPR 7.2; and **CIVIL PROCEDURE** vol 11 (2009) PARA 118.

2 As to the meaning of 'person' see PARA 13 note 29.

3 As to the British Waterways Board see PARA 725 et seq.

4 I.e. its general duty under the Transport Act 1968 s 105(1) (see PARA 741) to maintain commercial and cruising waterways in a suitable condition, or a new specified duty substituted by an order made under s 105(3) (see PARA 741): s 106(1)(a), (b). References in s 106 to an order made under s 105(3) include references to such an order made by the Scottish Ministers by virtue of s 105(3A) (see PARA 741): s 106(8) (s 106(2)-(6), (8) amended by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 Transport Act 1968 s 106(1). However, apart from this right to such a determination from the High Court, neither s 105(1) nor s 105(3) (see PARA 741) is to be construed as imposing any duty or liability enforceable by proceedings before any court to which the board would not otherwise be subject: s 106(1).

6 Enforcement proceedings are treated as instituted at the time when the document beginning the proceedings (see note 1) is served on the board: Transport Act 1968 s 106(7).

7 I.e. or, in the case of any waterway or any part of a waterway in Scotland, the Scottish Ministers: see the Transport Act 1968 s 106(2) (as amended: see note 4). The Secretary of State is the Secretary of State for Transport: see PARA 719.

8 I.e. an order under the Transport Act 1968 s 104(3): see PARA 741.

9 I.e. an order under the Transport Act 1968 s 105(3): see PARA 741.

10 Transport Act 1968 s 106(2) (as amended: see note 4).

11 le subject to the provisions of the Transport Act 1968 s 106(3): see the text to notes 14-19.

12 Transport Act 1968 s 106(2)(a).

13 Transport Act 1968 s 106(2)(b).

14 'Relevant order', in relation to any enforcement proceedings, means an order under the Transport Act 1968 s 104(3) or s 105(3) (see PARA 741) in relation to the waterway or part of a waterway which is the subject of the proceedings: s 106(5).

15 For these purposes, an order is 'pending' during the period of three months beginning with the day on which the Secretary of State (or, as the case may be, the Scottish Ministers) notifies the board that he is (or they are) considering the making of an order under either s 104(3) or s 105(3) (see PARA 741), and, if before the expiration of that period notice of the proposed order is published under the provisions of Sch 13 (see PARA 741), during any further period until the order is made or the Secretary of State (or, as the case may be, the Scottish Ministers) notifies the board that it will not be made: s 106(5) (as amended: see note 4). As soon as may be after giving the board any such notification, the Secretary of State must give notice in the London Gazette (and the Scottish Ministers likewise in the Edinburgh Gazette): s 106(6) (as so amended). As to the meaning of 'month' see PARA 23 note 10.

16 le or, in the case of any waterway or any part of a waterway in Scotland, the Scottish Ministers: see the Transport Act 1968 s 106(3) (as amended: see note 4).

17 Transport Act 1968 s 106(3) (as amended: see note 4). The said certificate is a certificate in writing to the effect that it appears to the Secretary of State or, as the case may be, the Scottish Ministers that the imposition of any requirement on the board on the basis of its existing duty would result in its incurring substantial expense and that, having regard to its financial position and its duty under the Transport Act 1962 s 18 (see PARA 750) and the Transport Act 1968 s 41 (see PARA 750), it would be unreasonable for it to bear that expense without a grant or further grant under s 43 (see PARA 752): s 106(4) (as so amended). As to the meaning of 'writing' see PARA 22 note 1.

18 Transport Act 1968 s 106(3)(a).

19 Transport Act 1968 s 106(3)(b).

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### **743. Board's power to make agreements for maintenance and transfer of canals.**

The British Waterways Board has power<sup>1</sup>:

1480 (1) to enter into an agreement with certain specified bodies for the maintenance by one of those bodies of any inland waterway<sup>2</sup> comprised in the board's undertaking which is not a commercial waterway or a cruising waterway<sup>3</sup> or of any part of, or any works connected with, such a waterway<sup>4</sup>;

1481 (2) by agreement with any of those bodies, to transfer to it any such waterway belonging to the board, together with any of its powers or obligations respecting the waterway<sup>5</sup>;

and any of the specified bodies has all such powers as are required to enable it to enter into and carry out any such agreement or as are required to be exercised by it in consequence of any such transfer<sup>6</sup>.

The specified bodies are: a local authority<sup>7</sup>; the Environment Agency<sup>8</sup>; a highway authority, not being a local authority<sup>9</sup>; a gas transporter<sup>10</sup>; an electricity supplier<sup>11</sup>; a water undertaker<sup>12</sup>; and a water development board<sup>13</sup>. These provisions also apply, respecting any particular agreement or transfer, to any other body having public or charitable objects<sup>14</sup> which is certified by the Secretary of State<sup>15</sup> as appearing to be capable of discharging the responsibilities falling on the body in consequence of that agreement or transfer<sup>16</sup>.

No such agreement or transfer may be made with or to: (a) any local authority, unless what is to be maintained or transferred is situated in the authority's area<sup>17</sup>, or although not situated in that area is so situated that persons residing in the area have convenient access to it<sup>18</sup>; or (b) the Environment Agency unless the Secretary of State<sup>19</sup> has consented to the agreement or transfer<sup>20</sup>. The board may make an agreement for maintenance or transfer with two or more bodies on such terms as to the sharing of expenses between those bodies as they may agree<sup>21</sup>.

1    Ie without prejudice to its powers apart from the Transport Act 1968 s 109, but subject to s 109(3) (see the text to notes 17-20). As to the British Waterways Board see PARA 725 et seq.

2    As to the meaning of 'inland waterway' see PARA 720 note 3.

3    As to commercial and cruising waterways see PARA 741.

4    Transport Act 1968 s 109(1)(a).

5    Transport Act 1968 s 109(1)(b).

6    Transport Act 1968 s 109(1). Any agreement whereby a waterway or part of a waterway is to be transferred to a body may include provision for securing that the body makes the waterway or part of the waterway available for public use: s 109(4).

7    Transport Act 1968 s 109(2)(a). As to the meaning of 'local authority' see PARA 720 note 5.

8    Transport Act 1968 s 109(2)(b) (substituted by the Water Act 1989 s 190(1), Sch 25 para 38(1); and amended by virtue of SI 1996/593). As to the Environment Agency see PARA 17.

9 Transport Act 1968 s 109(2)(c). 'Highway authority' in relation to any highway means for the purposes of the application of the Transport Act 1968 to England or Wales, the highway authority for that highway under the Highways Act 1980 Pt I (ss 1-9) (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq): Transport Act 1968 s 159(1) (definition amended by the Highways Act 1980 s 343(2), Sch 24 para 18(d)). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

10 Ie a gas transporter within the meaning of the Gas Act 1986 Pt I (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 805): Transport Act 1968 s 109(2)(d) (substituted by the Gas Act 1986 s 67(1), Sch 7 para 9; and amended by virtue of the Gas Act 1995 s 16(1), Sch 4 para 2(2)(d); Utilities Act 2000 s 76(7)).

11 Ie an electricity supplier within the meaning of the Electricity Act 1989 Pt I (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065): Transport Act 1968 s 109(2)(e) (substituted by the Electricity Act 1989 s 112(1), Sch 16 para 14; amended by virtue of the Utilities Act 2000 s 76(7)).

12 Transport Act 1968 s 109(2)(h) (substituted by the Water Act 1989 Sch 25 para 38(1)). As to the meaning of 'water undertaker' see PARA 137 note 4.

13 Transport Act 1968 s 109(2)(k).

14 As to charitable objects see **CHARITIES** vol 8 (2010) PARA 1 et seq.

15 Ie or, in the case of any waterway or any part of a waterway in Scotland, the Scottish Ministers: see the Transport Act 1968 s 109(2) (amended by SI 2000/3251). The Secretary of State is the Secretary of State for Transport: see PARA 719. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

16 Transport Act 1968 s 109(2) (as amended: see note 15).

17 Transport Act 1968 s 109(3)(a)(i).

18 Transport Act 1968 s 109(3)(a)(ii).

19 The statutory wording is 'the ministers for the purposes of the Water Resources Act 1991 Sch 2': see the Transport Act 1968 s 109(3)(b) (as substituted and amended: see note 20). As to the Secretary of State and 'the ministers' in this context see PARA 15 note 1.

20 Transport Act 1968 s 109(3)(b) (substituted by the Water Act 1989 Sch 25 para 38; and amended by the Water Act 1989 s 190, Sch 27 Pt I; Water Consolidation (Consequential Provisions) Act 1991 s 2, Sch 1 para 19; SI 1996/593).

21 Transport Act 1968 s 109(5). Notwithstanding s 109(3)(a)(i) (see the text to note 17), but without prejudice to s 109(3)(a)(ii) (see the text to note 18), a local authority may be a party to such an agreement if part of what is to be maintained or transferred is situated in its area and the remainder in the area or areas of one or more other authorities who are also parties to the agreement: s 109(5) (amended by the Water Act 1989 Sch 25 para 38, Sch 27 Pt I).

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#### **744. British Waterways Board's power to take water for the supply of its canals.**

Any local enactment<sup>1</sup> which authorises the British Waterways Board<sup>2</sup> to take water for the purpose, whether express or implied, of using it for a canal owned or managed by the board, or for purposes which include that purpose, is to have effect as if there were included the purpose of selling, or affording the use of, water from the canal; and the board may exercise its powers<sup>3</sup> accordingly<sup>4</sup>.

These provisions must not be taken as authorising the board: (1) to disregard any restriction as to quantity, rate or otherwise on the water which may be taken from any source<sup>5</sup>; or (2) to affect the level or flow of water in any part of the canal, or in any river or watercourse fed by the canal, to a degree which conflicts with any of the board's obligations, and in particular with any statutory obligation to maintain the canal in a navigable condition<sup>6</sup>.

1 As to the meaning of 'local enactment' see PARA 728 note 12.

2 As to the British Waterways Board see PARA 725 et seq.

3 Ie the board's powers under the Transport Act 1962 Pt I (ss 1-30).

4 Transport Act 1962 s 62(1). As to the power of the board to abstract and sell untreated water see PARA 738.

5 Transport Act 1962 s 62(2)(a).

6 Transport Act 1962 s 62(2)(b). As to the board's duty to maintain waterways see PARA 741.

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#### **745. British Waterways Board's general environmental and recreational duties.**

It is the duty of the British Waterways Board<sup>1</sup>, in formulating or considering any proposals relating to its functions<sup>2</sup>:

- 1482 (1) so far as may be consistent with the purposes of any enactment<sup>3</sup> relating to those functions, to exercise any power conferred on it with respect to the proposals as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest<sup>4</sup>;
- 1483 (2) to have regard to the desirability of protecting and conserving buildings<sup>5</sup>, sites and objects of archaeological, architectural, engineering or historic interest<sup>6</sup>; and
- 1484 (3) to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects<sup>7</sup>.

Subject to the duties imposed by heads (1) to (3) above, it is the duty of the board, in formulating or considering any proposals relating to its functions:

- 1485 (a) to have regard to the desirability of preserving for the public any freedom of access to towing paths and open land<sup>8</sup> and especially to places of natural beauty<sup>9</sup>;
- 1486 (b) to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural, engineering or historic interest<sup>10</sup>;
- 1487 (c) to take into account any effect which the proposals would have on any such freedom of access or on the availability of any such facility<sup>11</sup>;
- 1488 (d) to take into account the desirability of protecting for future use as cruising waterways<sup>12</sup>, or as areas appropriate for other public recreational use, remainder waterways<sup>13</sup> with potential for such use<sup>14</sup>.

It is the duty of the board in determining what steps to take in performance of any duty imposed by virtue of heads (1) to (3) or heads (a) to (d) above to take into account the needs of persons who are chronically sick or disabled<sup>15</sup>.

Nothing in the above provisions<sup>16</sup> requires recreational facilities made available by the board to be made available free of charge<sup>17</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 'Functions' includes powers and duties: British Waterways Act 1995 s 22(5).

3 As to the meaning of 'enactment' see PARA 14 note 31.

4 British Waterways Act 1995 s 22(1)(a). The provisions of s 22 make the British Waterways Board subject to the same general environmental and recreational duties as the Environment Agency: see PARA 774. As to the

duty of the Docklands Light Railway Limited to consult the board in relation to certain works and, in particular, pursuant to the requirements imposed on the board by s 22 and to the interest of the board in preserving and enhancing the environment of dock areas see the Docklands Light Railway (Capacity Enhancement) Order 2005, SI 2005/3105, art 44, Sch 14 para 9.

5 'Building' includes a structure: British Waterways Act 1995 s 22(5).

6 British Waterways Act 1995 s 22(1)(b).

7 British Waterways Act 1995 s 22(1)(c).

8 As to the meaning of 'land' see PARA 14 note 21.

9 British Waterways Act 1995 s 22(2)(a).

10 British Waterways Act 1995 s 22(2)(b).

11 British Waterways Act 1995 s 22(2)(c).

12 As to the meaning of 'cruising waterway' see PARA 741: definition applied by the British Waterways Act 1995 s 2(1).

13 'Remainder waterway' means an inland waterway of the board which is not for the time being a commercial waterway or a cruising waterway: British Waterways Act 1995 s 2(1). As to the meaning of 'commercial waterway' see PARA 741: definition applied by s 2(1). 'Inland waterway' means any canal or inland navigation belonging to or under the control of the board and includes any works, lands or premises belonging to or under the control of the board and held or used by it in connection with such canal or inland navigation: s 2(1); British Waterways Act 1983 s 2.

14 British Waterways Act 1995 s 22(2)(d).

15 British Waterways Act 1995 s 22(3).

16 Ie nothing in the British Waterways Act 1995 s 22.

17 British Waterways Act 1995 s 22(4).

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#### **746. British Waterways Board's duty to promote research and development.**

It is incumbent on the British Waterways Board<sup>1</sup> to take such steps as appear to it to be practicable and desirable for promoting:

- 1489 (1) research<sup>2</sup> on lines settled from time to time with the approval of the Secretary of State<sup>3</sup> into matters affecting, or arising out of, the exercise of the functions<sup>4</sup> of the board or of any subsidiary<sup>5</sup> of the board<sup>6</sup>; and
- 1490 (2) the doing of such work as is requisite to enable: (a) the results of any research into any such matter as aforesaid (whether or not promoted by the board)<sup>7</sup>; and (b) anything resulting from any idea affecting, or arising out of, the exercise of any of those functions<sup>8</sup>, to be turned to account<sup>9</sup>;

but these provisions<sup>10</sup> are not to be construed as imposing upon the board, either directly or indirectly, any form of duty or liability<sup>11</sup> enforceable by proceedings before any court to which the board would not otherwise be subject<sup>12</sup>.

The board may take such steps as above with respect to any matter either by itself carrying out the necessary research or doing the necessary work or by arranging for that research to be carried out or that work to be done by some other person<sup>13</sup> with or without assistance (including financial assistance) from the board<sup>14</sup>.

1 See the Transport Act 1968 s 46(1). As to the British Waterways Board see PARA 725 et seq.

2 As to the power to make grants for research or development in connection with transport services etc see the Transport Act 1968 s 57; and PARA 722.

3 I.e. or, in the case of any waterway or any part of a waterway in Scotland, the Scottish Ministers: see the Transport Act 1968 s 46(2)(a) (amended by SI 2000/3251). The Secretary of State is the Secretary of State for Transport: see PARA 719. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 'Functions' includes powers, duties and obligations: Transport Act 1968 s 159(1).

5 As to the meaning of 'subsidiary' see PARA 729 note 2.

6 Transport Act 1968 s 46(2)(a) (as amended: see note 3).

7 Transport Act 1968 s 46(2)(b)(i).

8 Transport Act 1968 s 46(2)(b)(ii).

9 Transport Act 1968 s 46(2)(b).

10 I.e. the Transport Act 1968 s 46(2).

11 'Liability' includes an obligation: Transport Act 1968 s 159(1); Transport Act 1962 s 92(1).

12 Transport Act 1968 s 46(2).

13 As to the meaning of 'person' see PARA 13 note 29.



14 Transport Act 1962 s 46(3). However, nothing in s 46 authorises the board to do itself, either directly or through a subsidiary, any work such as is mentioned in s 46(2)(b) (see head (2) in the text) which the board would not have power to do apart from s 46: s 46(3).

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#### **747. British Waterways Board's power to promote and oppose Bills in Parliament.**

The British Waterways Board<sup>1</sup> may, with the consent of the Secretary of State<sup>2</sup>, promote and oppose Bills in Parliament<sup>3</sup>. This power is in lieu of any power to promote or oppose Bills which the board might otherwise possess under the provisions of the Transport Act 1962 as successor to the persons<sup>4</sup> carrying on any undertaking, and, in particular, the persons carrying on any undertaking transferred to the British Transport Commission<sup>5</sup>, but this is not to be construed as prejudicing any power exercisable by the board as successor to apply for orders, and oppose applications for orders, including orders subject to special parliamentary procedure<sup>6</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 I.e. the Secretary of State for Transport: see PARA 719. As to general provisions regarding powers exercisable subject to the Secretary of State's consent see PARA 730.

3 Transport Act 1962 s 17(1). As to the promotion of, and opposition to, private Bills in Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 872 et seq. The British Waterways Board may, with the consent of the Scottish Ministers, promote Bills in the Scottish Parliament and may oppose any Bill in the Scottish Parliament: see s 17(1A), (3) (s 17(1A) added by SI 2000/3251). As to the Scottish Ministers and the Scottish Parliament see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the powers of the board to apply for or oppose orders under the Transport and Works Act 1992 see PARA 801.

4 As to the meaning of 'person' see PARA 13 note 29.

5 I.e. under the Transport Act 1947 (now wholly repealed). As to the effect of the Transport Act 1947 and the dissolution of the British Transport Commission under the Transport Act 1962 see PARA 714.

6 Transport Act 1962 s 17(2). As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq.

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#### **748. British Waterways Board's powers in relation to services and facilities.**

In addition to its power<sup>1</sup> to store certain goods<sup>2</sup> and to use certain premises to provide facilities for the storage of other goods, the British Waterways Board<sup>3</sup> has power, with the consent of the Secretary of State<sup>4</sup>, to provide such facilities at any other premises<sup>5</sup>.

The board also has power:

- 1491 (1) to provide and manage hotels<sup>6</sup> in places where those using the inland waterways<sup>7</sup> owned or managed by the board may require them, for use both by those and other persons<sup>8</sup>;
- 1492 (2) in addition to the powers of the board to provide transport services by road for the carriage of certain goods<sup>9</sup>, with the consent of the Secretary of State<sup>10</sup> to provide other transport services by road for the carriage of goods and to carry goods by those services<sup>11</sup>;
- 1493 (3) to provide services and facilities for the use for amenity or recreational purposes (including fishing) of the inland waterways and reservoirs owned or managed by it<sup>12</sup>;
- 1494 (4) to provide for any person<sup>13</sup> technical advice or assistance, including research services, as respects any matter in which the board has skill or experience<sup>14</sup>;
- 1495 (5) to form, promote and assist, or join with any other person in forming, promoting and assisting, a company for carrying on any activities which the board has power to carry on<sup>15</sup>.

1    Ie under the Transport Act 1962 s 10(3)(f): see PARA 738.

2    As to the meaning of 'goods' see PARA 738 note 10.

3    As to the British Waterways Board see PARA 725 et seq.

4    Ie or, in the case of the exercise of the British Waterways Board's functions in Scotland, the Scottish Ministers: see the Transport Act 1968 s 50(1) (amended by SI 2000/3251). The Secretary of State is the Secretary of State for Transport: see PARA 719. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to general provisions regarding powers exercisable subject to the Secretary of State's consent see PARA 730.

5    Transport Act 1968 s 50(1) (amended by the Transport Act 1981 s 40(1), Sch 12 Pt I; Transport Act 2000 s 274, Sch 31 Pt IV; SI 2000/3251). In engaging in activities specified in the Transport Act 1968 s 50(1) (so far as it relates to the provision of facilities at additional premises), and s 50(2)-(5) (see the text to notes 6-11) the board must act as a body engaged in commercial enterprise: see s 134; and PARA 740.

6    The reference to hotels includes a reference to any other form of residential accommodation or facilities, including caravan and camping sites, for travellers or persons on holiday: see the Transport Act 1968 s 50(4) (amended by the Railways Act 1993 s 152, Sch 12 para 6(5)(b); SI 1991/510).

7    As to the meaning of 'inland waterway' see PARA 720 note 3.

8    See the Transport Act 1968 s 50(3) (amended by SI 1991/510). The Transport Act 1968 s 50(3) is without prejudice to the powers of the board under the Transport Act 1962 s 14(1)(d) (see PARA 739) to provide amenities and facilities for persons for whom it does not provide residential accommodation or facilities: Transport Act 1968 s 50(4) (as amended: see note 6). See also note 5.

9 le as authorised by the Transport Act 1962 s 10(3)(c): see PARA 738.

10 le or, in connection with the exercise of the board's functions in Scotland, of the Scottish Ministers: see the Transport Act 1968 s 50(5) (amended by SI 2000/3251).

11 Transport Act 1968 s 50(5) (as amended: see note 10). See also note 5.

12 Transport Act 1968 s 50(6). This provision is expressed to be without prejudice to the powers of the board apart from s 50(6): s 50(6).

13 As to the meaning of 'person' see PARA 13 note 29.

14 Transport Act 1968 s 50(7). This power of the board to provide for any person technical advice and assistance, including research, includes power, exercisable on the request of any such person, to establish for that person an undertaking carrying on any business in which the board has skill or experience and, until such person is ready to manage such undertaking himself, to manage it on his behalf: British Waterways Act 1995 s 24.

15 Transport Act 1968 s 50(8). This provision is expressed to be without prejudice to the board's powers apart from s 50(8): see s 50(8). Without affecting the powers or obligations of the board in or as regards Scotland, s 50(8) does not oblige the board to secure any restriction on the borrowing powers of a company which it forms, promotes and assists, or joins with any other person in forming, promoting and assisting: s 50(8A) (added by SI 2003/1545). Where a company for carrying on any activities which the board has power to carry on has been formed in the exercise of the powers conferred by the Transport Act 1968 s 50(8) by the board, whether alone or jointly with some other person, or where in the exercise of its powers under the Transport Act 1962 s 14(1)(a) (see PARA 739) the board has entered into an agreement with any person for the carrying on by that person, whether as agent for the board or otherwise, of any of the activities which the board may itself carry on, then, without prejudice to its powers under s 14(1)(b) (see PARA 739), the board may, with the consent of the Secretary of State (or in connection with the exercise of the board's functions in Scotland, the Scottish Ministers) enter into arrangements with that company or person for the transfer from the board to that company or person, in such manner and on such terms (including payments by any of the parties to the arrangements to any other of them) as may be provided for by the arrangements, of any property, rights or liabilities of the board relevant to the carrying on of those activities: Transport Act 1968 s 50(9) (amended by SI 2000/3251). As to the meaning of 'liability' see PARA 746 note 11.

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#### **749. British Waterways Board's powers of manufacture and production.**

The British Waterways Board<sup>1</sup> has power to construct, manufacture, produce, purchase, maintain and repair<sup>2</sup> anything required for the purposes of its business<sup>3</sup>, but<sup>4</sup> it does not have power to construct, manufacture, produce, purchase, maintain or repair anything not required for those purposes<sup>5</sup>.

The board also has power<sup>6</sup>:

- 1496 (1) to manufacture<sup>7</sup> for sale to outside persons<sup>8</sup> (that is to say, to persons other than the board or a subsidiary of the board), and to repair<sup>9</sup> for outside persons, anything which the board considers can advantageously be so manufactured or, as the case may be, repaired by the board by reason of the fact that the board or its subsidiary has materials or facilities for, or skill in, the manufacture or repair of that thing in connection with some existing activity<sup>10</sup> of the board or subsidiary<sup>11</sup>;
- 1497 (2) to sell<sup>12</sup> to outside persons, and for that purpose to purchase, anything which is of a kind which the board or its subsidiary purchases in the course of some existing activity of the board or subsidiary<sup>13</sup>;
- 1498 (3) at any place where the board, in the exercise of its powers<sup>14</sup>, provides a car park, to repair motor vehicles for outside persons, and to sell to outside persons petrol, oil and spare parts and accessories for motor vehicles, and for that purpose to purchase any of those things, whether or not those persons are using the car park<sup>15</sup>;
- 1499 (4) to sell goods<sup>16</sup> of any description to outside persons, whether or not persons using its waterways, at any place where persons using those waterways may require facilities for the purchase of those goods, and for that purpose to purchase any such goods<sup>17</sup>.

The board must not engage in any activity under head (1), (2) or (3) above unless it is satisfied that it can do so without detriment to its duties under the Transport Acts<sup>18</sup>, and the board must exercise its control over its subsidiaries accordingly<sup>19</sup>.

From time to time the board must submit to the Secretary of State<sup>20</sup> for his approval proposals as to the manner in which any of the above activities<sup>21</sup> are to be carried on by itself or any of its subsidiaries, and must carry on, or, as the case may be, exercise its control over that subsidiary so as to ensure that the subsidiary carries on, those activities in accordance with the Secretary of State's approval<sup>22</sup>; and the Secretary of State may: (a) in approving any proposals, approve them subject to such modifications or subject to compliance with such conditions as he thinks fit<sup>23</sup>; and (b) at any time, after consultation with the board, direct the board to discontinue or, as the case may be, to exercise its control over any of its subsidiaries so as to require the subsidiary to discontinue, any of the activities which the board or subsidiary is carrying on in accordance with the Secretary of State's approval<sup>24</sup>.

The Secretary of State must publish, in such manner as he thinks fit, any proposals so approved by him, and must send copies of those proposals to the Confederation of British Industry and the Trades Union Congress<sup>25</sup>.

- 1 As to the British Waterways Board see PARA 725 et seq.
- 2 Certain powers of manufacture, repair and supply are conferred by the Transport Act 1968 s 48 (see the text to notes 6-25) upon the board, and the provisions of s 48(1)-(6) have effect notwithstanding the Transport Act 1962 s 13(1), so far as it confines the board's powers of manufacture, purchase and repair to those conferred by s 13: see the Transport Act 1968 s 48(7).
- 3 Transport Act 1962 s 13(1)(a). There are also powers to construct, manufacture, produce, purchase, maintain and repair anything required for the purposes of the business of any other board (ie established by the Transport Act 1962: see PARA 714), or of a subsidiary of any of the boards or of a subsidiary of the National Freight Company Limited: see s 13(1)(b), (c). As these bodies are now dissolved these powers would appear to be defunct. As to the meaning of 'subsidiary' see PARA 729 note 2.
- 4 Ie subject to the Transport Act 1962 s 11 (see PARA 758) and to the provisions of s 13.
- 5 See the Transport Act 1962 s 13(1).
- 6 In engaging in activities specified in the Transport Act 1968 s 48(2) the board must act as a body engaged in commercial enterprise: see s 134; and PARA 740. See also note 2.
- 7 References to manufacture include references to construction and production: Transport Act 1968 s 48(9).
- 8 As to the meaning of 'person' see PARA 13 note 29.
- 9 References to repair include references to maintenance: Transport Act 1968 s 48(9).
- 10 For the purposes of the Transport Act 1968 s 48(2)(a) or (b) (see heads (1) and (2) in the text), 'existing activity' means, in relation to any activity at any time undertaken by virtue of that head, any other activity already carried on at that time, including any such activity carried on by virtue of s 48 other than s 48(2)(c) (see head (3) in the text) and other than the provisions of s 48(2) which relate only to the board: see s 48(2).
- 11 Transport Act 1968 s 48(2)(a).
- 12 References to selling or purchasing include references to supplying, or, as the case may be, obtaining by exchange, hire or hire-purchase: Transport Act 1962 s 48(9).
- 13 Transport Act 1968 s 48(2)(b). See also note 10.
- 14 Ie powers under the Transport Act 1962 s 14(1)(d): see PARA 739.
- 15 Transport Act 1968 s 48(2)(c).
- 16 As to the meaning of 'goods' see PARA 738 note 10.
- 17 Transport Act 1968 s 48(2).
- 18 Ie the Transport Act 1962 or the Transport Act 1968.
- 19 Transport Act 1968 s 48(3).
- 20 Ie the Secretary of State for Transport: see PARA 719. In the application of the Transport Act 1968 s 48 to the board in connection with any activity in Scotland, any reference to the Secretary of State is to be construed as a reference to the Scottish Ministers and, in s 48(6) (see note 22) the words 'and with the approval of the Treasury' are to be omitted: see s 48(1A) (amended by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 21 Ie any of the activities authorised by the Transport Act 1968 s 48(2) (see the text to notes 6-17) or any activities of manufacture authorised by the Transport Act 1962 s 13 (see the text to notes 1-5).
- 22 Transport Act 1968 s 48(4). The board must include in the report in respect of any year required to be submitted by it under the Transport Act 1962 s 27(8) (see PARA 728) such particulars as the Secretary of State may, after consultation with the board and with the approval of the Treasury, direct with respect to all or any of the activities authorised by the Transport Act 1968 s 48(2) (see the text to notes 6-17) or the activities of manufacture authorised by the Transport Act 1962 s 13 (see the text to notes 1-5) which have been carried on in that year by the board or any of its subsidiaries: Transport Act 1968 s 48(6). See also note 20. As to the meaning of 'Treasury' see PARA 108 note 6.

23 Transport Act 1968 s 48(4)(a).

24 Transport Act 1968 s 48(4)(b).

25 Transport Act 1968 s 48(5).

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## **B. FINANCIAL DUTIES**

### **750. Financial duty of the British Waterways Board.**

The British Waterways Board<sup>1</sup> must charge to revenue in every year all charges<sup>2</sup> which are proper to be made to revenue, including, in particular, proper provision for the depreciation or renewal of assets and proper allocations to general reserve<sup>3</sup>.

Without prejudice to the power of the board to establish specific reserves, the board must establish and maintain a general reserve<sup>4</sup>. The management by the board of its general reserve, the sums to be carried from time to time to the credit thereof, and the application of the moneys comprised therein must be as the board may determine<sup>5</sup>. However, no part of the moneys comprised in the general reserve is to be applied otherwise than for the purposes of the board<sup>6</sup>; and the Secretary of State<sup>7</sup> may, with the approval of the Treasury<sup>8</sup>, give to the board directions<sup>9</sup> as to any matter relating to the establishment or management of the general reserve or the carrying of sums to the credit thereof, or the application thereof<sup>10</sup>.

The board may, with the consent of the Secretary of State<sup>11</sup> given with the approval of the Treasury, make charges to capital account representing interest on expenditure of a capital nature<sup>12</sup>, being interest for any period which ends on or before the end of the accounting period in which the project or scheme to which the expenditure relates is in the opinion of the Secretary of State completed<sup>13</sup>.

It is the duty of the British Waterways Board to perform its functions under the Transport Act 1962 or the Transport Act 1968 so as to secure that the combined revenues of the board and of its subsidiaries<sup>14</sup> taken together are not less than sufficient to meet its combined charges properly chargeable to revenue account, taking one year with another<sup>15</sup>. The board must secure that its subsidiaries charge to revenue account in every year all charges which are proper to be made to revenue account, including, in particular, proper provision for the depreciation or renewal of assets<sup>16</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 'Charges' includes fares, rates, tolls and dues of every description: Transport Act 1962 s 92(1).

3 Transport Act 1962 s 18(2). References in the Transport Act 1968 s 41(2) (see the text to notes 14-15) and in the Transport Act 1962 to charges properly chargeable to revenue are to be construed accordingly: see s 18(2); and the Transport Act 1968 s 41(5). The Transport Act 1962 s 18 has effect subject to ss 19-30 (see PARA 751 et seq): see s 18(6).

4 Transport Act 1962 s 18(3).

5 Transport Act 1962 s 18(4).

6 Transport Act 1962 s 18(4)(a). Notwithstanding anything in s 18(4)(a), the moneys comprised in the general reserve of the board may be applied for the purposes of its subsidiaries: Transport Act 1968 s 41(4). As to the meaning of 'subsidiary' see PARA 729 note 2.

7 I.e. the Secretary of State for Transport: see PARA 719.

8 As to the meaning of 'Treasury' see PARA 108 note 6.



9 As to directions see PARA 724.

10 Transport Act 1962 s 18(4)(b).

11 As to general provisions as to powers exercisable subject to the Secretary of State's consent see PARA 730.

12 le including expenditure of a capital nature incurred by the British Transport Commission before the vesting date: see the Transport Act 1962 s 18(5). As to the dissolution of the British Transport Commission and the transfer of its functions, property, rights and liabilities see PARA 714. As to the vesting date see s 31(1) (spent); and the Transport Act 1962 (Vesting Date) Order 1962, SI 1962/2634.

13 Transport Act 1962 s 18(5).

14 For the purposes of the Transport Act 1968 s 41(2), (3) (see the text to note 16), the provisions of s 51(5) (joint subsidiaries: see PARA 729) are disregarded: s 41(10).

15 Transport Act 1968 s 41(1), (2). As to additional financial provisions see PARA 752.

16 Transport Act 1968 s 41(3). See also note 14.

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### **751. Borrowing powers of the British Waterways Board.**

The British Waterways Board<sup>1</sup> does not have power to borrow money except in accordance with the following provisions<sup>2</sup>.

The board may borrow<sup>3</sup> temporarily, by way of overdraft or otherwise, either from the Secretary of State<sup>4</sup> or, with the consent of the Secretary of State<sup>5</sup>, from any other person<sup>6</sup>, such sums as the board may require for meeting its obligations or discharging its functions<sup>7</sup> under the Transport Act 1962, but the aggregate of the amounts outstanding in respect of any temporary loans raised by the board under this provision must not exceed such limit as the Secretary of State may for the time being have imposed on the board for these purposes by a direction<sup>8</sup> given to the board<sup>9</sup>.

The board may borrow<sup>10</sup> (otherwise than by way of temporary loan) from the Secretary of State or, with the consent of the Secretary of State and the approval of the Treasury<sup>11</sup>, may borrow (otherwise than by way of temporary loan) in a currency other than sterling from any person, or in sterling from the Commission of the European Communities or from the European Investment Bank<sup>12</sup> such sums as the board may require for all or any of the following purposes<sup>13</sup>:

- 1500 (1) for meeting any expenses properly chargeable to capital, being expenses incurred in connection with the provision or improvement of assets in connection with the business of the board<sup>14</sup>;
- 1501 (2) for the provision of working capital<sup>15</sup>;
- 1502 (3) for acquiring an undertaking or part of an undertaking<sup>16</sup>;
- 1503 (4) for lending money to, or meeting a guarantee given for the benefit of, any person for the purpose of an undertaking carried on by him, or where that person is a body corporate, an undertaking carried on by a subsidiary<sup>17</sup> of that body corporate<sup>18</sup>;
- 1504 (5) for subscribing for or acquiring securities<sup>19</sup> of a body corporate, otherwise than by way of investment<sup>20</sup>;
- 1505 (6) for the payment of interest charged to capital account<sup>21</sup>;
- 1506 (7) to pay off any part of the commencing capital debt<sup>22</sup> of the board, any money borrowed by the board, or any liability<sup>23</sup> transferred to the board from the British Transport Commission<sup>24</sup> under or in pursuance of the Transport Act 1962<sup>25</sup>;
- 1507 (8) for any purpose for which capital moneys are properly applicable (whether or not specified in heads (1) to (7) above)<sup>26</sup>.

The aggregate amount outstanding in respect of the principal of any money borrowed<sup>27</sup> by the board under these provisions<sup>28</sup>, and the board's commencing capital debt<sup>29</sup>, taken together must not exceed the specified sum<sup>30</sup>.

References to borrowing in the above provisions<sup>31</sup> do not include: (a) borrowing by the board from a body corporate which is a subsidiary of the board<sup>32</sup>; (b) the receipt of money by the board in the course of the carrying on of a savings bank operated by the board or the use by the board of money so received<sup>33</sup>; or (c) the receipt or use by the board of money of a pension fund<sup>34</sup> established for the purposes of a pension scheme<sup>35</sup> in which employees of the board or of a subsidiary of the board participate<sup>36</sup>.

- 1 As to the British Waterways Board see PARA 725 et seq.
- 2 Transport Act 1962 s 19(4). Section 19 has effect subject to ss 20-30 (see PARA 754 et seq): see s 19(6).
- 3 le subject to the limit for borrowing specified in the Transport Act 1962 s 19(3): see the text to notes 27-30.
- 4 le the Secretary of State for Transport: see PARA 719. As to the exercise by the British Waterways Board of its functions in Scotland see the Transport Act 1962 s 19(7) (added by SI 2000/3251). As to loans by the Secretary of State see further PARA 754.
- 5 As to general provisions as to powers exercisable subject to the Secretary of State's consent see PARA 730.
- 6 As to the meaning of 'person' see PARA 13 note 29. As to Treasury guarantees in respect of loans by other persons see PARA 755.
- 7 As to the meaning of 'function' see PARA 726 note 7.
- 8 As to directions see PARA 724.
- 9 Transport Act 1962 s 19(1).
- 10 le subject to the limit for borrowing specified in the Transport Act 1962 s 19(3): see the text to notes 27-30.
- 11 As to the meaning of 'Treasury' see PARA 108 note 6.
- 12 As to the establishment of the European Investment Bank see the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty') arts 129, 130 (as originally made); as to that bank now see arts 198D, 198E (added by the Treaty on European Union art G(68)).
- 13 Transport Act 1962 s 19(2) (amended by the Statutory Corporations (Financial Provisions) Act 1974 s 4, Sch 2).
- 14 Transport Act 1962 s 19(2)(a).
- 15 Transport Act 1962 s 19(2)(b).
- 16 Transport Act 1962 s 19(2)(c).
- 17 As to the meaning of 'subsidiary' see PARA 729 note 2.
- 18 Transport Act 1962 s 19(2)(d).
- 19 As to the meaning of 'securities' see PARA 739 note 27.
- 20 Transport Act 1962 s 19(2)(e).
- 21 Transport Act 1962 s 19(2)(f). The interest referred to in the text is that charged under s 18(5) (see PARA 750): see s 19(2)(f).
- 22 As to commencing capital debt see the Transport Act 1962 s 39(1).
- 23 As to the meaning of 'liability' see PARA 746 note 11.
- 24 As to the dissolution of the British Transport Commission and the transfer of its functions, property, rights and liabilities see PARA 714.
- 25 Transport Act 1962 s 19(2)(g).
- 26 Transport Act 1962 s 19(2)(h).
- 27 le under the Transport Act 1962 s 19.
- 28 Transport Act 1962 s 19(3)(a).

29 Transport Act 1962 s 19(3)(b). The board's commencing capital debt is that as defined in Pt II (ss 31-41): see s 19(3)(b). As to provision made for the extinguishment of part of the commencing capital debt of the British Waterways Board see PARA 752 note 3.

30 See the Transport Act 1962 s 19(3) (amended by the Transport Act 1968 s 165(a), Sch 18 Pt I; the Transport (London) Act 1969 s 47(2), Sch 6; the Transport (Financial Provisions) Act 1977 s 3(2)(a); and the Transport Act 1981 s 40(1), Sch 12 Pt I). The specified sum is £25 million or such greater sum not exceeding £35 million as the Secretary of State may by order made by statutory instrument specify: Transport Act 1962 s 19(3)(iv) (substituted by the Water Act 1981 s 1(1), (2)). An order made under the Transport Act 1962 s 19(3) (iv) must be made by statutory instrument, and no such order must be made unless a draft of the order has been approved by resolution of the House of Commons: s 19(3A) (added by the Water Act 1981 s 1(1), (2)). Under these powers, the limit specified in the Transport Act 1962 s 19(3) has been increased from £25 million to £35 million: see the British Waterways Board (Limit for Borrowing) Order 2001, SI 2001/1054, art 2.

31 Ie in the Transport Act 1962 s 19.

32 Transport Act 1962 s 19(5)(a).

33 Transport Act 1962 s 19(5)(b).

34 'Pension fund' means a fund established for the purposes of paying pensions: Transport Act 1962 s 92(1). As to the meaning of 'pension' see PARA 726 note 13.

35 'Pension scheme' includes any form of arrangement for the payment of pensions, whether subsisting by virtue of Act of Parliament, trust, contract or otherwise: Transport Act 1962 s 92(1).

36 Transport Act 1962 s 19(5)(c). 'Participant' means, in relation to a pension scheme, a person who (whether he is referred to in the scheme as a member, as a contributor or otherwise) contributes or has contributed under the scheme and has pension rights thereunder and 'participate' is construed accordingly: s 92(1). 'Pension rights' includes, in relation to any person, all forms of right to or eligibility for the present or future payment of a pension, and any expectation of the accrual of a pension under any customary practice, and includes a right of allocation in respect of the present or future payment of a pension: s 92(1).

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## **752. Grants to the board and payment of excess revenue into the Consolidated Fund.**

The Secretary of State<sup>1</sup> or any other Minister of the Crown may, with the approval of the Treasury<sup>2</sup>, from time to time make grants to the British Waterways Board<sup>3</sup>. If in any accounting year of the board there is an excess of its revenue over the total sums properly chargeable by it to revenue, the Secretary of State may, with the approval of the Treasury, require that excess, so far as it appears to him, after consultation with the board, to be surplus to the requirements of the board, to be paid over to the Secretary of State, who must pay it into the Consolidated Fund<sup>4</sup>.

1     le the Secretary of State for Transport: see PARA 719.

2     As to the meaning of 'Treasury' see PARA 108 note 6.

3     Transport Act 1968 s 43(1), (2). As to the British Waterways Board see PARA 725 et seq. The Scottish Ministers may also from time to time make grants to the board: see s 43(2A) (added by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

On 1 January 1969, without prejudice to any further adjustment under the Transport Act 1968 s 53(5) (power to vary the commencing capital debt under the Transport Act 1962 s 39 of the Holding Company or of any of the boards), there was extinguished such part of the commencing capital debt of the board under the Transport Act 1962 s 39 as was required to be extinguished in order to reduce the commencing capital debt of the board outstanding on that date to £3,750,000: see the Transport Act 1968 s 43(3)(a). As to the establishment of the British Waterways Board as one of the four new boards among whom, together with a holding company, the functions and the property of the British Transport Commission were divided see PARA 714.

4     Transport Act 1968 s 43(5) (s 43(5) amended, (6) added, by SI 2000/3251). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031. As to excesses in revenue arising from the activities of the British Waterways Board in Scotland see the Transport Act 1968 s 43(6) (as so added).

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### **753. Account by the Secretary of State of receipt and disposal of certain sums.**

The Secretary of State<sup>1</sup> must, as respects each financial year<sup>2</sup>, prepare in such form and manner as the Treasury<sup>3</sup> may direct an account of, and of the disposal by him of, the following sums, namely:

1508 (1) any sums issued to the Secretary of State by the Treasury out of the National Loans Fund<sup>4</sup> for the purpose of making loans<sup>5</sup> to the British Waterways Board<sup>6</sup>;

1509 (2) any sums which, being received by the Secretary of State:  
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25. (a) by way of interest on, or the repayment of, any such loan as aforesaid<sup>7</sup>;

26. (b) by way of interest on, or the repayment of, the commencing capital debt<sup>8</sup> of the board<sup>9</sup>; or

27. (c) in respect of any surplus of the board<sup>10</sup>,

28. are required by specified statutory provisions<sup>11</sup> to be paid by the Secretary of State into the National Loans Fund or the Consolidated Fund<sup>12</sup>, as the case may be<sup>13</sup>.

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The Secretary of State must send every such account prepared by him to the Comptroller and Auditor General<sup>14</sup> not later than the end of November following the year to which the account relates; and the Comptroller and Auditor General must examine, certify and report on the account and lay copies of it, together with his report, before each House of Parliament<sup>15</sup>.

1    Ie the Secretary of State for Transport: see PARA 719.

2    Ie the 12 months ending with 31 March: see the Interpretation Act 1978 s 5, Sch 1.

3    As to the meaning of 'Treasury' see PARA 108 note 6.

4    Ie under the Transport Act 1962 s 20(3): see PARA 754. As to the National Loans Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

5    Ie under the Transport Act 1962 s 20(1): see PARA 754.

6    Transport Act 1968 s 44(1)(a) (amended by SI 1973/338; SI 1991/510). As to the British Waterways Board see PARA 725 et seq.

7    Transport Act 1968 s 44(1)(b)(i).

8    Ie under the Transport Act 1962 s 39.

9    Transport Act 1968 s 44(1)(b)(ii) (amended by the Transport Act 1980 s 69, Sch 9 Pt III).

10   Transport Act 1968 s 44(1)(b)(iv) (amended by the Transport Act 1980 Sch 9 Pt III).

11 le required by the Transport Act 1962 s 20(5) (see PARA 754) (including as it was applied by the Transport Act 1968 s 27(1) (repealed)), or by the Transport Act 1962 s 39(8) (including as it is applied by the Transport Act 1968 s 27, Sch 2 para 1) or by the Transport Act 1968 s 43(5) (see PARA 752).

12 As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

13 Transport Act 1968 s 44(1) (amended by the Transport Act 1980 Sch 9 Pt III).

14 As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 724-726.

15 Transport Act 1968 s 44(3). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

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#### **754. Loans from the National Loans Fund to the British Waterways Board.**

Subject to the Transport Act 1962, the Secretary of State<sup>1</sup> may with the approval of the Treasury<sup>2</sup> lend to the British Waterways Board<sup>3</sup> any sums which the board has power<sup>4</sup> to borrow<sup>5</sup>. The Treasury may issue out of the National Loans Fund<sup>6</sup> to the Secretary of State such sums as are necessary to enable him to make such loans<sup>7</sup>.

Any such loans which the Secretary of State makes must be repaid to him at such times and by such methods, and interest must be paid to him at such rates and at such times, as he may with the approval of the Treasury from time to time direct<sup>8</sup>. Any such sums received by the Secretary of State must be paid into the National Loans Fund<sup>9</sup>.

1    Ie the Secretary of State for Transport: see PARA 719.

2    As to the meaning of 'Treasury' see PARA 108 note 6.

3    As to the British Waterways Board see PARA 725 et seq.

4    Ie under the Transport Act 1962 s 19(1) or (2): see PARA 751.

5    Transport Act 1962 s 20(1). As to the application of s 20 in relation to the exercise of the board's functions in Scotland see s 20(7) (added by SI 2000/3251).

6    As to the National Loans Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

7    Transport Act 1962 s 20(3) (amended by the National Loans Act 1968 s 2, Sch 1). As to the duty of the Secretary of State to account in respect of such sums see PARA 753.

8    Transport Act 1962 s 20(2).

9    Transport Act 1962 s 20(5) (amended by the National Loans Act 1968 ss 2, 24(2), Sch 1, Sch 6 Pt I).



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### **755. Treasury guarantees on behalf of the British Waterways Board.**

The Treasury<sup>1</sup> may guarantee, in such manner and on such conditions as it may think fit, the repayment of the principal of, the payment of interest on and the discharge of any other financial obligation in connection with any sums which the British Waterways Board<sup>2</sup> borrows from a person<sup>3</sup> other than the Secretary of State<sup>4</sup> in exercise of its powers<sup>5</sup> to borrow<sup>6</sup>. Immediately after giving any such guarantee, the Treasury must lay a statement of the guarantee before each House of Parliament<sup>7</sup>.

Any sums required by the Treasury for fulfilling any such guarantee must be charged on and issued out of the Consolidated Fund<sup>8</sup>; and where a sum is issued for fulfilling such a guarantee, the Treasury must, as soon as possible after the end of each financial year<sup>9</sup>, beginning with that in which the sum is issued, until the principal of the sum and the interest are finally discharged, lay annually before each House of Parliament a statement relating to that sum<sup>10</sup>. If sums are issued in fulfilment of any such guarantee given in favour of the board, the board must make to the Treasury, at such times and in such manner as the Treasury may direct, repayments of capital and interest<sup>11</sup>. Any sums so repaid to the Treasury must be paid into the Exchequer<sup>12</sup>.

1 As to the meaning of 'Treasury' see PARA 108 note 6.

2 As to the British Waterways Board see PARA 725 et seq.

3 As to the meaning of 'person' see PARA 13 note 29.

4 Ie the Secretary of State for Transport: see PARA 719.

5 Ie under the Transport Act 1962 s 19: see PARA 751.

6 Transport Act 1962 s 21(1) (amended by the Statutory Corporations (Financial Provisions) Act 1974 s 4, Sch 2; and the Miscellaneous Financial Provisions Act 1983 s 4, Sch 2). As to the power of the Scottish Ministers to give guarantees in connection with the exercise of the board's functions in Scotland see s 21A (added by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7 Transport Act 1962 s 21(2). As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

8 Transport Act 1962 s 21(3). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

9 Ie the 12 months ending with 31 March: see the Interpretation Act 1978 s 5, Sch 1.

10 Transport Act 1962 s 21(2).

11 See the Transport Act 1962 s 21(4).

12 Transport Act 1962 s 21(5). As to the Exchequer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711.

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## **756. Accounts of the British Waterways Board.**

The British Waterways Board<sup>1</sup> must: (1) keep proper accounts and other records in relation thereto<sup>2</sup>; and (2) prepare an annual statement of accounts in such form and containing such particulars, compiled in such manner, as the Secretary of State<sup>3</sup> may from time to time direct<sup>4</sup> with the approval of the Treasury<sup>5</sup>. The accounts of the board must be audited by an auditor or auditors to be appointed annually by the Secretary of State, and a person<sup>6</sup> must not be so appointed unless he is eligible for appointment<sup>7</sup> as a statutory auditor<sup>8</sup>. As soon as the accounts of the board have been so audited, the board must send a copy of the statement of accounts to the Secretary of State, together with a copy of the report made by the auditor or auditors on that statement<sup>9</sup>. A copy of that statement and of any such report must be included in the report which is to be laid by the Secretary of State<sup>10</sup> annually before each House of Parliament<sup>11</sup>.

The board is a designated body for the purposes of the Government Resources and Accounts Act 2000 and is therefore required to prepare and present to the Treasury such financial information in relation to the financial year as the Treasury requires to enable it to prepare Whole of Government Accounts<sup>12</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 Transport Act 1962 s 24(1)(a).

3 Ie the Secretary of State for Transport: see PARA 719.

4 As to directions see PARA 724.

5 Transport Act 1962 s 24(1)(b). As to the meaning of 'Treasury' see PARA 108 note 6. In connection with the exercise of the board's functions in Scotland, the Scottish Ministers must approve the manner and form of the accounts: see s 24(1) (amended by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

The Railway and Canal Traffic Act 1888 and the Railway Companies (Accounts and Returns) Act 1911 (which relate to the making of returns and the keeping of statistics by railway and canal companies) (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 14) and, except so far as the Secretary of State may by order made by statutory instrument otherwise provide, so much of any statutory provision as relates to the accounts, statistics and returns to be kept or made by the owners of undertakings which were by the Transport Act 1947 transferred to the British Transport Commission, or as relates to the audit or publication of any such accounts, do not apply to the board: Transport Act 1962 s 24(4). At the date at which this volume states the law no such order had been made. As to the dissolution of the British Transport Commission and the transfer of its functions, property, rights and liabilities see PARA 714.

6 As to the meaning of 'person' see PARA 13 note 29.

7 Ie under the Companies Act 2006 Pt 42 (ss 1209-1264): see **COMPANIES** vol 15 (2009) PARA 957 et seq.

8 Transport Act 1962 s 24(2) (amended by SI 1991/1997; SI 2008/948). The Scottish Ministers must be consulted before such appointments are made: see s 24(2) (amended by SI 2000/3251).

9 Transport Act 1962 s 24(3). A copy of the statement of accounts must be sent also to the Scottish Ministers: s 24(3) (amended SI 2000/3251).

10 As to such report see the Transport Act 1962 s 27(8); PARA 728.

11 Transport Act 1962 s 24(3). In the case of Scotland, the reference in the text is to the report which is to be laid by the Scottish Ministers annually before the Scottish Parliament: see s 24(3) (as amended: see note 9).

12 See the Government Resources and Accounts Act 2000 s 10(1); the Whole of Government Accounts (Designation of Bodies) Order 2007, SI 2007/1492, art 2, Schedule; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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### **C. POWERS OVER LAND**

#### **757. Powers of acquisition and compulsory purchase of land.**

The Secretary of State<sup>1</sup> may authorise the British Waterways Board<sup>2</sup> to purchase compulsorily<sup>3</sup> any land<sup>4</sup> in Great Britain<sup>5</sup> which it requires<sup>6</sup> for the purposes of its business<sup>7</sup>. The Secretary of State must not so authorise the board to purchase land for the purpose of constructing a pipeline if the construction of that pipeline requires<sup>8</sup> the consent of the Secretary of State<sup>9</sup>.

The power of purchasing land compulsorily under these provisions includes power to acquire an easement or other right over land by the creation of a new right<sup>10</sup>. However, this does not apply to an easement or other right over any land which would for the purposes of the Acquisition of Land Act 1981 form part of a common, open space or fuel or field garden allotment<sup>11</sup>.

1    I.e. the Secretary of State for Transport: see PARA 719.

2    As to the British Waterways Board see PARA 725 et seq.

3    The board also has power to promote Bills under the Transport Act 1962 s 17 which may include powers of compulsory purchase: see PARA 747.

4    As to the meaning of 'land' see PARA 739 note 7.

5    As to the meaning of 'Great Britain' see PARA 22 note 5. However, the Transport Act 1962 s 15 does not apply to the compulsory purchase of land in Scotland by the board: see s 15A(1) (s 15A added by SI 2000/3251). As to the compulsory purchase of land in Scotland by the board see s 15A (as so added). See also s 15(4) (amended by the Acquisition of Land Act 1981 s 34, Sch 4 para 1).

6    For these purposes, land required for the purposes of the business of a wholly owned subsidiary of the board is deemed to be land required for the purposes of the business of the board (see the Transport Act 1968 s 51(2)); and activities carried on by the board by virtue of the Transport Act 1968 s 48 (see PARA 749) or s 50(1)-(7) (see PARA 748) are deemed not to form part of the business of the board (see s 52(2) (amended by the Transport Act 1980 s 69, Sch 9 Pt III)). As to the meaning of 'wholly owned subsidiary' see PARA 739 note 10.

7    Transport Act 1962 s 15(1). The Acquisition of Land Act 1981 applies as if the board were a local authority within the meaning of that Act (see s 7; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 557): see the Transport Act 1962 s 15(1) (amended by the Acquisition of Land Act 1981 s 34, Sch 4 para 1, Sch 6 Pt I). However, the Transport Act 1962 s 15(1) is not to be taken as authorising the board to purchase compulsorily land which it has power to acquire by agreement under s 11(4) (see PARA 758): s 15(1) proviso.

8    I.e. under the Transport Act 1962 s 12(3): see PARA 761.

9    Transport Act 1962 s 15(2). As to the general provisions relating to the compulsory acquisition of land, and the compulsory acquisition of rights over land, for construction of pipelines see the Pipe-lines Act 1962; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 595 et seq.

10   Transport Act 1962 s 15(3).

11   Transport Act 1962 s 15(3) proviso (amended by the Acquisition of Land Act 1981 Sch 4 para 1). As to the meaning of 'common', 'fuel or field garden allotment' and 'open space' see the Acquisition of Land Act 1981 s 19(4); and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 531.

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### **758. Power of the British Waterways Board to develop land.**

The British Waterways Board<sup>1</sup> has power<sup>2</sup> to develop its land<sup>3</sup> in such manner as it may think fit<sup>4</sup>. The board may<sup>5</sup>, in particular:

- 1510 (1) retain any part of its land which is not required for the purposes of its business and develop it for use by other persons<sup>6</sup>; and
- 1511 (2) where the use of its land for the purposes of its business can be combined with its use for other purposes, develop the land by constructing or adapting buildings thereon for use wholly or partly by other persons<sup>7</sup>,

with a view to selling or otherwise disposing of any right or interest in the land or, as the case may be, the buildings or any part of the buildings, after the development is carried out<sup>8</sup>. The board must not incur any substantial item of expenditure in developing its land for use for purposes which are not the purposes of its business without the consent of the Secretary of State<sup>9</sup>, and the Secretary of State may from time to time give directions<sup>10</sup> to the board indicating what is to be treated for these purposes as a substantial item of expenditure<sup>11</sup>.

Where the board proposes under these provisions to develop any land for use otherwise than for the purposes of its business it has power, with the consent of the Secretary of State<sup>12</sup>, to acquire by agreement adjoining land for the purpose of developing it together with the other land<sup>13</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 Ie subject to the provisions of the Transport Act 1962 s 11.

3 As to the meaning of 'land' see PARA 739 note 7.

4 Transport Act 1962 s 11(1). As to the application of the Town and Country Planning Acts to any such development see the Transport Act 1962 s 86; and the Transport Act 1968 s 141.

5 Ie subject to the provisions of the Transport Act 1962 s 11. In engaging in activities specified in s 11(2)-(4) (see the text to notes 6-13) the board must act as would a company engaged in a commercial enterprise: see the Transport Act 1968 s 134; and PARA 740.

6 Transport Act 1962 s 11(2)(a). As to the meaning of 'person' see PARA 13 note 29.

7 Transport Act 1962 s 11(2)(b).

8 Transport Act 1962 s 11(2).

9 Ie the Secretary of State for Transport: see PARA 719. As to general provisions as to powers exercisable subject to the Secretary of State's consent see PARA 730. In relation to land situated in Scotland, the references to the Secretary of State in the Transport Act 1962 s 11(3), (4) (see the text to notes 12-13) are to be read as references to the Scottish Ministers: see s 11(5) (added by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

10 As to directions see PARA 724.

11 Transport Act 1962 s 11(3). See also note 5.

12 The board may exercise the power conferred by the Transport Act 1962 s 11(4) without the consent of the Secretary of State in any case where the Secretary of State has under s 11(3) (see the text to notes 9-11) consented to the incurring by the board of a substantial item of expenditure in developing land which includes expenditure proposed to be incurred in the exercise of that power: see the Transport Act 1968 s 49(2); and PARA 759.

13 Transport Act 1962 s 11(4) (amended by the Transport Act 1968 ss 49(1), 165(a), Sch 18 Pt I). Except as so provided, the board does not have power to acquire land for purposes which are not related to any of the activities of the board other than the development of land: s 11(4) proviso. See also notes 5, 9. As to the additional provisions relating to the application of s 11(4) see PARAS 759, 760.

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**759. Board's power to develop its own land otherwise than for the purposes of its business.**

Where the British Waterways Board<sup>1</sup> proposes<sup>2</sup> to develop any of its land<sup>3</sup> for use otherwise than for the purposes of its business, the Secretary of State<sup>4</sup> may give his consent<sup>5</sup> to the acquisition by the board by agreement of adjoining land for the purpose of developing it with the other land whether or not it appears to him that the other land cannot be satisfactorily developed unless the adjoining land is so acquired<sup>6</sup>. The board may exercise the power<sup>7</sup> to develop any of its land for use otherwise than for the purposes of its business without the consent of the Secretary of State in any case where the Secretary of State has consented<sup>8</sup> to the incurring by the board of a substantial item of expenditure in developing that land which includes expenditure proposed to be incurred in the exercise of that power<sup>9</sup>.

Where the board proposes<sup>10</sup> to dispose of any of its land it has power to acquire by agreement adjoining land for the purpose of disposing of it together with the other land; but the board must not incur any substantial item of expenditure under this provision without the consent of the Secretary of State; and the Secretary of State may from time to time give directions<sup>11</sup> to the board indicating what is to be treated for these purposes as a substantial item of expenditure<sup>12</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 I.e. under the Transport Act 1962 s 11: see PARA 758.

3 As to the meaning of 'land' see PARA 722 note 5.

4 I.e. the Secretary of State for Transport: see PARA 719. In relation to land situated in Scotland, the references to the Secretary of State are to be read as references to the Scottish Ministers: see the Transport Act 1968 s 49(4A) (added by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

5 I.e. consent under the Transport Act 1962 s 11(4): see PARA 758. The provisions of the Transport Act 1962 s 28 as to powers exercisable subject to the Secretary of State's consent apply to the Transport Act 1968 s 49: see s 52(3); and PARA 730.

6 Transport Act 1968 s 49(1). In engaging in activities specified in s 49(1)-(3) (see also the text to notes 7-12) the board must act as a body engaged in commercial enterprise: see s 134; and PARA 740.

7 I.e. the power conferred by the Transport Act 1962 s 11(4): see PARA 758.

8 I.e. under the Transport Act 1962 s 11(3): see PARA 758.

9 Transport Act 1968 s 49(2). See also notes 4, 6.

10 I.e. notwithstanding anything in the Transport Act 1962 s 11(4): see PARA 758.

11 As to directions see PARA 724.

12 Transport Act 1968 s 49(3). See also notes 4, 6. As to the application of the Town and Country Planning Acts in relation to the exercise of powers under the Transport Act 1968 s 49(3) see s 141(1), (3) (s 141(1) amended by the Transport Act 1985 s 57(6), Sch 3).

**UPDATE**

**759 Board's power to develop its own land otherwise than for the purposes of its business**

NOTE 12--Transport Act 1968 s 141(1) further amended: Local Transport Act 2008 Sch 4 para 15.



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## **760. Board's power to acquire land for development purposes.**

The British Waterways Board<sup>1</sup> has power<sup>2</sup>, with the consent of the Secretary of State<sup>3</sup>, to acquire land<sup>4</sup> by agreement with a view to its development, whether by the board or by some other person<sup>5</sup>, for use otherwise than for the purposes of its business if that land adjoins or is situated in the vicinity of any inland waterway<sup>6</sup> comprised in the undertaking of the board, and the Secretary of State is satisfied that the land acquired will be so connected by waterway to, or is so situated in relation to, that waterway that the waterway can be conveniently used by the person for the time being occupying the land proposed to be acquired<sup>7</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 Ie notwithstanding anything in the Transport Act 1962 s 11(4): see PARA 758.

3 Ie the Secretary of State for Transport: see PARA 719. The provisions of the Transport Act 1962 s 28 as to powers exercisable subject to the Secretary of State's consent apply to the Transport Act 1968 s 49: see s 52(3); and PARA 730. In relation to land situated in Scotland, the references in s 49 to the Secretary of State are to be read as references to the Scottish Ministers: see s 49(4A) (added by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 As to the meaning of 'land' see PARA 722 note 5.

5 As to the meaning of 'person' see PARA 13 note 29.

6 As to the meaning of 'inland waterway' see PARA 720 note 3.

7 See the Transport Act 1968 s 49(4) (amended by the British Waterways Act 1995 s 23). In engaging in activities specified in the Transport Act 1968 s 49(4) the board must act as a body engaged in commercial enterprise: see s 134; and PARA 740. As to the application of the Town and Country Planning Acts in relation to the exercise of powers under the Transport Act 1968 s 49(4) see s 141(1), (3) (s 141(1) amended by the Transport Act 1985 s 57(6), Sch 3).

## **UPDATE**

## **760 Board's power to acquire land for development purposes**

NOTE 7--Transport Act 1968 s 141(1) further amended: Local Transport Act 2008 Sch 4 para 15.

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### **761. Power of the British Waterways Board to construct and operate pipelines.**

The British Waterways Board<sup>1</sup> has power<sup>2</sup>:

- 1512 (1) to construct and operate pipelines<sup>3</sup> in Great Britain<sup>4</sup>; and
- 1513 (2) to enter into transactions with other persons<sup>5</sup> for the construction or operation by those other persons of pipelines on land<sup>6</sup> in Great Britain belonging to the board<sup>7</sup>.

However, the board must not without the consent of the Secretary of State<sup>8</sup> construct any pipeline unless the pipeline is required for the purposes of the business of the board other than the operation of pipelines<sup>9</sup>.

The board does not have power to acquire land for the purpose of constructing pipelines except: (a) where the pipeline is or is to be mainly on land belonging to the board and acquired for other purposes<sup>10</sup>; or (b) where the pipeline is required for the purposes of the business of the board other than the operation of pipelines<sup>11</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 Ie subject to the Transport Act 1962 s 12: s 12(1) (amended by the Railways Act 1993 s 152(1), Sch 12 para 5(1), (3)).

3 'Pipeline' means any main or pipe for the transmission of any substance, together with any works provided in connection with the operation of such a main or pipe: Transport Act 1962 s 12(4). As to general provisions regulating and facilitating the construction and safe operation of cross-country pipelines see the Pipe-lines Act 1962; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 559 et seq.

4 Transport Act 1962 s 12(1)(a). As to the meaning of 'Great Britain' see PARA 22 note 5. The construction of a pipeline may require an environmental impact assessment: see PARA 10.

5 As to the meaning of 'person' see PARA 13 note 29.

6 As to the meaning of 'land' see PARA 739 note 7.

7 Transport Act 1962 s 12(1)(b).

8 Ie in the case of a proposed pipe-line in England and Wales: see the Transport Act 1962 s 12(3A)(a) (s 12(3A) added by SI 2000/3251). In the case of a proposed pipe-line in Scotland, the consent required is that of the Scottish Ministers: see the Transport Act 1962 s 12(3A)(b) (as so added). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to general provisions as to powers exercisable subject to the Secretary of State's consent see PARA 730.

9 Transport Act 1962 s 12(3A) (as added: see note 8).

10 Transport Act 1962 s 12(2)(a).

11 Transport Act 1962 s 12(2)(b).

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## ***D. POWERS OF ENTRY ON LAND UNDER THE BRITISH WATERWAYS ACT 1995***

### **762. Entry on to land in cases of emergency.**

Where the British Waterways Board<sup>1</sup> has reasonable cause to believe that:

- 1514 (1) the carrying out of relevant operations<sup>2</sup> is necessary<sup>3</sup>;
- 1515 (2) the relevant operations are required to be carried out without delay: (a) in the case of any relevant operations consisting of any inspection, survey or investigation, for the purpose of confirming that there exists an immediate danger to persons or property and, if so, establishing the nature of the repair, maintenance, alteration, protection or demolition required to remove the danger<sup>4</sup>; (b) in the case of any other relevant operations, for the purpose of removing or facilitating the removal of any immediate danger to persons or property<sup>5</sup>; and
- 1516 (3) it would not be reasonably practicable for the operations to be carried out without entry on to land (other than a highway<sup>6</sup>) adjoining or in the vicinity of an inland waterway<sup>7</sup>,

any person authorised in writing<sup>8</sup> in that behalf by the board may enter the land and carry out the operations on that land<sup>9</sup> or on any adjoining land of the board<sup>10</sup>.

The board must inform the owner<sup>11</sup> and occupier of the land as soon as possible of the carrying out of emergency operations<sup>12</sup> and, not more than seven days after the entry on that land, it must serve on such owner and occupier a notice<sup>13</sup>: (i) specifying the land upon which entry has been made and the nature of the emergency operations<sup>14</sup>; and (ii) containing details of the right of the occupier to claim payment for such entry and the right of the owner and occupier to claim compensation<sup>15</sup>. The board must as soon as possible inform all relevant undertakers<sup>16</sup> of the carrying out of emergency operations likely to affect them and must thereafter give notice as soon as possible to the relevant undertakers of any such operations<sup>17</sup>.

Nothing contained in or done under the provisions relating to notice of entry<sup>18</sup> or the power to enter land and carry out relevant operations pursuant to notice of entry<sup>19</sup>, affects the powers of the board under the above provisions<sup>20</sup> to enter land and carry out emergency operations at any time<sup>21</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 'Relevant operations' means: (1) the repair, maintenance, alteration, renewal, protection or demolition of any inland waterway; (2) the repair, maintenance, alteration, renewal or protection of any works (not forming part of any inland waterway) for the drainage of, or supply of water to, any inland waterway; (3) any inspection, survey or investigation of any inland waterway or adjoining land, or any works such as are referred to in head (2) above, for the purpose of ascertaining whether any such repair, maintenance, alteration, renewal, protection or demolition is required: British Waterways Act 1995 s 3(1). For the purposes of s 3(1), 'maintenance' includes the removal, felling, cutting back or treating of any tree or other vegetation: s 3(2). As to the meaning of 'inland waterway' see PARA 745 note 13. As to the meaning of 'land' see PARA 14 note 21.

Nothing in Pt II (ss 3-15) affects the obligation of the board: (a) to obtain a works licence under the Port of London Act 1968 s 66 (which relates to the licensing of works in the river Thames and adjoining waters: see **LONDON GOVERNMENT**) in respect of any operation constituting works to which s 66 relates (British Waterways Act 1995 s 14); or (b) to obtain a licence under the Thames Conservancy Act 1932 Pt III (ss 44-109) (see **LONDON GOVERNMENT**) in respect of any operation requiring a licence under Pt III (British Waterways Act 1995 s 15).

3 British Waterways Act 1995 s 4(1)(a).

4 British Waterways Act 1995 s 4(1)(b)(i).

5 British Waterways Act 1995 s 4(1)(b)(ii).

6 'Highway' is not defined in the British Waterways Act 1995. As to the meaning of the expression at common law see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1; and as to the meaning under the Highways Act 1980 see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 7.

7 British Waterways Act 1995 s 4(1)(c).

8 As to the meaning of 'writing' see PARA 22 note 1.

9 'On' in relation to the carrying out of relevant operations on land, includes in, under or over: British Waterways Act 1995 s 3(1).

10 British Waterways Act 1995 s 4(1). As to powers of entry in cases other than an emergency see PARAS 763-764. As to further provisions as to entry see PARA 765. As to offences relating to entry on land see PARA 769.

11 'Owner' means, in relation to any land in England or Wales, a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack-rent of the land or, where the land is not let at a rack-rent, would be entitled if it were so let: see the British Waterways Act 1995 s 3(1). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'person' see PARA 13 note 29.

12 'Emergency operations' means relevant operations carried out pursuant to the British Waterways Act 1995 s 4: s 3(1).

13 Subject to the British Waterways Act 1995 s 19(5) (see PARA 793), the British Waterways Act 1983 s 17 (see below) applies to all notices authorised or required to be served on any person by or under the British Waterways Act 1995: s 31(1). The British Waterways Act 1983 s 17(2)(e) applies to notices under the British Waterways Act 1995 s 4(2), to notices of entry under s 5 (see PARA 763) and to notices under s 21(12) (see PARA 794) as it applies to notices under the British Waterways Act 1983 s 12 (see PARA 771), as though the said s 12 applied to Scotland as well as to England and Wales: British Waterways Act 1995 s 31(2).

All notices authorised or required to be served on any person by or under the British Waterways Act 1983 must be in writing: s 17(1). Any such notice may be served: (1) by delivering it to the person upon whom it is to be served or by leaving it at his proper address or by sending it by post to him at that address (s 17(2)(a)); or (2) if the person is a body corporate, by serving it in accordance with head (1) above on the secretary or clerk of that body (s 17(2)(b)); or (3) if the person is a partnership, by serving it in accordance with head (1) above on a partner or a person having the control or management of the partnership business (s 17(2)(c)); or (4) if in the case of a notice relating to a vessel the name and address of the person upon whom the notice is to be served cannot after reasonable inquiry be ascertained, by exhibiting it in a conspicuous position on or near the vessel (s 17(2)(d)); or (5) if in the case of a notice under s 12 the name and address of any owner or occupier of land upon whom the notice is to be served cannot after reasonable inquiry be ascertained, either by leaving it in the hands of a person who is or who appears to be resident or employed on the land or by leaving it conspicuously affixed to some building or object on the land (s 17(2)(e)). For these purposes and for the purposes of the Interpretation Act 1978 s 7 (see PARA 22 note 5) in its application to these provisions, the proper address of any person on whom notice is to be served by the board is his last known address, except that (a) in the case of service on a body corporate or its secretary or clerk it is the address of the registered or principal office of the body (s 17(3)(a)); (b) in the case of service on a partnership or a partner or a person having the control or management of the partnership business it is the principal office of the partnership (s 17(3)(b)); and for these purposes the principal office of a company registered outside the United Kingdom or of a partnership carrying on business outside the United Kingdom is its principal office within the United Kingdom (s 17(3)). If a person to be served by virtue of these provisions with any notice by the board has specified an address within the United Kingdom other than his proper address (as determined in pursuance of s 17(3) above) as the one at which he or someone on his behalf will accept documents of the same kind as that document, that address is also to be treated as his proper address for the purposes of s 17 and the Interpretation Act 1978 s 7 in its application thereto: British Waterways Act 1983 s 17(4). 'Vessel' includes any ship, boat, barge, lighter or raft and any other description of craft, whether used in navigation or not: s 2; British Waterways Act 1995 s 2(1). As to the meaning of 'United Kingdom' see PARA 22 note 5.

14 British Waterways Act 1995 s 4(2)(a).

15 British Waterways Act 1995 s 4(2)(b). As to payment for entry see PARA 766. As to the payment of compensation see PARA 767.

16 'Relevant undertaker' means any of the following: (1) the Environment Agency; (2) the British Coal Corporation (now dissolved: see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARAS 2-3, 89); (3) any of the following undertakers, that is, any: (a) water undertaker; (b) sewerage undertaker; (c) internal drainage board; or (d) supplier of electricity within the meaning of the Electricity Act 1989 Pt I (ss 3A-64) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065) which has apparatus in the area where the land upon which relevant operations are carried out or proposed to be carried out is situated; (4) any of the following undertakers, that is, any (a) gas transporter within the meaning of the Gas Act 1986 Pt I (ss 4AA-48) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 805); or (b) generator or transmitter of electricity within the meaning of the Electricity Act 1989 Pt I, which has apparatus on, under or over land upon or immediately adjacent to which relevant operations are carried out or proposed to be carried out; (5) any undertakers authorised by any enactment to carry on any water transport, canal, inland navigation, dock, harbour or pier undertaking if in any case the land on which relevant operations are carried out or proposed to be carried out is in the ownership or occupation of any such undertakers, or is immediately adjacent to any land in the ownership or occupation of any such undertakers; (6) any provider of an electronic communications network having any electronic communications apparatus in the area where relevant operations are carried out or proposed to be carried out: British Waterways Act 1995 s 3(1) (definition amended by virtue of SI 1996/362, SI 1996/593, and the Utilities Act 2000 s 76(7); and by the Communications Act 2003 s 406(1), Sch 17 para 134). As to the Environment Agency see PARA 17. As to the meanings of 'water undertaker' and 'sewerage undertaker' see PARA 137 note 4. As to internal drainage boards see PARA 569. As to the meaning of 'enactment' see PARA 14 note 31.

17 British Waterways Act 1995 s 13(1). This provision has effect subject to any agreement between the board and any relevant undertakers: see s 13(3).

18 Ie the British Waterways Act 1995 s 5: see PARA 763.

19 Ie the British Waterways Act 1995 s 6: see PARA 764.

20 Ie the British Waterways Act 1995 s 4: see the text to notes 1-15.

21 British Waterways Act 1995 s 7.

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### **763. Notice of entry.**

Where the British Waterways Board<sup>1</sup> has reasonable cause to believe that the carrying out of relevant operations<sup>2</sup> other than emergency operations is necessary<sup>3</sup>, and where it would not be reasonably practicable for the operations to be carried out without entry on to land<sup>4</sup> (other than a highway<sup>5</sup>) adjoining or in the vicinity of an inland waterway<sup>6</sup>, the board may serve<sup>7</sup> a notice of entry in the following terms<sup>8</sup>. A notice of entry:

1517 (1) must specify:

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- 29. (a) the land on which entry is proposed to be made<sup>9</sup>;
- 30. (b) the nature of the relevant operations, the manner in which it is proposed they should be carried out and the nature of any apparatus to be placed and left on the land in connection with the relevant operations<sup>10</sup>;
- 31. (c) the date upon which it is intended that the relevant operations will commence (which must not be earlier than the day after the last date upon which a counter-notice<sup>11</sup> may be served in respect of the notice of entry) and their maximum duration<sup>12</sup>; and
- 32. (d) the hours during which the relevant operations are to be carried out<sup>13</sup>;

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1518 (2) must contain details of the rights to object to the notice (including a form of counter-notice for use by the recipient<sup>14</sup>) and to claim payment for such entry together with compensation<sup>15</sup>; and

1519 (3) must state that it would not be reasonably practicable for the operations to be carried out without entry on the land specified in the notice<sup>16</sup>.

A notice of entry must be served on the owner of the land<sup>17</sup>, on the occupier of the land (if not the owner)<sup>18</sup>, and on every relevant undertaker<sup>19</sup>. A copy of every such notice of entry must be posted in some conspicuous place on or near the land specified in the notice not less than 28 days before entry is proposed to be made<sup>20</sup>.

A person<sup>21</sup> served with a notice of entry may, within 28 days from the date on which the notice is served on him, serve on the board a counter-notice stating that he consents unconditionally to the entry by the board on the land described in the notice and to the carrying out of the relevant operations specified in the notice, in the manner so specified (the 'proposals of the notice of entry')<sup>22</sup>; or stating that he objects to the proposals of the notice of entry on any one or more of the following grounds, which must be specified in the counter-notice<sup>23</sup>. Those grounds are:

1520 (i) that it would be reasonably practicable for the operations mentioned in the notice to be carried out in some other way not involving entry on to the land specified in the notice<sup>24</sup>;

1521 (ii) that the carrying out of the relevant operations is unnecessary<sup>25</sup>;

- 1522 (iii) that the maximum duration of the relevant operations, as stated in the notice of entry, is excessive, having regard to the nature of the relevant operations<sup>26</sup>;
- 1523 (iv) that there has been some informality, defect or error in, or in connection with, the notice<sup>27</sup>;
- 1524 (v) that the notice should lawfully have been served on another person<sup>28</sup>;
- 1525 (vi) that the proposals of the notice of entry will interfere unreasonably with the use and enjoyment of the land by the recipient of the notice of entry and that the board should be required to comply with the conditions specified in the counter-notice with respect to those proposals, or that the proposals should be modified in the manner specified in the counter-notice for the purpose of reducing or preventing such interference<sup>29</sup>;
- 1526 (vii) (where the recipient is a relevant undertaker) that the proposals of the notice of entry would be detrimental to the carrying on by the recipient of its undertaking and that having regard to the detriment entry by the board should not be permitted; or the board should be required to comply with the conditions specified in the counter-notice with respect to those proposals, or that the proposals should be modified in the manner specified in the counter-notice, for the purpose of reducing or preventing such detriment<sup>30</sup>.

If the recipient of a notice of entry does not within 28 days serve a counter-notice on the board, he is deemed to have granted his consent unconditionally to the proposals of the notice of entry<sup>31</sup>.

Upon receipt of a counter-notice the board must within 28 days: (A) inform the recipient of the notice of entry in writing<sup>32</sup> that the notice of entry has been withdrawn (without prejudice to the right of the board to serve a further notice of entry on the recipient or on any other person)<sup>33</sup>, or the board will accept and comply with the conditions with respect to matters such as are mentioned in head (vi) or (vii) above and specified in the counter-notice or modify the proposals of the notice of entry<sup>34</sup>; (B) where the person is a relevant undertaker, refer the counter-notice to arbitration<sup>35</sup>; or (C) in any other case, appeal against the counter-notice to a magistrates' court<sup>36</sup>.

In so far as a counter-notice is based on the ground of some informality, defect or error in or in connection with the notice of entry the court or, as the case may be, the arbitrator must uphold the notice of entry if it or he is satisfied that the informality, defect or error was not a material one<sup>37</sup>. On the hearing of the appeal the court may make such order as it thinks fit<sup>38</sup>. A person aggrieved<sup>39</sup> by an order of a magistrates' court may appeal to the Crown Court<sup>40</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 As to the meaning of 'relevant operations' see PARA 762 note 2.

3 British Waterways Act 1995 s 5(1)(a). As to the meaning of 'emergency operations' see PARA 762 note 12.

4 As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'on', in relation to the carrying out of relevant operations on land, see PARA 762 note 9.

5 'Highway' is not defined in the British Waterways Act 1995. As to the meaning of the expression at common law see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1; and as to the meaning under the Highways Act 1980 see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 7.

6 British Waterways Act 1995 s 5(1)(b). As to the meaning of 'inland waterway' see PARA 745 note 13.

7 As to the service of notices see PARA 762 note 13.

8 British Waterways Act 1995 s 5(1). Nothing contained in or done under s 5 affects the powers of the board under s 4 (see PARA 762) to enter land and carry out emergency operations at any time: see s 7; and PARA 762.

As to power to enter land and carry out relevant operations pursuant to a notice of entry see PARA 764. As to further provisions as to entry see PARA 765. As to offences relating to entry on land see PARA 769.

9 British Waterways Act 1995 s 5(4)(a)(i).

10 British Waterways Act 1995 s 5(4)(a)(ii).

11 Ie a counter-notice under the British Waterways Act 1995 s 5(5): see the text to notes 21-23.

12 British Waterways Act 1995 s 5(4)(a)(iii).

13 British Waterways Act 1995 s 5(4)(a)(iv).

14 Ie pursuant to the provisions of the British Waterways Act 1995 s 5(5)-(14): see the text to notes 21-40.

15 British Waterways Act 1995 s 5(4)(b). As to payment for entry see PARA 766. As to the payment of compensation see PARA 767.

16 British Waterways Act 1995 s 5(4)(c).

17 British Waterways Act 1995 s 5(2)(a). As to the meaning of 'owner' see PARA 762 note 11.

18 British Waterways Act 1995 s 5(2)(b).

19 British Waterways Act 1995 s 5(2)(c). As to the meaning of 'relevant undertaker' see PARA 762 note 16.

20 British Waterways Act 1995 s 5(3).

21 As to the meaning of 'person' see PARA 13 note 29.

22 British Waterways Act 1995 s 5(5)(a)(i).

23 British Waterways Act 1995 s 5(5)(a)(ii).

24 British Waterways Act 1995 s 5(6)(a).

25 British Waterways Act 1995 s 5(6)(b).

26 British Waterways Act 1995 s 5(6)(c).

27 British Waterways Act 1995 s 5(6)(d).

28 British Waterways Act 1995 s 5(6)(e).

29 British Waterways Act 1995 s 5(6)(f).

30 British Waterways Act 1995 s 5(6)(g).

31 British Waterways Act 1995 s 5(5)(b).

32 As to the meaning of 'writing' see PARA 22 note 1.

33 British Waterways Act 1995 s 5(7)(a)(i).

34 British Waterways Act 1995 s 5(7)(a)(ii).

35 British Waterways Act 1995 s 5(7)(b). On any such reference to arbitration the arbitrator may have regard to any court order made on any appeal under s 5(7)(c) (see the text to note 36) relating to the proposals of the notice of entry which is the subject of the reference: s 5(8). As to arbitration see PARA 725 note 10.

36 British Waterways Act 1995 s 5(7)(c). An appeal is by way of complaint for an order: s 5(10). For the purposes of the time limit for bringing an appeal, the making of the complaint is treated as the bringing of the appeal: s 5(11). On any appeal under s 5(7)(c) the court may have regard to any award of an arbitrator made following a reference under s 5(7)(b) (see the text to note 35) relating to the proposals of the notice of entry which is the subject of the appeal: s 5(9). As to complaints see **MAGISTRATES** vol 29(2) (Reissue) PARA 681. As to magistrates' courts see **MAGISTRATES** vol 29(2) (Reissue) PARA 583 et seq.

37 British Waterways Act 1995 s 5(12).



- 38 British Waterways Act 1995 s 5(13).
- 39 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
- 40 British Waterways Act 1995 s 5(14). As to the Crown Court see **COURTS** vol 10 (Reissue) PARA 621 et seq.

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**764. Power to enter land and carry out relevant operations pursuant to notice of entry.**

On or after the date mentioned in the notice of entry<sup>1</sup>, or, if such a notice of entry is upheld on appeal<sup>2</sup> (with or without modification) after service of a counter-notice<sup>3</sup>, after the notice of entry has been upheld, any person authorised in writing<sup>4</sup> in that behalf by the British Waterways Board<sup>5</sup> may enter on the land<sup>6</sup> and carry out on that land or on any adjoining land of the board the relevant operations<sup>7</sup> of the nature specified in the notice during the hours and in the manner so specified<sup>8</sup>.

A person so authorised by the board to enter on land must not exercise any of the powers under the above provisions unless notice of his intention to do so has been served<sup>9</sup> by the board, not less than 28 days before he does so, on any relevant undertakers<sup>10</sup>.

1 As to the notice of entry see PARA 763.

2 As to appeals see PARA 763.

3 As to counter-notices see PARA 763.

4 As to the meaning of 'writing' see PARA 22 note 1.

5 As to the British Waterways Board see PARA 725 et seq.

6 As to the meaning of 'land' see PARA 14 note 21.

7 As to the meaning of 'relevant operations' see PARA 762 note 2. As to the meaning of 'on', in relation to the carrying out of relevant operations on land, see PARA 762 note 9.

8 British Waterways Act 1995 s 6. Nothing contained in or done under s 6 affects the powers of the board under s 4 (see PARA 762) to enter land and carry out emergency operations at any time: see s 7; and PARA 762. As to further provisions as to entry see PARA 765. As to payment for entry see PARA 766. As to compensation see PARA 767. As to offences relating to entry on land see PARA 769.

9 As to the service of notices see PARA 762 note 13.

10 British Waterways Act 1995 s 13(2). This provision has effect subject to any agreement between the board and any relevant undertakers: see s 13(3). As to the meaning of 'relevant undertaker' see PARA 762 note 16.

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### **765. Further provisions as to entry.**

The power of the British Waterways Board<sup>1</sup> to carry out relevant operations<sup>2</sup> includes power:

- 1527 (1) to place and leave on the land<sup>3</sup> apparatus for use in connection with the relevant operations in question, and to remove such apparatus<sup>4</sup>; and
- 1528 (2) to carry out excavations<sup>5</sup>.

The nature of any apparatus and of any proposed excavations such as are referred to in heads (1) and (2) above must be specified in the notice of entry<sup>6</sup> in the case of relevant operations which are not emergency operations<sup>7</sup>. In carrying out any relevant operations in pursuance of entry on to land in cases of emergency<sup>8</sup>, the board must secure that as little damage as may be is done<sup>9</sup>.

A person authorised by the board to enter on land<sup>10</sup> to carry out relevant operations must, if so required before or after entering on the land, produce evidence of his authority to enter<sup>11</sup>. He may take with him on to the land such other persons and such vehicles, materials and equipment as are necessary for the relevant operations<sup>12</sup>, and he must leave the land as effectually secured against trespassers as he found it unless the occupier of the land or his agent indicates that he does not wish the land to be so secured<sup>13</sup>.

However, nothing in the relevant provisions of the British Waterways Act 1995<sup>14</sup> authorises the board to:

- 1529 (a) enter any building or any operational railway, tramroad or any part of a tramway laid otherwise than in a highway<sup>15</sup>;
- 1530 (b) use or interfere with any apparatus of a relevant undertaker<sup>16</sup>, unless the board is entitled to do so otherwise than by virtue of those provisions<sup>17</sup>; or
- 1531 (c) construct any permanent works on any land unless the board has a sufficient right or interest in the land apart from those provisions<sup>18</sup>.

The board, when it has entered any land<sup>19</sup>, must commence the relevant operations for the purposes of which entry was made as soon as is reasonably practicable and must complete them with all reasonable dispatch<sup>20</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 As to the meaning of 'relevant operations' see PARA 762 note 2. As to such powers see PARAS 762-765.

3 As to the meaning of 'land' see PARA 14 note 21. As to the meaning of 'on', in relation to the carrying out of relevant operations on land, see PARA 762 note 9.

4 British Waterways Act 1995 s 8(1)(a)(i).

5 British Waterways Act 1995 s 8(1)(a)(ii). If the British Waterways Board carries out any such excavation, it must make good the surface of the land as soon as reasonably practicable after the completion of the relevant operations: s 8(1)(c). As soon as reasonably practicable after the completion of any relevant operations and any

making good carried out under s 8(1)(c) the board must remove any apparatus, vehicles and equipment and any unused materials from the land: s 8(4).

6 As to the notice of entry see PARA 763.

7 British Waterways Act 1995 s 8(1)(b). As to the meaning of 'emergency operations' see PARA 762 note 12.

8 Ie in pursuance of the British Waterways Act 1995 s 4: see PARA 762.

9 British Waterways Act 1995 s 8(2).

10 Ie in pursuance of the British Waterways Act 1995 s 4 (see PARA 762) or s 6 (see PARA 764.

11 British Waterways Act 1995 s 8(3)(a). As to offences in relation to entry on land see PARA 769.

12 British Waterways Act 1995 s 8(3)(b).

13 British Waterways Act 1995 s 8(3)(c).

14 Ie in the British Waterways Act 1995 Pt II (ss 3-15).

15 British Waterways Act 1995 s 8(5)(a). 'Highway' is not defined in the British Waterways Act 1995. As to the meaning of the expression at common law see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1; and as to the meaning under the Highways Act 1980 see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 7.

16 As to the meaning of 'relevant undertaker' see PARA 762 note 16.

17 British Waterways Act 1995 s 8(5)(b).

18 British Waterways Act 1995 s 8(5)(c).

19 Ie pursuant to the provisions of the British Waterways Act 1995 Pt II (ss 3-15).

20 British Waterways Act 1995 s 8(6). Nothing in the provisions of Pt II (ss 3-15) authorises the board to enter any land for the purposes of (or in connection with) the development of any land, being land not forming part of any inland waterway or of any works such as are mentioned in head (2) of the definition of 'relevant operations': see s 8(7). As to the meaning of 'inland waterway' see PARA 745 note 13.

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## **766. Payment for entry.**

The British Waterways Board<sup>1</sup> must pay to the occupier of any land<sup>2</sup> upon which entry is made<sup>3</sup> a sum in respect of such entry which is assessed as follows<sup>4</sup>. The sum so payable is such sum as would have been paid if the occupier had entered into an agreement with the board granting it rights to enter the land for such period and for such purposes as entry has been made<sup>5</sup> and, where entry is made pursuant to a notice of entry<sup>6</sup>, on such conditions as are specified in any counter-notice<sup>7</sup> and accepted by the board or imposed either on any reference to arbitration of a counter-notice, by an arbitrator<sup>8</sup>, or on any appeal against a counter-notice, by a court<sup>9</sup>.

Nothing in these provisions requires the board to defer or suspend entry on land or the carrying out of relevant operations<sup>10</sup> while any dispute as to the sum so payable<sup>11</sup> is determined<sup>12</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 As to the meaning of 'land' see PARA 14 note 21.

3 Ie in accordance with the British Waterways Act 1995 Pt II (ss 3-15).

4 British Waterways Act 1995 s 9(1). The rights of any person to a payment under s 9(1) are without prejudice to the rights of that or any other person to recover compensation under s 10 (see PARA 767): s 9(5). The Land Compensation Act 1961 Part II (ss 5-16) (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 754 et seq) so far as material, applies to the assessment of the sum payable under the British Waterways Act 1995 s 9(1) as though the rights deemed by s 9(2) (see the text to notes 5-9) to be granted to the board had been acquired by it compulsorily; and in assessing that sum regard must be had to the degree of inconvenience caused to the occupier by the entry: s 9(3). As to the meaning of 'person' see PARA 13 note 29.

5 Ie in accordance with the British Waterways Act 1995 Pt II (ss 3-15).

6 As to notices of entry' see PARA 763.

7 As to counter-notices see PARA 763.

8 British Waterways Act 1995 s 9(2)(a).

9 British Waterways Act 1995 s 9(2)(b).

10 As to the meaning of 'relevant operations' see PARA 762 note 2.

11 Ie the sum payable under the British Waterways Act 1995 s 9(1): see the text to notes 1-4.

12 British Waterways Act 1995 s 9(4). As to the settlement of disputes as to a person's entitlement to, or the amount of, a payment under s 9 see PARA 768.

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## **767. Compensation.**

If a person<sup>1</sup> suffers loss or damage in consequence of:

- 1532 (1) entry on to land<sup>2</sup> in accordance with the British Waterways Act 1995<sup>3</sup>;
- 1533 (2) the carrying out<sup>4</sup> of relevant operations<sup>5</sup>; or
- 1534 (3) the failure by the British Waterways Board<sup>6</sup> to comply with any condition:
  - (a) specified in a counter-notice and accepted by the board<sup>7</sup>; or (b) imposed on any reference to arbitration of a counter-notice by an arbitrator or imposed on any appeal against a counter-notice by a court<sup>8</sup>,

he is entitled to recover compensation for the loss or damage from the board<sup>9</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'land' see PARA 14 note 21.

3 British Waterways Act 1995 s 10(a). The entry on to land referred to in the text is one in accordance with the British Waterways Act 1995 Pt II (ss 3-15). As to such entry see PARAS 762-765.

4 Ie in accordance with the British Waterways Act 1995 Pt II (ss 3-15).

5 British Waterways Act 1995 s 10(b). As to the meaning of 'relevant operations' see PARA 762 note 2.

6 As to the British Waterways Board see PARA 725 et seq.

7 British Waterways Act 1995 s 10(c)(i). As to counter-notices see PARA 763.

8 British Waterways Act 1995 s 10(c)(ii).

9 British Waterways Act 1995 s 10. As to the settlement of disputes as to a person's entitlement to, or the amount of, compensation under s 10 see PARA 768.

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## **768. Disputes as to payments and compensation.**

Any dispute as to a person's<sup>1</sup> entitlement to a payment for entry<sup>2</sup>, or to compensation<sup>3</sup>, or as to the amount of the payment or compensation, is to be determined:

- 1535 (1) where the person is a relevant undertaker<sup>4</sup>, and the dispute does not relate to the meaning or construction of either of the statutory provisions<sup>5</sup> relating to payment for entry or compensation, by arbitration<sup>6</sup>; and  
 1536 (2) in any other case, by the Lands Tribunal<sup>7</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 British Waterways Act 1995 s 11(a). The payment referred to in the text is one under s 9: see PARA 766.

3 British Waterways Act 1995 s 11(b). The compensation referred to in the text is compensation in pursuance of s 10: see PARA 767.

4 As to the meaning of 'relevant undertaker' see PARA 762 note 16.

5 I.e. the British Waterways Act 1995 s 9 or s 10.

6 British Waterways Act 1995 s 11(i). As to arbitration see PARA 725 note 10.

7 See the British Waterways Act 1995 ss 2(1), 11(ii). In such a case the Land Compensation Act 1961 s 2(2)-(5) (procedure on references) and s 4 (costs: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 716-717, 746) apply with necessary modifications in relation to the determination by the tribunal of such a dispute: see the British Waterways Act 1995 ss 2(1), 11(ii). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

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### **769. Offences under the provisions as to entry on land.**

A person<sup>1</sup> is guilty of an offence<sup>2</sup> if he:

- 1537 (1) intentionally obstructs another person in the exercise of any power of entry conferred on the other person by the British Waterways Act 1995<sup>3</sup>;
- 1538 (2) while another person is on any land<sup>4</sup> intentionally obstructs him in carrying out any emergency operations<sup>5</sup>, or any relevant operations<sup>6</sup> specified in a notice of entry<sup>7</sup> (and not superseded by any conditions accepted or modifications<sup>8</sup> or by the order of any court or the award of an arbitrator), as the case may be<sup>9</sup>; or
- 1539 (3) without reasonable excuse removes or otherwise interferes with apparatus left<sup>10</sup> on or in land<sup>11</sup>.

It is a defence in any prosecution for an offence under head (1) or (2) above that the person obstructed could not reasonably be identified as a person entitled to exercise the powers<sup>12</sup> in question<sup>13</sup>.

If a person who has entered on any land<sup>14</sup> discloses to another person information obtained by him there about a manufacturing process or trade secret, he is guilty of an offence<sup>15</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 See the British Waterways Act 1995 s 12(1). The penalty for such an offence is, on summary conviction, a fine: (1) in the case of an offence of obstructing another person in the exercise of a power conferred by s 4 (entry on to land in cases of emergency: see PARA 762), not exceeding level 4 on the standard scale (s 12(1)(i)); and (2) in the case of any other offence, not exceeding level 2 on the standard scale (s 12(1)(ii)). As to the standard scale see PARA 141 note 18.

3 British Waterways Act 1995 s 12(1)(a). The provisions of the British Waterways Act 1995 referred to in the text are those of Pt II (ss 3-15). As to such powers of entry see PARAS 762, 764, 765.

4 Ie in pursuance of the British Waterways Act 1995 Pt II (ss 3-15). As to the meaning of 'land' see PARA 14 note 21.

5 As to the meaning of 'emergency operations' see PARA 762 note 12.

6 As to the meaning of 'relevant operations' see PARA 762 note 2. As to the meaning of 'on', in relation to the carrying out of relevant operations on land, see PARA 762 note 9.

7 As to notices of entry see PARA 763.

8 Ie made under the British Waterways Act 1995 s 5(7)(a)(ii): see PARA 763.

9 British Waterways Act 1995 s 12(1)(b).

10 Ie in pursuance of the British Waterways Act 1995 s 8(1): see PARA 765.

11 British Waterways Act 1995 s 12(1)(c).

12 Ie under the British Waterways Act 1995 Pt II (ss 3-15).



13 British Waterways Act 1995 s 12(2). As to the requirement for a person exercising powers of entry on land to produce evidence of his authority to enter see PARA 765.

14 ie in pursuance of the British Waterways Act 1995 Pt II (ss 3-15).

15 British Waterways Act 1995 s 12(3). The penalty for such an offence is, on summary conviction, a fine not exceeding the statutory maximum or, on conviction on indictment, imprisonment for a term not exceeding two years or a fine or both: s 12(3). As to the statutory maximum see PARA 169 note 20.

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## ***E. POWERS AVAILABLE UNDER OTHER LOCAL ACTS***

### **(A) POWER TO MAKE CANAL BYELAWS**

#### **770. Power to make canal byelaws under local Acts.**

The British Waterways Board<sup>1</sup> has power to make byelaws (except in relation to tidal waters) for regulating the use of canals, including the express power to make byelaws for excluding any vessel from its canals, prohibiting the use by any vessel of canals or prohibiting the use of its canals except in compliance with such conditions as the board may prescribe<sup>2</sup>. The board may also from time to time make byelaws for regulating the use of its canals and the conduct of all persons<sup>3</sup>, including its officers and servants, who may be on canals<sup>4</sup>. In particular, byelaws may be made for all or any of the following purposes:

- 1540 (1) for determining the description, size and construction of vessels that may be used on the canal or on specified parts of it and the means by which, and the conditions on which, those vessels may be navigated and used<sup>5</sup>;
- 1541 (2) for regulating the markings of vessels and the loading, discharging and mooring of vessels<sup>6</sup>;
- 1542 (3) for prohibiting or imposing conditions and restrictions on the conveyance, handling and storage of any goods which might endanger the safety of the canal, except where the conveyance, handling or storage is subject to the provisions of a public general Act<sup>7</sup>;
- 1543 (4) for requiring the owner, master or person in charge of any vessel conveying goods to declare in writing its correct tonnage and the weight and description of any goods on board<sup>8</sup>;
- 1544 (5) for prescribing the person or persons to whom and the place or places at which the board's rates, tolls, dues and charges are to be paid<sup>9</sup>;
- 1545 (6) for preventing damage or injury to the canal or any vessel or goods on it and the removal, alteration, damage or destruction of any work or thing set up by the board or with its consent in connection with the canal<sup>10</sup>;
- 1546 (7) for preventing any rubbish or live or dead animal from being thrown or discharged or being permitted to be thrown or discharged into the canal<sup>11</sup>;
- 1547 (8) for preventing obstructions, and preventing or regulating bathing, in the canal<sup>12</sup>; and
- 1548 (9) for prohibiting, without prejudice to any public or private rights, the passage without the board's consent of any person, animal or vehicle over any canal towpath<sup>13</sup>.

The board has additional powers to make byelaws for prohibiting or controlling water-skiing or any similar activity on canals, either generally or during specified periods<sup>14</sup>. Any byelaws so made by the British Waterways Board may provide that any person contravening them is to be liable on summary conviction to a penalty not exceeding £100 for each offence and, in the case of a continuing offence, a further penalty not exceeding £2 for each day on which the offence is continued after conviction<sup>15</sup>.

Byelaws made by the British Waterway Board do not come into operation until they have been confirmed by the Secretary of State<sup>16</sup>, and provision is made for their publication and proof<sup>17</sup>.

The enactments conferring the power to make canal byelaws do not affect the validity or operation of any byelaws made by the former British Transport Commission or its predecessors under any public general Act or restrict the British Waterways Board from making further byelaws under any such Act<sup>18</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 See the British Waterways Act 1975 s 5.

3 As to the meaning of 'person' see PARA 13 note 29.

4 See the British Transport Commission Act 1954 s 16(2). So far as they were inconsistent with this provision, local enactments authorising the board to make canal byelaws have been repealed: s 16(1), (5). This repeal was subject to a saving of existing byelaws made under those enactments but power is conferred to repeal those byelaws: s 16(1), (3), (5). As to the power conferred on all navigation authorities to make waterways byelaws see PARA 720; and as to byelaws made by canal companies under special Acts see PARA 780.

5 British Transport Commission Act 1954 s 16(2)(a).

6 British Transport Commission Act 1954 s 16(2)(b), (c).

7 British Transport Commission Act 1954 s 16(2)(d).

8 British Transport Commission Act 1954 s 16(2)(e).

9 British Transport Commission Act 1954 s 16(2)(f).

10 British Transport Commission Act 1954 s 16(2)(g).

11 British Transport Commission Act 1954 s 16(2)(h).

12 British Transport Commission Act 1954 s 16(2)(i), (j).

13 British Transport Commission Act 1954 s 16(2)(k).

14 British Transport Commission Act 1954 s 16(2)(jj) (added by the British Waterways Act 1971 s 22(a)).

15 See the British Transport Commission Act 1954 s 16(4) (amended by the British Waterways Act 1975 s 8); Decimal Currency Act 1969 s 10(1).

16 As to the Secretary of State see PARA 15 note 1. The Railway and Canal Traffic Act 1888 s 40 (byelaws made by canal companies: see PARA 780) does not apply to any such byelaws: see the British Transport Commission Act 1954 s 16(13). Any person affected by any of the byelaws submitted for confirmation is entitled to make representations to the Secretary of State within a specified period: see s 16(7).

17 See British Transport Commission Act 1954 s 16(6)-(12).

18 See the British Transport Commission Act 1954 s 16(17).

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## (B) POWERS TO MAINTAIN AND CONTROL WATERWAYS

### **771. Miscellaneous powers under local Acts.**

In addition to the general powers conferred on the British Waterways Board<sup>1</sup> by the British Waterways Act 1995<sup>2</sup>, and the specific powers to make byelaws for regulating the use of its canals and the conduct of persons who may be on those canals<sup>3</sup>, local Acts also confer on the board the following powers<sup>4</sup>:

- 1549 (1) to require canal basins to be kept watertight<sup>5</sup>;
- 1550 (2) to carry out or complete works to fill in a canal basin where a person has either failed to complete those works or failed to complete them in accordance with the necessary requirements<sup>6</sup>;
- 1551 (3) to recover charges due to the board under or by virtue of specified enactments<sup>7</sup>;
- 1552 (4) to obtain information as to the master or the owner (as the case may be) of any vessel which is or has been on an inland waterway or on a reservoir owned or managed by the board<sup>8</sup>;
- 1553 (5) to control vessels on any inland waterway or on any reservoir owned or managed by the board which are, in the opinion of the board, unsafe<sup>9</sup>;
- 1554 (6) to remove any relevant craft after giving not less than 28 days' notice to the owner<sup>10</sup>;
- 1555 (7) to remove from any inland waterway or from any reservoir owned or managed by the board anything (other than a vessel) which is: (a) causing (or likely to become) an obstruction to (or likely to cause interference with) navigation; (b) causing or likely to cause interference with the operation of any works of the board, or damage to any such works or to any property; or (c) in the waterway or reservoir without lawful authority<sup>11</sup>;
- 1556 (8) to obtain, for the purpose of performing any of the board's statutory duties, particulars of persons interested in land<sup>12</sup>.

Provision is made for the service of notices pursuant to the exercise of the powers under heads (4) to (8) above<sup>13</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 As to powers of entry onto land see PARA 762 et seq. As to powers of regulation of waterways see PARA 784 et seq.

3 As to the power conferred by the British Transport Commission Act 1954 s 16: see PARA 770.

4 As to the treatment of local Acts in this title see PARA 725 note 7. It should be noted also that, notwithstanding the powers and duties applicable to the British Waterways Board under general and local legislation of the nature described in this paragraph, the board remains subject to, and has the benefit of, over 500 special Acts under which the waterways it is now responsible for were created: see PARA 714.

- 5 See the British Transport Commission Act 1959 s 26 (amended by the Transport Act 1962 s 32(1), Sch 2 Pt III).
- 6 See the British Transport Commission Act 1959 s 26 (as amended: see note 5).
- 7 See the British Waterways Act 1983 s 5.
- 8 See the British Waterways Act 1983 s 6.
- 9 See the British Waterways Act 1983 s 7. Nothing in the British Waterways Act 1995 s 17 affects the operation of the British Waterways Act 1983 s 7: see the British Waterways Act 1995 s 17(11)(c); and PARA 789.
- 10 See the British Waterways Act 1983 s 8. For these purposes, 'relevant craft' means any vessel which is sunk, stranded or abandoned in any inland waterway or in any reservoir owned or managed by the board or which is left or moored therein without lawful authority and includes any part of such vessel; and 'owner', in relation to any relevant craft, means the owner of the relevant craft at the time of sinking, stranding or abandonment and includes a person letting a vessel for hire, whether or not that person owns the vessel: see s 8(1). As to the meaning of 'person' see PARA 13 note 29. This provision is the enforcement power most commonly used by the British Waterways Board and regularly features in county court litigation, especially in relation to unlicensed vessels (being 'vessel[s] . . . left or moored therein without any lawful authority'). See *Moore v British Waterways Board* [2009] All ER (D) 161 (Mar) in which the validity of notices served under the British Waterways Act 1983 s 8 was challenged.
- 11 See the British Waterways Act 1983 s 9.
- 12 See the British Waterways Act 1983 s 12.
- 13 See the British Waterways Act 1983 s 17; and PARA 762 note 13.

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## **(ii) Duties and Powers of Other Navigation Authorities**

### **A. IN GENERAL**

#### **772. Power to make waterways byelaws.**

The Secretary of State<sup>1</sup> may, on the application of any qualified body which owns or manages an inland waterway and after consultation with the relevant authority, by order confer on that body power to make byelaws in relation to that waterway for such purposes as may be specified in the order<sup>2</sup>. The Broads Authority<sup>3</sup> has powers to make byelaws for the purposes of preventing damage to the land and interference with the enjoyment of the land<sup>4</sup>, and for the purposes of the good management of the navigation area, the conservation of its natural beauty and amenities and the promotion of its use for purposes of recreation<sup>5</sup>.

1    le the Secretary of State for Transport: see PARA 719.

2    See the Transport Act 1968 s 113; and PARA 720.

3    As to the Broads Authority see PARA 734.

4    See the Norfolk and Suffolk Broads Act 1988 s 6; and PARA 735.

5    See the Norfolk and Suffolk Broads Act 1988 s 10; and PARA 735.

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### **773. Revision of charges made by inland waterway undertakings.**

An independent statutory undertaking, including an inland waterway undertaking<sup>1</sup>, together with any person<sup>2</sup>, or any body representative of persons, appearing to the Secretary of State<sup>3</sup> to have a substantial interest, may make an application<sup>4</sup> to the Secretary of State for a revision of the amount of any of the charges which that undertaking is for the time being authorised to demand and take in pursuance of any statutory provision<sup>5</sup>. However, this power to apply for revision does not apply to any charge which, by the statutory provisions authorising the charge, is left to the discretion of the undertakers without any restriction or subject only to a requirement that the charge is to be reasonable<sup>6</sup>.

1 See the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6(1)(b) (amended by the Transport Act 1962 ss 52(3), 95(1), Sch 12 Pt I). 'Inland waterway undertaking' means an undertaking engaged in conserving, maintaining, improving or working a canal or other inland navigation not navigated by sea-going ships or the navigation of a tidal water not so navigated: Transport Charges etc (Miscellaneous Provisions) Act 1954 s 13 (amended by the Harbours Act 1964 s 39(1)).

2 As to the meaning of 'person' see PARA 13 note 29.

3 The Transport Charges etc (Miscellaneous Provisions) Act 1954 refers to 'the minister' which expression is defined as meaning the Minister of Transport: see ss 6, 13(1) (definition amended by SI 1959/1768). As to the devolution of the functions of the Minister of Transport to the Secretary of State for Transport: see PARA 719.

4 As to the requirements for information to be provided and published in relation to any such application see the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6(4).

5 See the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6(2). The provisions of s 6 do not apply to any undertaking in relation to any charge if the statutory provisions relating to that undertaking confer a power of revising that charge on the Secretary of State and some other minister acting together: s 6(1) (amended by SI 1959/1768). As to the exercise of the power of the Secretary of State to make an order under the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6 see s 6(2), (3), (5). Any such order is made by statutory instrument and an order made under s 6(2) may vary or revoke any previous order made under that provision: s 6(6). Such orders, being of local effect, are not recorded in this work.

6 Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6(7).

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## ***B. PARTICULAR DUTIES AND POWERS***

### **(A) THE ENVIRONMENT AGENCY**

#### **774. Environment Agency's general environmental and recreational duties.**

The Environment Agency<sup>1</sup> has a general duty to promote the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters, the conservation of flora and fauna which are dependent on an aquatic environment, and the use of such waters and land for recreational purposes<sup>2</sup>. The Agency is also subject to a general duty to further the conservation and enhancement of the environment<sup>3</sup>, and under a duty to take steps for securing, so long as the Agency has rights to the use of water or land associated with water, that those rights are exercised so as to ensure that the water or land is made available for recreational purposes and is so made available in the best manner<sup>4</sup>.

1 As to the Environment Agency see PARA 17.

2 See the Environment Act 1995 s 6(1); and PARAS 675, 683.

3 See the Environment Act 1995 s 7(1); and PARA 675.

4 See the Environment Act 1995 s 7(4), (5); and PARA 683.



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### **775. Powers in relation to navigation and drainage.**

Where any navigable waters in England and Wales<sup>1</sup> are not subject to the control of any navigation authority, harbour authority or conservancy authority, the Environment Agency<sup>2</sup> may apply to the Secretary of State or, as the case may be, the Welsh Ministers for an order imposing tolls in respect of the navigation of vessels in those waters<sup>3</sup>. The Agency may apply to the Secretary of State or, as appropriate, the Welsh Ministers for an order transferring to it the functions of a navigation or conservancy authority<sup>4</sup>.

Where it appears necessary or expedient to do so for the purposes of its relevant statutory functions, the Agency may make byelaws regulating the use of inland waters<sup>5</sup>, the use of navigable waters<sup>6</sup>, and the use of the Agency's waters<sup>7</sup>.

The Agency also has powers to carry out drainage works in respect of main rivers<sup>8</sup>, and to make drainage and flood defence byelaws but no such byelaw may conflict or interfere with the operation of any byelaw made by a navigation authority, harbour authority or conservancy authority<sup>9</sup>.

1 As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2.

2 As to the Environment Agency see PARA 17.

3 See the Water Resources Act 1991 s 143; and PARA 710. In the case of waters within an internal drainage district which do not form part of a main river, these powers are exercisable by the drainage board for that district concurrently with the Agency: see the Land Drainage Act 1991 s 56; and PARA 710.

4 See the Water Resources Act 1991 s 111; and PARA 590.

5 See the Water Resources Act 1991 s 210, Sch 25 para 1; and PARA 709.

6 See the Water Resources Act 1991 s 210, Sch 25 para 2; and PARA 709.

7 See the Water Resources Act 1991 s 210, Sch 25 para 3; and PARA 709.

8 See PARA 589.

9 See PARA 605.

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## (B) THE BROADS AUTHORITY

### **776. Authority's powers in relation to navigation and conservation.**

The general duty of the Broads Authority<sup>1</sup> to manage the Broads includes management for the purposes of protecting the interests of navigation<sup>2</sup>. The Authority has a duty to maintain the navigation area for the purposes of navigation and to improve and develop it as it thinks fit<sup>3</sup>; and it has powers to make byelaws for the good management of the navigation area, for its conservation and for the promotion of its use for purposes of recreation<sup>4</sup>. Other duties of the Authority relate to the conservation and enhancement of the Broads, and to the promotion of opportunities for the understanding and enjoyment of the special qualities of the Broads by the public<sup>5</sup>.

1 As to the Broads Authority see PARA 734.

2 See the Norfolk and Suffolk Broads Act 1988 s 2(1)(c); and PARA 735.

3 See the Norfolk and Suffolk Broads Act 1988 s 10; and PARA 735.

4 See the Norfolk and Suffolk Broads Act 1988 s 10; and PARA 735.

5 See the Norfolk and Suffolk Broads Act 1988 s 2(1)(a), (b); and PARA 735.

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## (C) OTHER AUTHORITIES

### **777. Power of local authorities to assist in maintaining waterways for amenity purposes.**

Without prejudice to the provisions relating to the power of certain bodies to maintain or take over waterways and connected works<sup>1</sup>, a local authority<sup>2</sup> may assist any other person<sup>3</sup> (whether financially, by the provision of services or facilities, or otherwise) in maintaining or improving for amenity or recreational purposes, including fishing: (1) any inland waterway<sup>4</sup> situated wholly or partly in the area of the authority<sup>5</sup>; and (2) any other waterway which is so situated that it can conveniently be used for those purposes by persons residing in the area of the authority<sup>6</sup>.

1    le without prejudice to the Transport Act 1968 s 109: see PARA 743.

2    As to the meaning of 'local authority' see PARA 720 note 5.

3    As to the meaning of 'person' see PARA 13 note 29.

4    As to the meaning of 'inland waterway' see PARA 720 note 3.

5    Transport Act 1968 s 114(a).

6    Transport Act 1968 s 114(b).

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**778. Powers of water and sewerage undertakers, etc.**

Under the Water Industry Act 1991, water undertakers and sewerage undertakers<sup>1</sup> have powers to regulate navigation by byelaws<sup>2</sup>, which are similar to those possessed by the Environment Agency<sup>3</sup>.

1 As to the meaning of 'water undertaker' see PARA 137 note 4.

2 See the Water Industry Act 1991 s 157; and PARA 711.

3 See PARA 775.

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### **779. Flood defence powers of drainage boards, etc.**

Within internal drainage districts<sup>1</sup>, internal drainage boards<sup>2</sup> have flood defence powers in respect of ordinary watercourses (that is, watercourses that are not main rivers<sup>3</sup>), and outside such districts local authorities have those powers<sup>4</sup>. An internal drainage board or a local authority may make such drainage or flood defence byelaws as it considers necessary to secure the efficient working of the drainage system in its district or area respectively so long as no byelaw so made conflicts or interferes with the operation of any byelaw made by a navigation authority, harbour authority or conservancy authority<sup>5</sup>.

In the case of waters within an internal drainage district which do not form part of a main river, the powers of the Environment Agency to levy navigation tolls are exercisable by the drainage board for that district concurrently with the Agency<sup>6</sup>.

1 As to internal drainage districts see PARA 569 et seq.

2 As to internal drainage boards see PARA 569.

3 As to the meaning of 'main river' see PARA 574.

4 See PARA 589.

5 See PARA 605. The Environment Agency has similar powers: see PARA 775.

6 See PARAS 710, 775.

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## (D) CANAL COMPANIES

### **780. Canal companies' powers and duties.**

The powers and obligations of a canal company are normally governed by the special Act under which it was formed<sup>1</sup>. The special Acts often included the power to make byelaws and regulations<sup>2</sup>, which are subject to the approval of the Secretary of State<sup>3</sup>, and no byelaw or regulation disallowed by the Secretary of State has any effect<sup>4</sup>. Any power to borrow money possessed by a canal company must be given to it by its special Act<sup>5</sup>.

Where a canal company is obliged by its Act to repair a canal and to keep it in repair for the use of those members of the public who desire to use it and are prepared to pay the prescribed tolls, an injunction will be granted restraining the company from impeding navigation by failing to keep the canal in repair, but a mandatory order to repair will not be granted<sup>6</sup>. A railway company which owns or manages a canal is bound at all times to keep or maintain the canal and all the works appertaining to it, as well as maintaining a supply of water so as to permit rights of navigation to be exercised<sup>7</sup>.

The Secretary of State may by order direct, in respect of any canal not comprised in the undertaking of the British Waterways Board, that any local Act is to cease to have effect so far as it confers public or private rights of navigation or imposes a duty to maintain a canal or supply of water from it<sup>8</sup>.

1 As to the special Act see PARA 799. As to the exercise of statutory powers by canal undertakers see PARA 781. It should be noted also that, notwithstanding the powers and duties applicable to the British Waterways Board under general and local legislation (see PARA 725), the board remains subject to, and has the benefit of, over 500 special Acts under which the waterways it is now responsible for were created: see PARA 714. As to the British Waterways Board see PARA 725 et seq.

2 In the case of canals in England and Wales belonging to or under the control of the British Waterways Board, powers to make byelaws contained in special Acts have now been largely superseded: see PARA 770.

3 In this case the Secretary of State for Transport, as to whom see PARA 719.

4 See the Railway and Canal Traffic Act 1888 s 40(2), (3) (s 40(2) amended by the Statute Law Revision Act 1908).

5 Where a special Act gave power to borrow on the security of the undertaking and the tolls and rents authorised to be charged, it was held that the property mortgaged was alone liable and that the company was not liable in an action for interest due: *Pontet v Basingstoke Canal Co* (1837) 3 Bing NC 433; and see *Rogers v Oxford, Worcester and Wolverhampton Rly Co* (1858) 25 Beav 322. As to the borrowing powers of the British Waterways Board see PARA 751.

6 See PARA 827. Where the construction and maintenance of a canal is permissive only, and part of it is closed to navigation for want of repair, reopening will not be enforced if the expense of so doing makes it unreasonable: see PARA 827.

7 See the Regulation of Railways Act 1873 s 17; and PARA 826.

8 See the Transport Act 1968 s 112; and PARA 828.

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### **781. Exercise of statutory powers by canal undertakers.**

The law as to the exercise of statutory powers by canal undertakers is the same as in the case of railway undertakers<sup>1</sup>. Damage inevitably caused by the exercise of statutory powers is not actionable unless the powers were exercised negligently<sup>2</sup>, but the special Acts creating the canal undertakers<sup>3</sup> usually make provision for compensation to persons injured by the exercise of the statutory powers and, in such cases, compensation, in the manner provided, is the only remedy<sup>4</sup>. The right to compensation is not affected by the fact that the cause of the damage is the negligent intervention of a third person<sup>5</sup>. If the canal undertakers exceed their statutory powers by an act which would not otherwise be actionable, it will become actionable only if the claimant can show that the statutory limitation was made for the benefit of a class of persons of whom he is one<sup>6</sup>.

The right of a canal undertaker to supply water from its canal is limited to the extent of its express powers<sup>7</sup>. In the absence of express power, it is ultra vires the general powers of canal undertakers to make a grant of the water in their canal; consequently a right to use such water cannot be obtained by prescription<sup>8</sup>.

1 As to the exercise of statutory powers by railway undertakers see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 293 et seq.

2 *Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430 at 455, HL; *Whitehouse v Birmingham Canal Co* (1857) 27 LJ Ex 25; *Dunn v Birmingham Canal Co* (1872) LR 8 QB 42; *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, HL; *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284, [1949] 2 All ER 1021, CA; *Boxes Ltd v British Waterways Board* [1971] 2 Lloyd's Rep 183, CA. See further **TORT** vol 97 (2010) PARA 720.

3 As to special Acts see PARA 799.

4 *Ware v Regent's Canal Co* (1858) 3 De G & J 212 at 227.

5 *Evans v Manchester, Sheffield and Lincolnshire Rly Co* (1887) 36 ChD 626.

6 *Lee v Milner* (1837) 2 Y & C Ex 611.

7 *A-G v Rochdale Canal Co* [1939] 3 All ER 57, CA. As to the power of the British Waterways Board to take water for the supply of its canals see PARA 744; and as to its power to abstract and sell untreated water see PARA 738. As to the British Waterways Board see PARA 725 et seq.

8 *Staffordshire and Worcestershire Canal Navigation Proprietors v Birmingham Canal Navigations Proprietors* (1866) LR 1 HL 254. See also *Manchester Ship Canal Co v Rochdale Canal Proprietors* [1899] WN 24 (affd 81 LT 472, CA); on appeal sub nom *Rochdale Canal Proprietors v Manchester Ship Canal Co* (1901) 85 LT 585, HL.

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## **782. Carrying powers of canal companies.**

Most canal companies originally had no powers to engage in the business of carrying. In 1845, as a further inducement to competition between railways and canals, Parliament authorised canal companies which adopted the Canal Carriers Act 1845<sup>1</sup>:

- 1557 (1) to carry as common carriers on their own or any other canals and railways<sup>2</sup>;
- 1558 (2) to obtain, own and use the means for collecting, carrying, warehousing and delivering traffic<sup>3</sup>;
- 1559 (3) to make such reasonable charges in respect of such conveyance, warehousing, collection and delivery as any such company or undertakers may respectively from time to time determine (in addition to the several tolls or dues which they are authorised to take)<sup>4</sup>;
- 1560 (4) to provide and use boats and means of hauling or towing them on their own and other canals<sup>5</sup>; and
- 1561 (5) to make reasonable charges for the services mentioned in head (4) above<sup>6</sup>.

Such canal companies may sue and be sued in their capacity as carriers for charges due or losses caused<sup>7</sup>, but they are not liable beyond the liability of a common carrier<sup>8</sup>. Such a company may, by contract, divide its tolls and charges with, and provide passage over its canal for the vessels of, another canal company<sup>9</sup>.

1 See the Canal Carriers Act 1845 s 12 (repealed). However, nothing in the Canal Carriers Act 1845 is to be construed as exempting any canal company that adopts its powers from the operation of any general Act regulating the manner of charging tolls and other charges upon canals or navigations in respect of passengers, goods, etc which may be passed in any future session of Parliament: see s 13 (ss 1, 3, 5-7, 13 amended by the Statute Law Revision Act 1891).

2 See the Canal Carriers Act 1845 s 1 (as amended: see note 1).

3 See the Canal Carriers Act 1845 s 1 (as amended: see note 1).

4 See the Canal Carriers Act 1845 s 1 (as amended: see note 1).

5 See the Canal Carriers Act 1845 s 3 (as amended: see note 1).

6 See the Canal Carriers Act 1845 s 3 (as amended: see note 1).

7 See the Canal Carriers Act 1845 s 5 (as amended: see note 1).

8 See the Canal Carriers Act 1845 s 6 (as amended: see note 1). However, independent canal companies are not to be regarded as common carriers: see the Transport Act 1962 ss 43(6), 52(2); and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 5. The British Waterways Board has express powers to carry goods and passengers by inland waterways but is also not to be regarded as a common carrier by virtue of s 43(6): see PARA 738. As to the British Waterways Board see PARA 725 et seq.

9 See the Canal Carriers Act 1845 s 7 (as amended: see note 1).



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### **783. Canal company's power to lease tolls and duties.**

After giving public notice by advertisement of its intention, a canal company<sup>1</sup> which has adopted the Canal Carriers Act 1845<sup>2</sup> may from time to time lease the tolls and duties on the whole or any part of its canal to any other canal company for any period not exceeding 21 years<sup>3</sup>. If any such lease of tolls and duties becomes void or voidable by reason of the lessee's failure to comply with any of its terms, or if the rent is 21 days in arrear, then, on the application of the lessor company, a magistrate has power to order a constable<sup>4</sup> to enter upon any toll house, dwelling house, office, weighing machine or other building of the company, to remove from it any employee of the lessees and to deliver to the lessor company the premises together with any of its property found there<sup>5</sup>. Upon possession being thus obtained, the lease is determined, except as to the remedies of the lessor company for rent due and for breaches of contract, and the lessor company has power to relet the tolls as if the former lease had never been made<sup>6</sup>.

1 The British Waterways Board may have succeeded to this power in relation to such nationalised canal companies as had adopted the Canal Carriers Act 1845, but in practice the board's power to make charges for the use of its facilities is not confined to tolls: see the Transport Act 1962 s 43(3); and PARA 785. The board may also dispose (whether absolutely or for a term of years) of any part of its undertaking not required for the purposes of its business: see s 14(1)(e); and PARA 739. As to the British Waterways Board see PARA 725 et seq. As to the nationalisation of the canal companies see PARA 714.

2 As to the adoption of the Canal Carriers Act 1845 see s 12 (repealed); and PARA 782.

3 See the Canal Carriers Act 1845 s 8 (ss 8-11 amended by the Statute Law Revision Act 1891). During the continuance of any such lease the lessees are deemed collectors of the tolls: see the Canal Carriers Act 1845 s 9 (as so amended). Where a railway company obtained powers to purchase the property of the X canal, and the exercise of all the 'rights, powers, and privileges' of that company, it was held that, after such purchase, the railway company had power to take a lease of the Y canal, this being a 'right, power, or privilege' of the X company which passed to the railway company; and a motion by a shareholder of the railway company for an injunction restraining that company from taking a lease of the Y canal was therefore refused: *Rogers v Oxford, Worcester and Wolverhampton Rly Co* (1858) 25 Beav 322.

4 As to the office of constable see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

5 See the Canal Carriers Act 1845 s 10 (as amended: see note 3).

6 See the Canal Carriers Act 1845 s 11 (as amended: see note 3).

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## **(4) REGULATION AND MANAGEMENT OF INLAND WATERWAYS**

### **(i) Waterways of the British Waterways Board**

#### **784. Board's general powers of regulation and management.**

The British Waterways Board<sup>1</sup> has the power that is conferred on all navigation authorities to make waterways byelaws<sup>2</sup>. The board also has extensive powers conferred on it by both local and public general Acts to allow for the regulation and management of its inland waterways<sup>3</sup> as well as specific powers that are conferred in order to impose standards on vessels using those waterways and to take other measures to prevent pollution and to improve safety on those waterways<sup>4</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 See PARA 720.

3 See PARA 738 et seq.

4 See PARA 786 et seq.

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### **785. Board's general power to charge for its services and facilities.**

The British Waterways Board<sup>1</sup> has power to demand, take and recover, or waive, such charges<sup>2</sup> for its services and facilities<sup>3</sup> and to make the use of those services and facilities subject to such terms and conditions as it thinks fit<sup>4</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 'Charges' includes fares, rates, tolls and dues of every description: Transport Act 1962 s 92(1).

3 The services and facilities referred to include the use of any inland waterway owned or managed by the British Waterways Board by any ship or boat: see the Transport Act 1962 s 43(8). As to the meaning of 'inland waterway' see PARA 720 note 3. 'Ship' includes every description of vessel used in navigation: s 92(1). See *R v Goodwin* [2005] EWCA Crim 3184, [2006] 2 All ER 519, [2006] 2 All ER (Comm) 281, in which it was held, in interpreting a definition in the same terms in the Merchant Shipping Act 1995 s 313, that a jet ski was capable of being a 'vessel' but that craft, such as jet skis, that were simply used for having fun on the water without the object of going anywhere were not 'used in navigation', and were accordingly excluded from the definition.

4 Transport Act 1962 s 43(3) (amended by the Transport Act 1968 s 50(10); the Transport Act 2000 s 252, Sch 27 para 1(1), (3); and the Railways Act 2005 s 59(1), (6), Sch 12 para 1(1), (2)(b)). This power is subject to the Transport Act 1962 and to any local enactment so far as it expressly provides for freedom from charges or otherwise prohibits the making of any charge: see s 43(2), (3) (s 42(2) amended by the Transport Act 2000 Sch 27 para 1(1), (2), the Railways Act 2005 Sch 12 para 1(1), (2)(a)). As to the power of the board to recover sums due to it under these provisions see the British Waterways Act 1983 s 5; and PARA 771. As to the imposition of terms and conditions see *Burnett v British Waterways Board* [1973] 2 All ER 631, [1973] 1 WLR 700, CA.

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### **786. Pleasure boat and houseboat certificates issued by the board.**

In relation to certain river navigations controlled by the British Waterways Board (known as 'river waterways')<sup>1</sup>, provision is made under the British Waterways Act 1971 making it unlawful to keep, let for hire or use any pleasure boat unless a certificate in relation to the pleasure boat is then in force or unless there is then in force in relation to it a licence issued by the board authorising the use of all inland waterways without further payment<sup>2</sup>.

A houseboat certificate<sup>3</sup> issued or renewed after 16 January 1995<sup>4</sup> under the British Waterways Act 1971 is, unless the certificate or some other document referred to in the certificate provides otherwise, subject to the general terms set out in the British Waterways Act 1995<sup>5</sup> in addition to such conditions (if any) as the board may determine<sup>6</sup> under the British Waterways Act 1971<sup>7</sup>. The board must on demand provide a copy of the general terms for the time being in force<sup>8</sup> to any person<sup>9</sup> requiring the same and to the holder on the issue or renewal of the certificate<sup>10</sup>. A houseboat certificate must contain or refer to some other document containing the general terms and any conditions to which it is subject<sup>11</sup>.

1 As to the meaning of 'river waterways' for these purposes see the British Waterways Act 1971 s 4, which provides for the British Waterways Board to register pleasure boats and houseboats under the British Waterways Act 1971 for such periods and on payment of such charges as it may from time to time determine, notwithstanding any common law public right of navigation. As to the British Waterways Board see PARA 725 et seq.

2 See the British Waterways Act 1971 s 5(1), Sch 1 (Sch 1 amended by the British Waterways Act 1974 s 36(2); British Waterways Act 1995 s 30). Any person contravening these provisions is liable to a fine not exceeding £50 and a daily fine of £5: see the British Waterways Act 1971 s 5(2) (amended by the British Waterways Act 1975 s 7). As to the meaning of 'person' see PARA 13 note 29. It is not a defence to a charge under the British Waterways Act 1971 s 5 that the accused believed that the boat in question was not a pleasure boat and therefore did not require a licence: see *British Waterways Board v James* [2003] EWHC 881 (Admin), [2003] All ER (D) 81 (Apr). See also *VAT case 19786: Stephen Richard Peters* (Manchester Tribunal Centre, 18 September 2006) (the board, in issuing licences permitting the holder to use and keep a pleasure boat on river waterways, is making supplies of services to boat-owners and may correctly charge VAT on its supplies). Information as to licences is available on the board's website at [www.britishwaterways.co.uk](http://www.britishwaterways.co.uk).

On receiving due payment, due documents and any required additional information, the board must assign to each boat a number, register its details and issue to the applicant a pleasure boat certificate in respect of the registration bearing the number assigned to the pleasure boat: see the British Waterways Act 1971 s 6. The board is able to make a charge for the registration of every pleasure boat on a river waterway: see s 7 (amended by the British Waterways Act 1974 s 36, Schedule). Every powered pleasure boat so registered must have its name or number conspicuously painted or otherwise displayed on the outside in letters of such colour, character and size as to be clearly legible at all times and must have similarly displayed the mark and number which the board assigns in respect of the boat: see the British Waterways Act 1971 s 9(1). Similar provisions apply to unpowered pleasure boats, but with exceptions: see s 9(2). Failure to comply with the provisions of the British Waterways Act 1971 concerning the display of the mark, name or number on a pleasure boat registered under the Act may render the master of the pleasure boat liable to a fine not exceeding £50: see s 9(4) (amended by the British Waterways Act 1975 s 7(b)).

3 As to houseboat certificates see further PARA 787 et seq.

4 Ie after the passing of the British Waterways Act 1995: see s 16(1). The British Waterways Act 1995 received Royal Assent on 16 January 1995.

5 Ie the general terms set out in the British Waterways Act 1995 Sch 1: see PARAS 787-788.

6 Ie under the British Waterways Act 1971 s 14.

7 British Waterways Act 1995 s 16(1).

8 Is in force under the British Waterways Act 1995 s 16.

9 As to the meaning of 'person' see PARA 13 note 29.

10 British Waterways Act 1995 s 16(2).

11 British Waterways Act 1995 s 16(3). As to conditions as to certificates and licences see s 17; and PARA 789. As to obstruction by vessels see s 18; and PARA 792. As to the removal of vessels to permit works etc see s 19; and PARA 793. As to moorings see ss 20, 21; and PARAS 794-795.

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### **787. Terms of houseboat certificates regarding sites controlled by the board.**

The following provisions apply where the British Waterways Board<sup>1</sup> owns an interest in, or rights over, the site<sup>2</sup>, and the site is managed by the board or its agent<sup>3</sup>.

Subject to the statutory provisions as to the terms of houseboat certificates<sup>4</sup>, the holder<sup>5</sup> has the right to moor<sup>6</sup> the houseboat at the site throughout the period of validity of the certificate<sup>7</sup>. If the interest of the board in the site is insufficient to enable it to grant the right to moor the houseboat there for an indefinite period, the period for which that right subsists may not extend beyond the date when the estate or interest of the board determines<sup>8</sup>. If planning permission for the use of the site as a mooring has been granted in terms such that it will expire at the end of a specified period, the period for which the right to moor the houseboat at the site subsists may not extend beyond the date when the planning permission expires<sup>9</sup>.

The holder is entitled to assign the certificate to a person (being aged 18 or over<sup>10</sup>) approved by the board whose approval must not be unreasonably withheld<sup>11</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 British Waterways Act 1995 Sch 1 para 2(1)(a). 'Site' means the mooring or other location specified in the certificate: Sch 1 para 1. 'Certificate' means the certificate relating to any houseboat; and 'houseboat' means the houseboat named or otherwise identified in the certificate: Sch 1 para 1.

3 British Waterways Act 1995 Sch 1 para 2(1)(b). As to terms applicable to all certificates see PARA 788. As to houseboat certificates generally see PARA 786. As to conditions in respect of certificates see PARAS 789-791.

4 I.e. the provisions of the British Waterways Act 1995 Sch 1 PARAS 4-15: see note 7, the text to notes 8-11 and PARA 788.

5 'Holder' means the person named in a certificate as the person having control of the houseboat specified in the certificate or the assignee or personal representative (ie within the meaning of the Administration of Estates Act 1925 s 55: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4) of the person so named: British Waterways Act 1995 Sch 1 para 1.

6 'Moor' includes place, keep or maintain, and 'moored' is to be construed accordingly: British Waterways Act 1995 Sch 1 para 1.

7 British Waterways Act 1995 Sch 1 para 3. The provisions of Sch 1 para 3 do not prejudice or affect the right of the board to move or to require the removal of a houseboat under s 19 (removal of vessels to permit works, etc: see PARA 793) or any other powers available to the board but, if it so moves or requires the removal of a houseboat during the period of validity of a certificate, the board (unless it would be entitled under Sch 1 para 6 to determine the certificate (see PARA 788)) must make available for it a suitable mooring or other location (which must be broadly comparable to the site) situated as near as is practicable to the site, and must permit the houseboat to be replaced at the site as soon as practicable after the circumstances necessitating the removal have ceased to apply: Sch 1 para 4(3). Any costs and expenses occasioned by the removal and replacement of a houseboat under Sch 1 para 4(3) must be paid by the board: Sch 1 para 4(4).

8 British Waterways Act 1995 Sch 1 para 4(1).

9 British Waterways Act 1995 Sch 1 para 4(2). As to planning permission see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 213 et seq.

10 The time at which a person attains a particular age expressed in years is the commencement of the relevant anniversary of the date of his birth: see the Family Law Reform Act 1969 s 9; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 2.

11 Transport Act 1962 Sch 1 para 5.

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### **788. Terms applicable to all houseboat certificates issued by the board.**

The following provisions apply to all certificates<sup>1</sup> issued by the British Waterways Board<sup>2</sup>.

The certificate relating to any houseboat<sup>3</sup> remains in force for the period or until the date specified therein unless:

- 1562 (1) the certificate is surrendered<sup>4</sup>;
- 1563 (2) the certificate is<sup>5</sup> withdrawn<sup>6</sup>;
- 1564 (3) the holder's interest in or other right to moor<sup>7</sup> at the site<sup>8</sup> (otherwise than by virtue of the certificate) ends<sup>9</sup>; or
- 1565 (4) the certificate is determined<sup>10</sup>.

The holder must not without the consent in writing of the board moor the houseboat otherwise than at the site except in the following circumstances<sup>11</sup>. The houseboat may be moved from place to place but while being so moved may not be navigated for hire<sup>12</sup>. While the houseboat is in the course of being moved the certificate is deemed to be either a pleasure boat certificate<sup>13</sup>, where the houseboat is on a river waterway<sup>14</sup>, or a pleasure boat licence issued by the board, when the houseboat is on any other inland waterway<sup>15</sup>; and its use at such times is subject to any conditions for the time being in force for the control of pleasure boats and the holder must comply with any requirements made by or under any enactment<sup>16</sup> applicable to pleasure boats<sup>17</sup>.

The certificate must be displayed on the houseboat so as to be clearly visible from the outside of the houseboat at all times<sup>18</sup>. The holder of a certificate must comply in all respects with the terms of any planning permission given in relation to the houseboat and with any other enactment or byelaw in force applying to houseboats within the area in which it is moored<sup>19</sup>. The holder must comply with the requirements of any notice served by a local authority<sup>20</sup> in respect of the houseboat, and must also comply with any limitation as to the number of persons permitted to sleep on board which may be imposed by the local authority for the area where the site is located<sup>21</sup>.

The holder must ensure that no sanitary appliance which in the normal course of operation discharges (or can discharge) polluting matter<sup>22</sup> into any inland waterway is used on the houseboat<sup>23</sup>. The holder must ensure that there are available for the use of the occupants of the houseboat means for disposing of sewage arising from the occupation of the boat which are satisfactory to the board<sup>24</sup>, the Environment Agency<sup>25</sup>, and the local authorities for the area in which the site is located<sup>26</sup>.

1 As to the meaning of 'certificate' see PARA 787 note 2.

2 See the British Waterways Act 1995 Sch 1 para 2(2). As to the British Waterways Board see PARA 725 et seq. As to terms of certificates applicable to sites controlled by the board see PARA 787. As to houseboat certificates generally see PARA 786. As to conditions in respect of certificates see PARAS 789-791.

3 As to the meaning of 'houseboat' see PARA 787 note 2.

4 British Waterways Act 1995 Sch 1 para 6(1)(a). The holder is entitled to surrender the certificate by notice in writing given to the board not less than four weeks before the date on which the notice is to take effect: Sch



1 para 8. Where the certificate is so surrendered, the holder is entitled to recover from the board so much of any payment made by him in pursuance of the certificate as is attributable to a period beginning after the termination: Sch 1 para 9. As to the meaning of 'holder' see PARA 787 note 5. As to the meaning of 'writing' see PARA 22 note 1. As to the power of the board to charge see PARA 785.

5 le pursuant to the British Waterways Act 1995 s 17 (conditions as to certificates and licences): see PARA 789.

6 British Waterways Act 1995 Sch 1 para 6(1)(b).

7 As to the meaning of 'moor' see PARA 787 note 6.

8 As to the meaning of 'site' see PARA 787 note 2.

9 British Waterways Act 1995 Sch 1 para 6(1)(c).

10 See the British Waterways Act 1995 Sch 1 para 6(1)(d). If the holder has contravened or failed to comply with any of the terms or conditions applicable to the certificate the board may give notice requiring the holder to take or refrain from taking such action as may be necessary to remedy the contravention or non-compliance, as the case may be, within such time as may be reasonable (not being less than 28 days): Sch 1 para 6(2). If the holder does not comply with any such notice the certificate determines on the date on which the notice expires: Sch 1 para 6(3). As to the service of notices see PARA 762 note 13.

11 See the British Waterways Act 1995 Sch 1 para 7.

12 British Waterways Act 1995 Sch 1 para 15(1).

13 le for the purposes of the British Waterways Act 1971 Pt II (ss 4-12): see PARA 786.

14 British Waterways Act 1995 Sch 1 para 15(2)(i). 'River waterway' means a river waterway within the meaning of the British Waterways Act 1971 s 4 (see PARA 786 note 1): see the British Waterways Act 1995 Sch 1 para 15(2)(i).

15 British Waterways Act 1995 Sch 1 para 15(2)(ii). As to the meaning of 'inland waterway' see PARA 745 note 13.

16 As to the meaning of 'enactment' see PARA 14 note 31.

17 British Waterways Act 1995 Sch 1 para 15(2).

18 British Waterways Act 1995 Sch 1 para 10.

19 British Waterways Act 1995 Sch 1 para 11. As to planning permission see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 213 et seq. As to byelaws see PARAS 720, 770-771.

20 'Local authority' has the meaning given by the Local Government Act 1972 s 270 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 23): see the British Waterways Act 1995 Sch 1 para 1.

21 British Waterways Act 1995 Sch 1 para 12.

22 The expression 'polluting matter' does not include waste discharged from a sink, wash basin, bath or shower: British Waterways Act 1995 Sch 1 para 13(2).

23 British Waterways Act 1995 Sch 1 para 13(1).

24 British Waterways Act 1995 Sch 1 para 14(a).

25 See the British Waterways Act 1995 Sch 1 para 14(b) (amended by virtue of SI 1996/593). As to the Environment Agency see PARA 17. Separate provision applies in relation to Scotland: see the British Waterways Act 1995 Sch 1 para 14(c).

26 British Waterways Act 1995 Sch 1 para 14(d).

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**789. Board's power to refuse certificates or licences in respect of any vessel.**

The British Waterways Board<sup>1</sup> may refuse a relevant consent<sup>2</sup> in respect of any vessel unless<sup>3</sup>:

- 1566 (1) the applicant for the relevant consent satisfies the board that the vessel complies with the standards<sup>4</sup> applicable to that vessel<sup>5</sup>;
- 1567 (2) an insurance policy<sup>6</sup> is in force in respect of the vessel and a copy of the policy, or evidence that it exists and is in force, has been produced to the board<sup>7</sup>; and
- 1568 (3) either: (a) the board is satisfied that a mooring<sup>8</sup> or other place where the vessel can reasonably be kept and may lawfully be left is available for the vessel, whether on an inland waterway or elsewhere<sup>9</sup>; or (b) the applicant for the relevant consent satisfies the board that the vessel to which the application relates is to be used *bona fide* for navigation throughout the period for which the consent is valid without remaining continuously in any one place for more than 14 days or such longer period as is reasonable in the circumstances<sup>10</sup>.

If:

- 1569 (i) the vessel does not comply with the standards applicable to the vessel on the date when the consent was granted<sup>11</sup>; or
- 1570 (ii) an insurance policy is not in force in respect of the vessel<sup>12</sup>; or
- 1571 (iii) either: (A) (in the case of a vessel in respect of which a relevant consent is issued pursuant to head (3)(a) above) it appears to the board that a mooring or other place such as is referred to in head (3)(a) above is not available for the vessel<sup>13</sup>; or (B) (in the case of a vessel in respect of which a relevant consent is issued pursuant to head (3)(b) above) the vessel has not in fact been used *bona fide* for navigation in accordance with head (3)(b) above<sup>14</sup>,

the board may give notice<sup>15</sup> requiring the holder of the relevant consent to remedy the default within such time as may be reasonable (not being less than 28 days)<sup>16</sup>. If the holder of the relevant consent does not comply with any notice so served then the relevant consent determines on the date the notice expires<sup>17</sup>.

Nothing in these provisions<sup>18</sup> affects any power of the board under any other enactment to refuse or withdraw a relevant consent<sup>19</sup>; or the operation of the provisions<sup>20</sup> relating to the control of unsafe vessels<sup>21</sup>. The refusal or withdrawal by the board of a relevant consent in respect of any vessel on the grounds that the vessel does not comply with the standards applicable to that vessel does not preclude the movement or use of the vessel with the consent of the board (which is not to be unreasonably withheld) and subject to such reasonable conditions (if any) as it may determine<sup>22</sup>; but, without prejudice to the generality of this provision, the board must not so withhold its consent to the movement or use of a vessel for the purpose of taking it to a place where it may be repaired or modified so as to comply with the standards applicable to it, or for the purpose of taking the vessel to be destroyed, unless such movement or use would give rise to the risk of obstruction or danger to navigation or to persons or property<sup>23</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 'Relevant consent' means a houseboat certificate, a licence or a pleasure boat certificate: British Waterways Act 1995 s 17(1). 'Houseboat certificate' means a houseboat certificate issued under the British Waterways Act 1971 (see PARA 786); British Waterways Act 1995 s 17(1). 'Licence' means a licence issued by the board in respect of any vessel allowing the use of the vessel on any inland waterways: s 17(1). 'Pleasure boat certificate' means a pleasure boat certificate issued under the British Waterways Act 1971 (see PARA 786); British Waterways Act 1995 s 17(1). As to the meaning of 'vessel' see PARA 762 note 13. As to the meaning of 'inland waterway' see PARA 745 note 13.

3 British Waterways Act 1995 s 17(3). Section 17(3) has effect notwithstanding anything in any enactment but is subject to s 17(7): see s 17(3). Accordingly, the board was not permitted (1) in the case of any designated vessel constructed after 31 December 1970, before the first anniversary of the passing of the British Waterways Act 1995 (which received Royal Assent on 16 January 1995) (s 17(7)(b)(i)); or (2) in the case of any designated vessel constructed before 1 January 1971, before the second anniversary of the passing of the Act (s 17(7)(b)(ii)), to refuse or withdraw a relevant consent in respect of the vessel on the grounds that the vessel did not or had ceased to comply with the standards applicable to it (s 17(7)(b)). 'Designated vessel' means any vessel in respect of which a relevant consent has been in force at any time during the qualifying period other than: (a) a houseboat registered under the British Waterways Act 1971 for the first time after 31 December 1979 (British Waterways Act 1995 s 17(7)(a)(i)); (b) any hire pleasure boat, that is, any pleasure boat which is let, lent, hired or engaged for gift, pay, hire or reward or promise of payment or carries or conveys passengers for a charge or payment (s 17(7)(a)(ii)); or (c) any pleasure boat (not being a hire pleasure boat) adapted or used for the carriage or conveyance of passengers, being a vessel in respect of which the board is satisfied that a multi-user licence would be appropriate (s 17(7)(a)(iii)). 'Qualifying period' means the period commencing 12 months before the date of the passing of the British Waterways Act 1995 and ending six months before the date of the passing of the Act: s 17(7)(a). As to the meaning of 'enactment' see PARA 14 note 31. As to the meaning of 'month' see PARA 23 note 10.

4 'Standards' means standards for the construction and equipment of vessels prescribed under the British Waterways Act 1995 s 17 and Sch 2 Pt II (see PARA 791): s 17(1).

5 British Waterways Act 1995 s 17(3)(a).

6 'Insurance policy' means an insurance policy complying with the British Waterways Act 1995 Sch 2 Pt I (see PARA 790): s 17(1).

7 British Waterways Act 1995 s 17(3)(b).

8 As to terms of certificates applicable to mooring sites controlled by the board see PARA 787. As to provisions relating to the control of moorings see s 21; and PARA 794. As to provisions relating to private moorings see s 20; and PARA 795.

9 British Waterways Act 1995 s 17(3)(c)(i).

10 British Waterways Act 1995 s 17(3)(c)(ii).

11 British Waterways Act 1995 s 17(4)(a). Where prior to the grant of a relevant consent a certificate (the 'boat safety certificate') has been issued by a person authorised by the board so to do in respect of a vessel confirming that the vessel complies with the standards applicable to it at the date upon which the boat safety certificate is issued, s 17(4)(a) has effect throughout the period for which the boat safety certificate is expressed to be valid as if for reference to the date when the consent was granted there were substituted reference to the date when the boat safety certificate was issued: s 17(6). As to the meaning of 'person' see PARA 13 note 29.

12 British Waterways Act 1995 s 17(4)(b).

13 British Waterways Act 1995 s 17(4)(c)(i).

14 British Waterways Act 1995 s 17(4)(c)(ii).

15 As to the service of notices see PARA 762 note 13.

16 British Waterways Act 1995 s 17(4).

17 British Waterways Act 1995 s 17(5). The board was not permitted within the period expiring at the end of the sixth month after the month current at 16 January 1995 (ie the date of the passing of the Act) to refuse or

withdraw a relevant consent in respect of any vessel on the grounds that a mooring or other place such as is referred to in s 17(3)(c)(i) (see head (3)(a) in the text) and s 17(4)(c)(i) (see head (iii)(A) in the text) was not available for the vessel: s 17(8).

18    le nothing in the British Waterways Act 1995 s 17.

19    British Waterways Act 1995 s 17(9).

20    le the British Waterways Act 1983 s 7: see PARA 771.

21    British Waterways Act 1995 s 17(11)(c).

22    British Waterways Act 1995 s 17(11)(a).

23    British Waterways Act 1995 s 17(11)(b). As to obstruction by vessels see s 18; and PARA 792.

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## **790. Requirements for insurance policies as to vessels on the board's waterways.**

The following provisions have effect with respect to insurance policies<sup>1</sup> for vessels<sup>2</sup>.

An insurance policy must be issued by an insurer authorised<sup>3</sup> to carry on in Great Britain<sup>4</sup> or in Northern Ireland insurance business of a relevant class or who has corresponding permission under the law of another member state of the European Community<sup>5</sup>. The policy must insure the owner of the vessel and such other person<sup>6</sup>, persons or classes of persons (if any) as is or as are authorised by the owner to have control of the vessel, in respect of any liability (other than a liability specified below<sup>7</sup>) which may be incurred by the owner or any such other person resulting from the presence of the vessel on any inland waterway<sup>8</sup> in respect of the death of or bodily injury to any person or any damage to property<sup>9</sup>.

The policy is not by virtue of the British Waterways Act 1995 required:

- 1572 (1) to cover liability in respect of the death, arising out of and in the course of his employment, of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment<sup>10</sup>;
- 1573 (2) to cover liability in respect of damage to the vessel to which the policy relates<sup>11</sup>;
- 1574 (3) to cover liability in respect of goods carried on or in the vessel to which the policy relates, or any vessel drawn or propelled by such vessel<sup>12</sup>;
- 1575 (4) to cover any liability of a person in respect of damage to property in his custody or under his control<sup>13</sup>;
- 1576 (5) to cover any contractual liability<sup>14</sup>; or
- 1577 (6) to provide cover in respect of any one accident for a sum in excess of such sum as may for the time being be prescribed by the British Waterways Board<sup>15</sup> for these purposes<sup>16</sup>.

1 As to the meaning of 'insurance policy' see PARA 789 note 6.

2 See the British Waterways Act 1995 s 17(2). As to the meaning of 'vessel' see PARA 762 note 13.

3 I.e. authorised under the Insurance Companies Act 1982 (repealed): see the British Waterways Act 1995 Sch 2 Pt I para 1. As to the current provisions relating to the authorisation of insurers see the Financial Services and Markets Act 2000; and **INSURANCE** vol 25 (2003 Reissue) PARAS 22, 31 et seq.

4 As to the meaning of 'Great Britain' see PARA 22 note 5.

5 British Waterways Act 1995 Sch 2 Pt I para 1. As to the authorisation of insurers from other member states see **INSURANCE** vol 25 (2003 Reissue) PARA 33.

6 As to the meaning of 'person' see PARA 13 note 29.

7 I.e. other than a liability specified in the British Waterways Act 1995 Sch 2 Pt I para 3: see the text to notes 10-16.

8 As to the meaning of 'inland waterway' see PARA 745 note 13.

- 9 British Waterways Act 1995 Sch 2 Pt I para 2.
- 10 British Waterways Act 1995 Sch 2 Pt I para 3(a).
- 11 British Waterways Act 1995 Sch 2 Pt I para 3(b).
- 12 British Waterways Act 1995 Sch 2 Pt I para 3(c).
- 13 British Waterways Act 1995 Sch 2 Pt I para 3(d).
- 14 British Waterways Act 1995 Sch 2 Pt I para 3(e).
- 15 As to the British Waterways Board see *PARA 725 et seq.*
- 16 British Waterways Act 1995 Sch 2 Pt I para 3(f).

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### **791. Board's power to prescribe standards for vessels, etc used on its waterways.**

The following provisions have effect with respect to standards<sup>1</sup> for the construction and equipment of vessels<sup>2</sup>.

The British Waterways Board<sup>3</sup> may<sup>4</sup> from time to time prescribe standards for the construction of vessels to be used on inland waterways<sup>5</sup>, and standards for any appliances, fittings or equipment in such vessels and for making provision with regard to the use and operation of such appliances, fittings and equipment with a view to securing the safety of passengers in such vessels and of other vessels or persons on the inland waterway, and the prevention of pollution, noise and interference with the operation of radio or television equipment<sup>6</sup>. Without prejudice to the generality of this provision<sup>7</sup>, standards prescribed<sup>8</sup> may make provision:

- 1578 (1) with regard to the construction, maintenance and operation of engines used for the propulsion of powered boats and to the storage and supply of fuel for such engines<sup>9</sup>;
- 1579 (2) requiring the provision of sufficient and effective fire extinguishers<sup>10</sup>;
- 1580 (3) regulating appliances for cooking, heating, lighting or refrigeration and the storage and supply of fuel for such appliances<sup>11</sup>.

Different standards may be prescribed<sup>12</sup> in relation to different categories of vessels, and in relation to different inland waterways or parts thereof<sup>13</sup>.

The board may from time to time revoke or amend any standards so prescribed<sup>14</sup>. Before prescribing, revoking or amending such standards the board must:

- 1581 (a) have regard to the requirements of the byelaws of any inland navigation undertakers whose waterways are contiguous with those of the board where those byelaws deal with the subject matter of the proposed standards<sup>15</sup>;
- 1582 (b) take such steps as appear to the board to be appropriate to bring the proposed standards to the attention of builders, owners and operators of vessels who are likely to be affected by them, and thereafter consider any representations made by any such persons<sup>16</sup> with regard to the proposed standards<sup>17</sup>;
- 1583 (c) consult the Inland Waterways Advisory Council<sup>18</sup>; and
- 1584 (d) consult such organisations as represent a substantial number of builders, owners and operators of vessels who may be affected by the proposed standards<sup>19</sup>.

Following the taking of the steps and the completion of the consultation so required, the board must:

- 1585 (i) give notice<sup>20</sup> to the Inland Waterways Advisory Council, and to such other organisations as were so consulted, of the date (the 'prescribed date'<sup>21</sup>) upon which the proposed standards are to be prescribed, revoked or amended<sup>22</sup>; and
- 1586 (ii) take such steps as appear to the board to be appropriate to bring the proposed standards and the prescribed date to the attention of the builders, owners and operators of vessels who are likely to be affected by the standards<sup>23</sup>,

unless the board decides not to prescribe, revoke or amend the standards, in which case it must give notice of its decision to the Inland Waterways Advisory Council and to the organisations which were so consulted<sup>24</sup>.

Standards prescribed<sup>25</sup> do not apply to a vessel used wholly or mainly for the purpose of the carriage of goods on a commercial waterway<sup>26</sup> while the vessel is on any such waterway<sup>27</sup>.

The board may on application by any person or any organisation appearing to the board to represent a substantial number of owners or operators of such vessels as may be affected by any standards grant exemptions in writing<sup>28</sup> on such conditions (if any) as the board thinks fit, from the requirements of any standards in respect of any individual vessel, or any category of vessels, being a vessel or, as the case may be, a category of vessels which cannot reasonably be expected to be altered or adapted or otherwise made to comply therewith, having regard in particular to its or their traditional construction or historical character<sup>29</sup>.

Any dispute as to any refusal or withdrawal by the board of a relevant consent<sup>30</sup> on the grounds that the vessel does not comply, or has ceased to comply, with the standards applicable to it<sup>31</sup>, or any refusal by the board of an exemption for which such application is made or any condition subject to which an exemption is granted<sup>32</sup>, is to be determined by the standards appeal panel whose decision is final and binding on the parties<sup>33</sup>. The standards appeal panel for the purpose of determining such appeals consists of two persons appointed by the board and three other persons of whom one each is appointed by: (A) the Inland Waterways Advisory Council<sup>34</sup>; (B) in the case of any appeal relating to a narrow boat or other similar vessel normally used on canals, the Inland Waterways Association, and in the case of any other appeal, the Royal Yachting Association<sup>35</sup>; and (C) the British Marine Industries Federation<sup>36</sup>.

1 As to the meaning of 'standards' see PARA 789 note 4.

2 See the British Waterways Act 1995 s 17(2). As to the meaning of 'vessel' see PARA 762 note 13. Information as to standards for vessels is available on the board's website at [www.britishwaterways.co.uk](http://www.britishwaterways.co.uk).

3 As to the British Waterways Board see PARA 725 et seq.

4 Ie for the purposes of the British Waterways Act 1995 s 17: see PARA 789.

5 As to the meaning of 'inland waterway' see PARA 745 note 13.

6 British Waterways Act 1995 Sch 2 Pt II para 1.

7 Ie without prejudice to the generality of the British Waterways Act 1995 Sch 2 Pt II para 1: see the text to notes 1-6.

8 Ie under the British Waterways Act 1995 s 17 (see PARA 789) and Sch 2 Pt II.

9 British Waterways Act 1995 Sch 2 Pt II para 5(a).

10 British Waterways Act 1995 Sch 2 Pt II para 5(b).

11 British Waterways Act 1995 Sch 2 Pt II para 5(c).

12 Ie under the British Waterways Act 1995 s 17 (see PARA 789) and Sch 2 Pt II.

13 British Waterways Act 1995 Sch 2 Pt II para 2.

14 See the British Waterways Act 1995 Sch 2 Pt II para 3.

15 British Waterways Act 1995 Sch 2 Pt II para 6(a). References in Sch 2 Pt II to proposed standards are to standards as proposed to be prescribed, revoked or amended under s 17 (see PARA 789) and Sch 2 Pt II: Sch 2 Pt II para 4. As to byelaws of inland navigation undertakers see PARA 720, 772.

16 As to the meaning of 'person' see PARA 13 note 29.



17 British Waterways Act 1995 Sch 2 Pt II para 6(b). The board must have regard to any advice given to it by the Inland Waterways Advisory Council as regards the nature of the steps to be taken in accordance with Sch 2 Pt II para 6(b): see Sch 2 Pt II para 8 (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 2 para 175(1)(a), (2)). As to the constitution and functions of the Inland Waterways Advisory Council see PARA 737.

18 British Waterways Act 1995 Sch 2 Pt II para 6(c) (amended by the Natural Environment and Rural Communities Act 2006 s 105(1), Sch 11 Pt 2 para 175(1)(a), (2)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.

19 British Waterways Act 1995 Sch 2 Pt II para 6(d). The Inland Waterways Advisory Council must maintain a list of organisations which claim to represent substantial numbers of builders, owners and operators of vessels who may be affected by any proposed standards and which should thus be consulted by the board in accordance with the duty imposed on them by Sch 2 Pt II para 6(d); and the board is deemed to have complied with that duty if it consults every organisation named in the said list: Sch 2 Pt II para 9 (amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 2 para 175(1)(a), (2)).

20 As to the service of notices see PARA 762 note 13.

21 The prescribed date must not be less than 84 days after the date of the giving of the notices and the taking of the required steps unless it is necessary to prescribe, revoke or amend the standards immediately after the completion of the consultation so as to avoid any serious risk of danger to persons or property: British Waterways Act 1995 Sch 2 Pt II para 7(2).

22 British Waterways Act 1995 Sch 2 Pt II para 7(1)(a) (amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 2 para 175(1)(a), (2)).

23 British Waterways Act 1995 Sch 2 Pt II para 7(1)(b). The board must have regard to any advice given to it by the Inland Waterways Advisory Council as regards the nature of the steps to be taken in accordance with Sch 2 Pt II para 7(1)(b): see Sch 2 Pt II para 8 (as amended: see note 17).

24 British Waterways Act 1995 Sch 2 Pt II para 7(1) (amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 2 para 175(1)(a), (2)).

25 Ie under the British Waterways Act 1995 s 17 (see PARA 789) and Sch 2 Pt II.

26 As to the meaning of 'commercial waterway' see PARA 741: definition applied by the British Waterways Act 1995 s 2.

27 British Waterways Act 1995 Sch 2 Pt II para 10.

28 As to the meaning of 'writing' see PARA 22 note 1.

29 British Waterways Act 1995 Sch 2 Pt II para 11.

30 As to the meaning of 'relevant consent' see PARA 789 note 2.

31 British Waterways Act 1995 Sch 2 Pt II para 13(a).

32 British Waterways Act 1995 Sch 2 Pt II para 13(b).

33 British Waterways Act 1995 Sch 2 Pt II para 13. As to judicial review of decisions expressed to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

34 British Waterways Act 1995 Sch 2 Pt II para 12(a) (amended by the Natural Environment and Rural Communities Act 2006 Sch 11 Pt 2 para 175(1)(a), (2)).

35 British Waterways Act 1995 Sch 2 Pt II para 12(b).

36 British Waterways Act 1995 Sch 2 Pt II para 12(c).

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## **792. Prohibition on obstruction by vessels on the board's waterways.**

No person<sup>1</sup> may moor or otherwise leave a vessel<sup>2</sup> on an inland waterway<sup>3</sup> so as to cause obstruction or hindrance to navigation or to the free passage of persons or vehicles over and along the towing path beside the inland waterway<sup>4</sup>.

Any person who without reasonable excuse contravenes this prohibition in such a way as to cause, or give rise to the risk of, injury to any person or damage to property is guilty of an offence<sup>5</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'vessel' see PARA 762 note 13.

3 As to the meaning of 'inland waterway' see PARA 745 note 13.

4 British Waterways Act 1995 s 18(1). Any vessel moored or allowed to remoor in contravention of s 18(1) is deemed to be a relevant craft for the purpose of the British Waterways Act 1983 s 8 (removal of vessels: see PARA 771): British Waterways Act 1995 s 18(3).

5 British Waterways Act 1995 s 18(2). The penalty for such an offence is, on summary conviction, a fine not exceeding level 3 on the standard scale: s 18(2). As to the standard scale see PARA 141 note 18.

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### **793. Board's power to remove vessels in order to permit works.**

When any vessel<sup>1</sup> is moored or lying in such a position as is likely to interfere with any dredging, repairs, maintenance works or any other works or operations of the British Waterways Board<sup>2</sup>, or any works or operations proposed to be carried out by any other authority or body in pursuance of any statutory functions, the board may serve on the owner of such vessel a notice<sup>3</sup> requiring him within 28 days of the date upon which the notice is served to remove the vessel for such time as the board or such other authority or body may reasonably require for the completion of such works or operations<sup>4</sup>. Where any vessel is moored or allowed to remain in contravention of a notice so served the board may without further notice remove the vessel<sup>5</sup>. If the board so removes a vessel it must, if it was lawfully moored, provide a suitable temporary mooring for the vessel and replace the same as soon as practicable after the completion of the works or operations which required its removal<sup>6</sup>. Where any vessel is removed by the owner or the board pursuant to these provisions, the board must if the vessel was lawfully moored at the time of the removal make available a suitable temporary mooring for the vessel until the completion of the works or operations which required its removal<sup>7</sup>.

If the board in exercise of these powers<sup>8</sup> removes a vessel to a place not readily visible from the place from which it was removed it must serve on the owner: (1) as soon as practicable after the removal, a notice that it has exercised these powers stating the place to which the vessel has been removed<sup>9</sup>; and (2) as soon as practicable after the replacement of the vessel, a notice that the vessel has been replaced<sup>10</sup>. However, heads (1) and (2) do not have effect if the board after reasonable inquiry is unable to establish the name and address of the owner or for any other sufficient reason is unable to serve the notice<sup>11</sup>.

The removal or replacement by the board under these provisions<sup>12</sup> of any vessel which at the time of the removal was lawfully moored is at the cost and risk of the board, and if any person<sup>13</sup> suffers loss or damage in consequence of the exercise of these powers in relation to any hire pleasure boat<sup>14</sup>, he is entitled to recover compensation for the loss or damage from the board<sup>15</sup>. Any dispute as to a person's entitlement to such compensation or as to the amount of the compensation is to be determined by arbitration<sup>16</sup>.

1 As to the meaning of 'vessel' see PARA 762 note 13.

2 As to the British Waterways Board see PARA 725 et seq. As to the board's duty to maintain waterways see PARAS 741-743. As to its general environmental and recreational duties see PARA 745. As to its powers over land see PARA 757 et seq.

3 A notice under the British Waterways Act 1995 s 19 has effect notwithstanding any private rights of mooring: s 20(2). As to private rights of mooring see PARA 795. As to the service of notices see PARA 762 note 13.

4 British Waterways Act 1995 s 19(1). For the purposes of s 19, a vessel is not deemed to be unlawfully moored solely by virtue of its being moored or allowed to remain in contravention of a notice served under s 19(1): s 19(8). As to obstruction by vessels see PARA 792.

5 British Waterways Act 1995 s 19(2).

6 British Waterways Act 1995 s 19(4).

7 British Waterways Act 1995 s 19(3).

8     le the powers of the British Waterways Act 1995 s 19.

9     British Waterways Act 1995 s 19(5)(a)(i).

10    British Waterways Act 1995 s 19(5)(a)(ii).

11    British Waterways Act 1995 s 19(5)(b). In such cases, the provision as to notices contained in the British Waterways Act 1983 s 17(2)(d) (see PARA 762 note 13) does not apply to notices under the British Waterways Act 1995 s 19(5): see s 19(5)(b).

12    le under the British Waterways Act 1995 s 19.

13    As to the meaning of 'person' see PARA 13 note 29.

14    le within the meaning of the British Waterways Act 1971 s 3.

15    British Waterways Act 1995 s 19(6).

16    British Waterways Act 1995 s 19(7). As to arbitration see PARA 725 note 10.

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#### **794. Board's power to control moorings, etc.**

As from such day as the British Waterways Board<sup>1</sup> may by resolution appoint, no person<sup>2</sup> may, in an inland waterway<sup>3</sup> specified in that resolution, construct or maintain any structure being a mooring, gangway, landing stage or other erection or installation for any vessel<sup>4</sup> unless there is in force in relation to that structure a certificate granted by the board<sup>5</sup>. An application for the grant or renewal of such a certificate must be made in writing<sup>6</sup> and must give the name and address of the person responsible for the structure, specify the type of structure and its precise location, and contain such other particulars as the board may reasonably require<sup>7</sup>. Upon receipt of an application made in accordance with these requirements, the board must grant (or as the case may be, renew) such a certificate for such period not being less than five years as it may determine<sup>8</sup>. It is a condition of every certificate so granted that the structure is maintained in good repair and not allowed to become unsafe or an obstruction or danger to navigation<sup>9</sup>.

The board may at any time, upon giving written notice<sup>10</sup>, refuse to grant or renew a certificate (or, as the case may be, revoke a certificate) if it is satisfied that the structure which is the subject of the application or certificate, or any part of it, is not in good repair, or is or will become unsafe or an obstruction or danger to navigation<sup>11</sup>. Any dispute between the board and any applicant for (or person named in) a certificate as responsible for the structure respecting a failure or refusal by the board to grant or renew a certificate or respecting a decision by the board to revoke a certificate must be determined by arbitration<sup>12</sup>. Pending the determination of any such reference to arbitration in relation to an existing structure, there is deemed to be a certificate in force in relation to that structure and any failure or refusal by the board to grant or renew a certificate in relation to the structure or a revocation of the certificate in relation to a structure is ignored<sup>13</sup>.

Nothing in these provisions<sup>14</sup> applies to: (1) any item of equipment designed to secure or to afford access to or from a vessel which when not in use is normally carried on board the vessel<sup>15</sup>; (2) any mooring, erection or installation no part of which is situated on, in, under or over the waters of any inland waterway<sup>16</sup>; (3) any structure or apparatus belonging to or required by the Environment Agency<sup>17</sup>. Also, nothing in these provisions or in any certificate thereunder:

- 1587 (a) relieves any person of the obligation under the Water Resources Act 1991<sup>18</sup> to obtain the consent of the Environment Agency to the erection of any structure in, over or under a watercourse which is designated as a main river<sup>19</sup>;
- 1588 (b) entitles a person to construct or maintain any mooring, gangway, landing stage or other erection or installation for any vessel on land<sup>20</sup> in respect of which he does not hold such rights as are necessary to enable him to exercise the powers of the certificate<sup>21</sup>;
- 1589 (c) requires the board to grant any right or interest in any land<sup>22</sup>; or
- 1590 (d) prejudices the right of the board to require any payment for any right or interest granted by it in any land to enable the powers to be exercised<sup>23</sup>.

The board may by notice require a person who contravenes these provisions<sup>24</sup>: (i) to remove or abate within a reasonable time specified in the notice any works to which the contravention relates and to restore the site to its former condition<sup>25</sup>; or (ii) in the case of any contravention of

the condition of every certificate so granted that the structure is maintained in good repair<sup>26</sup>, to repair or alter the structure so as to avoid such contravention<sup>27</sup>. If the person to whom the notice is given fails to comply with the notice, the board may carry out the work required by the notice and recover the cost of so doing from that person<sup>28</sup>.

- 1 As to the British Waterways Board see PARA 725 et seq.
- 2 As to the meaning of 'person' see PARA 13 note 29.
- 3 As to the meaning of 'inland waterway' see PARA 745 note 13.
- 4 As to the meaning of 'vessel' see PARA 762 note 13.
- 5 British Waterways Act 1995 s 21(1). As to regulation by such a certificate of the exercise of private rights of mooring see s 20; and PARA 795.
- 6 As to the meaning of 'writing' see PARA 22 note 1.
- 7 British Waterways Act 1995 s 21(2).
- 8 See the British Waterways Act 1995 s 21(3).
- 9 British Waterways Act 1995 s 21(4). As to the prohibition on obstruction by vessels see PARA 792.
- 10 Such written notice must be given to the applicant for the certificate as applied for or granted and, where different, the person named in the application or, as the case may be, certificate as the person responsible for the structure: British Waterways Act 1995 s 21(6). As to the service of notices see PARA 762 note 13.
- 11 British Waterways Act 1995 s 21(5).
- 12 British Waterways Act 1995 s 21(7). As to arbitration see PARA 725 note 10.
- 13 British Waterways Act 1995 s 21(8).
- 14 Ie nothing in the British Waterways Act 1995 s 21.
- 15 British Waterways Act 1995 s 21(10)(a).
- 16 British Waterways Act 1995 s 21(10)(b).
- 17 British Waterways Act 1995 s 21(10)(c) (amended by virtue of SI 1996/593). As to the Environment Agency see PARA 17.
- 18 Ie the obligation under the Water Resources Act 1991 s 109: see PARA 603.
- 19 See the British Waterways Act 1995 s 21(9) (amended by virtue of SI 1996/593).
- 20 As to the meaning of 'land' see PARA 14 note 21.
- 21 British Waterways Act 1995 s 21(11)(a).
- 22 British Waterways Act 1995 s 21(11)(b). As to the board's powers over land see PARA 757 et seq.
- 23 British Waterways Act 1995 s 21(11)(c). As to the general power of the board to charge see PARA 785.
- 24 Ie the British Waterways Act 1995 s 21. As to specific provision in relation to such notices see s 31(2); and PARA 762 note 13.
- 25 British Waterways Act 1995 s 21(12)(a).
- 26 Ie in the case of any contravention of the British Waterways Act 1995 s 21(4): see the text to note 9.
- 27 British Waterways Act 1995 s 21(12)(b).
- 28 British Waterways Act 1995 s 21(12).



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### **795. Board's power to regulate private rights of mooring.**

Conditions attached to a certificate granted under the power conferred on the British Waterways Board<sup>1</sup> to control moorings<sup>2</sup> may regulate the exercise of private rights of mooring<sup>3</sup> on any inland waterway<sup>4</sup> but, in exercising these powers, the board must have due regard to the desirability of refraining from interference with private rights and established mooring practices and must not prevent the mooring of any vessel<sup>5</sup> which could lawfully have been moored pursuant to any such private right but for the exercise of such powers<sup>6</sup>.

1 As to the British Waterways Board see PARA 725 et seq.

2 Ie the power under the British Waterways Act 1995 s 21: see PARA 794.

3 'Private rights of mooring' include any rights conferred by the board or (in England or Wales) enjoyed as an incident of an interest in land: British Waterways Act 1995 s 20(3). As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the meaning of 'land' see PARA 14 note 21.

4 As to the meaning of 'inland waterway' see PARA 745 note 13.

5 As to the meaning of 'vessel' see PARA 762 note 13.

6 British Waterways Act 1995 s 20(1). A notice under s 19 (removal of vessels to permit works, etc: see PARA 793) has effect notwithstanding any private rights of mooring: s 20(2).



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## **(ii) Waterways of Other Navigation Authorities**

### **796. Powers of regulation and management available to other navigation authorities.**

All navigation authorities have the power to make waterways byelaws<sup>1</sup>. On many rivers and inland waterways pleasure boats must be registered with or licensed by the appropriate navigation authority or local authority<sup>2</sup>. Subject to the powers conferred upon other authorities, local authorities have a general power to license pleasure boats and vessels to be let for hire or to be used for carrying passengers for reward and they have powers to make byelaws for a range of specified purposes regulating such boats and vessels<sup>3</sup>. The Environment Agency<sup>4</sup> may make byelaws to the same effect<sup>5</sup>; and the Broads Authority<sup>6</sup> has power to make byelaws for the management of the navigation area for which it is responsible and the promotion of its use for purposes of recreation<sup>7</sup>.

1 See PARA 720.

2 See PARA 684. As to the British Waterway Board's power in this regard see PARA 786 et seq.

3 See PARA 684.

4 As to the Environment Agency see PARA 17.

5 See PARA 775.

6 As to the Broads Authority see PARA 734.

7 See PARA 735.

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### **797. Power to levy tolls.**

Where any navigable waters in England and Wales are not subject to the control of any navigation authority, harbour authority or conservancy authority, the Environment Agency<sup>1</sup> may apply to the Secretary of State<sup>2</sup> for an order imposing tolls in respect of the navigation of vessels in those waters<sup>3</sup>. In the case of waters within an internal drainage district which do not form part of a main river, these powers are exercisable by the drainage board for that district concurrently with the Agency<sup>4</sup>.

1 As to the Environment Agency see PARA 17.

2 As to the Secretary of State see PARA 15 note 1.

3 See the Water Resources Act 1991 s 143; and PARA 710. As to the general power of the British Waterways Board to charge see PARA 785.

4 See the Land Drainage Act 1991 s 56(1); and PARA 710.

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### **(iii) Canals under the Management of Canal Companies**

#### **798. Powers of management and regulation available to canal companies.**

Canal companies have usually been given powers to make byelaws and regulations by the special Acts under which they were formed<sup>1</sup>.

<sup>1</sup> See PARA 780. As to authorisation under special Act see PARA 799. As to the exercise of statutory powers by canal undertakers see PARA 781. As to the continuance of inland waterways outside the control of the British Waterways Board or the Environment Agency see PARA 714.

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## **(5) STRUCTURE WORKS AND CONSTRUCTION**

### **(i) Power to Make Works for Inland Waterways**

#### ***A. POWERS UNDER SPECIAL ACT***

##### **799. Authorisation under special Act.**

Until the coming into force of the Transport and Works Act 1992<sup>1</sup>, promoters obtained the authority to construct purpose-built canals (and the necessary compulsory acquisition of land for that purpose) by special Acts made in each case under the private Bill procedure<sup>2</sup>.

The law as to the exercise of statutory powers by canal undertakers has already been covered in this title<sup>3</sup>.

1 The Transport and Works Act 1992 received Royal Assent on 16 March 1992 and came into force in accordance with various commencement orders made under s 70. A regime consisting of ministerial orders made under that Act has replaced, for most purposes, the former authorisation procedure described in the text and note 2: see PARA 801 et seq.

2 See PARA 714. As to the private Bill procedure see **PARLIAMENT** vol 34 (Reissue) PARA 846. As to the acquisition of land authorised under special Acts for the purpose of constructing canals and works see PARA 820.

3 See PARA 781.

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## ***B. ORDERS AUTHORISING WORKS***

### **800. Authorisation of inland waterways works by ministerial order.**

The effect of the Transport and Works Act 1992 is that inland waterways projects (as well as other similar types of project)<sup>1</sup> can now be authorised by ministerial orders<sup>2</sup> so that, except in highly exceptional circumstances, they cannot now be made the subject of private Bills<sup>3</sup>. Ministerial orders may only be made on an application made in accordance with statutory rules<sup>4</sup>. Such rules<sup>5</sup> include provision for the environmental impact assessment of proposed projects so as to comply with the requirements of the Environmental Impact Directive<sup>6</sup>, and no order may be made without the consideration of such assessment<sup>7</sup>.

1    Ie especially railways works: see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 292 et seq.

2    See the Transport and Works Act 1992 ss 3, 4; and PARA 801 et seq.

3    The preamble to every private Bill has to maintain the averment that the purposes of the Act cannot be effected without the authority of Parliament, and this could not be maintained for the purposes of projects to which the ministerial orders regime attaches once that regime had been established: see **PARLIAMENT** vol 34 (Reissue) PARA 846.

4    See PARA 804.

5    See in particular the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, SI 2006/1466, rr 6, 7; and PARA 804 note 3.

6    Ie EC Council Directive 85/337 (OJ L175, 05.07.85, p 40); see PARA 10.

7    See PARA 809.

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## **(ii) Orders under the Transport and Works Act 1992**

### **A. TYPES OF ORDER AND THEIR SCOPE**

#### **801. Orders authorising works as to inland waterways.**

The Secretary of State<sup>1</sup> or, in relation to Wales the Welsh Ministers<sup>2</sup> may make an order<sup>3</sup> relating to, or to matters ancillary to: (1) the construction or operation of an inland waterway<sup>4</sup> in England and Wales<sup>5</sup>; (2) the carrying out of works which interfere with rights of navigation in waters within or adjacent to England and Wales, up to the seaward limits of the territorial sea<sup>6</sup> and are of a description prescribed by order made for this purpose<sup>7</sup>.

A body which has power to promote or power to oppose Bills in Parliament also has power to apply for, or as the case may be power to object to, such orders<sup>8</sup>. Where the power of a body to promote or to oppose Bills is subject to any condition, then with certain exceptions<sup>9</sup>, the corresponding power conferred on the body by this provision<sup>10</sup> is subject to the like condition<sup>11</sup>.

If the appropriate authority<sup>12</sup> agrees, an interest which subsists in land in which there is a Crown or Duchy interest<sup>13</sup>, but is not itself a Crown or Duchy interest, may be acquired compulsorily by virtue of an order under the Transport and Works Act 1992<sup>14</sup>, and any provision of the Transport and Works Act 1992 or of such an order (other than a provision by virtue of which an interest in land is compulsorily acquired) may apply in relation to land in which there is a Crown or Duchy interest<sup>15</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The order-making function of the Secretary of State under the Transport and Works Act 1992 s 3, so far as exercisable in relation to Wales, was transferred to the National Assembly for Wales except where any order made thereunder would have effect both in Wales and England; and, so far as exercisable in relation to Wales, the order-making function of the Secretary of State under s 3 was exercisable only with the agreement of the Assembly: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, arts 2, 5(1), Schs 1, 2. Such functions of the National Assembly for Wales are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'England' see PARA 19 note 8. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 The power to make orders under the Transport and Works Act 1992 s 3 is exercisable by statutory instrument: s 3(3). For the matters as to which provision may be made by an order under s 3 see PARA 802; and as to the validity of orders so made see PARA 813. As to the procedure for making such orders see PARA 804 et seq. At the date at which this volume states the law no such order of general application had been made. Orders of local effect are not recorded in this work.

The Transport and Works Act 1992 s 3 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq. On making an order under the Transport and Works Act 1992 s 3 which includes provision for development, the Secretary of State or, as appropriate, the Welsh Ministers may direct that planning permission for that development is deemed to be granted, subject to such conditions, if any, as may be specified in the direction: see the Town and Country Planning Act 1990 s 90(2A) (added by the Transport and Works Act 1992 s 16(1)); and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 238. On making any such order which includes any provision that would involve the presence of a hazardous substance in circumstances requiring hazardous substances consent, the Secretary of State or, as appropriate, the Welsh Ministers may direct that hazardous substances consent is deemed to be granted, subject to such conditions, if any, as may be specified in the direction: see the Planning (Hazardous Substances) Act 1990 s 12(2A) (added by the Transport and Works Act 1992 s 18); and **TOWN AND COUNTRY PLANNING** vol

46(3) (Reissue) PARA 1254. Land whose compulsory acquisition is authorised by an order under the Transport and Works Act 1992 (or which falls within the limits of deviation within which powers of compulsory acquisition conferred by such an order are exercisable) is blighted land for the purposes of the Town and Country Planning Act 1990: see s 149(1), Sch 13 para 23 (added by the Transport and Works Act 1992 s 16(2)); and **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 986.

As to orders made by the Secretary of State under the Transport and Works Act 1992, and their relationship to the application of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial) as set out in the Human Rights Act 1998 Sch 1 Pt I, see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 'Inland waterway' includes both natural and artificial waterways, and waterways within parts of the sea that are in Great Britain, but not any waterway managed or maintained by a person who is a harbour authority within the meaning of the Harbours Act 1964 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) PARA 619) in relation to the waterway: Transport and Works Act 1992 s 67. The Secretary of State or, as the case may be, the Welsh Ministers must not make an order under s 3 if in his or their opinion the primary object of the order could be achieved by means of an order under the Harbours Act 1964: Transport and Works Act 1992 s 3(2). As to the meaning of 'Great Britain' see PARA 22 note 5. As to the meaning of 'person' see PARA 13 note 29.

5 Transport and Works Act 1992 s 3(1)(a).

6 Transport and Works Act 1992 s 3(1)(b)(i). As to the territorial sea see PARA 31.

7 See the Transport and Works Act 1992 s 3(1)(b)(ii). The Secretary of State may by order prescribe descriptions of works for the purposes of s 3(1)(b): s 4(1). The power to make such orders is exercisable by statutory instrument; but no order must be made unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament: s 4(2). The order-making power under s 4 is not transferred to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941.

In exercise of these powers, the Secretary of State has, for the purposes of the Transport and Works Act 1992 s 3(1)(b)(ii), prescribed works relating to a barrage, bridge, cable, fountain, land reclamation, navigational aid, observation structure, offshore installation, pier, pipeline, tunnel and utilities structure: see the Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 2 (amended by SI 1997/2906). 'Barrage' includes a dam, weir, barrier, embankment, breakwater and any other structure for impounding, or diverting or controlling the flow of, water; 'bridge' includes a viaduct, an aqueduct and a gantry and the abutments of and approaches to a bridge; and 'cable' means a telegraph, telephone or electric power cable (whether submerged or airborne), an aerial cableway or a cable or chain used to guide a ferry: Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 3(1). 'Fountain' means a structure or device (whether fixed or floating) used, or intended to be used, to project jets of water from static or manoeuvrable nozzles: art 3(1) (definition added by SI 1997/2906). 'Land reclamation' means works for restoring or converting to dry land or to a polder areas of land which are continuously or intermittently covered by water and also means other works in, on or over such land; and 'navigational aid' means any structure or device (whether fixed or floating) providing a light, sound or other signal or other aid for the safety of navigation in or over water or in the air: Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 3(1). 'Observation structure' means a structure (whether fixed or floating) with a platform or gallery for viewing events, objects or the surrounding region: art 3(1) (definition added by SI 1997/2906). 'Offshore installation' means an installation or device (whether fixed or floating) for the exploitation, or exploration with a view to exploitation, of the natural resources of any waters, the bed or subsoil thereof or the air-space thereover and also means any other installation or device performing, or intended to perform, or which has performed, any activity of a kind specified in the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995, SI 1995/738 (see **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 733) in so far as the activity relates to such bed or subsoil: Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 3(1); Interpretation Act 1978 s 17(2). 'Pier' includes a jetty, quay, wharf, mole, staging, slipway and any similar structure, device or facility (whether fixed or floating), together with any building thereon, used for the mooring, landing, launching or beaching of vessels or for commercial, residential or leisure purposes: Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 3(1) (definition amended by SI 1997/2906). 'Pipeline' means a pipe or system of pipes for the conveyance of any thing and also means a sewer, drain, duct and any apparatus or works associated with such a pipe or system of a kind specified in the Petroleum Act 1998 (see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1741) and for the purposes of this definition references to 'the pipe or system' are to be construed accordingly: Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 3(1); Interpretation Act 1978 s 17(2). 'Tunnel' means a tunnel for the passage of vehicles, persons on foot or animals and includes a submerged tube used for any of those purposes, the approaches to a tunnel and works for the operation or protection of a tunnel; and 'utilities structure' means a structure or plant, whether attached to dry land or otherwise and whether fixed or floating, used, or intended to be used, or which has been used, for a transport, communications, electricity generation, water extraction

(including desalination), waste disposal or similar purpose: Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992, SI 1992/3230, art 3(1). References to 'works' are to be construed as including the construction, emplacement, removal, demolition, alteration or modification of the works in question, or of any part thereof, and any works ancillary thereto: art 3(2).

8 Transport and Works Act 1992 s 20(1).

9 The powers conferred by the Transport and Works Act 1992 s 20(1) (see the text to note 8) on the British Waterways Board are exercisable without the consent of the Secretary of State: s 20(3) (amended by the Transport Act 2000 s 274, Sch 31 Pt IV; SI 2003/1615). As to the British Waterways Board see PARA 725 et seq. As to the promotion and opposition of Bills in Parliament by the British Waterways Board see PARA 747.

10 le by the Transport and Works Act 1992 s 20(1): see the text to note 8.

11 Transport and Works Act 1992 s 20(2) (amended by the Greater London Authority Act 1999 s 168(1), (2)).

12 'Appropriate authority' means: (1) in the case of land belonging to Her Majesty in right of the Crown and forming part of the Crown Estate, the Crown Estate Commissioners; (2) in the case of other land belonging to Her Majesty in right of the Crown, the government department having the management of the land; (3) in the case of land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor of the Duchy; (4) in the case of land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints; (5) in the case of land belonging to a government department or held in trust for Her Majesty for the purposes of a government department, that department: Transport and Works Act 1992 s 25(3). If any question arises as to what authority is the appropriate authority in relation to any land, that question must be referred to the Treasury, whose decision is final: s 25(4). The functions of a minister of the Crown under s 25, except under s 25(4), so far as exercisable in relation to Wales, are transferred to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'land' see PARA 14 note 21. As to the Crown Estate Commissioners see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 280 et seq. As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq. As to the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq. As to the meaning of 'Treasury' see PARA 108 note 6.

13 'Crown or Duchy interest' means an interest belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or belonging to the Duchy of Cornwall, or belonging to a government department, or held in trust for Her Majesty for the purposes of a government department: Transport and Works Act 1992 s 25(2).

14 Transport and Works Act 1992 s 25(1)(a).

15 Transport and Works Act 1992 s 25(1)(b).



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## **802. Subject matter of orders as to inland waterways.**

The matters as to which provision may be made by an order as to inland waterways<sup>1</sup> include the following<sup>2</sup>:

- 1591 (1) the construction, alteration, repair, maintenance, demolition and removal of railways<sup>3</sup>, tramways, trolley vehicle systems<sup>4</sup> and other transport systems within the meaning of the Transport and Works Act 1992<sup>5</sup>, waterways, roads, watercourses, buildings and other structures<sup>6</sup>;
- 1592 (2) the carrying out of any other civil engineering or other works<sup>7</sup>;
- 1593 (3) the acquisition of land<sup>8</sup>, whether compulsorily or by agreement<sup>9</sup>;
- 1594 (4) the creation and extinguishment of rights over land<sup>10</sup> (including rights of navigation over water), whether compulsorily or by agreement<sup>11</sup>;
- 1595 (5) the abrogation and modification of agreements relating to land<sup>12</sup>;
- 1596 (6) the conferring on persons<sup>13</sup> providing transport services of rights to use systems belonging to others<sup>14</sup>;
- 1597 (7) the protection of the property or interests of any person<sup>15</sup>;
- 1598 (8) the imposition and exclusion of obligations or of liability in respect of any acts or omissions<sup>16</sup>;
- 1599 (9) the making of agreements to secure the provision of police services<sup>17</sup>;
- 1600 (10) the carrying out of surveys and the taking of soil samples<sup>18</sup>;
- 1601 (11) the payment of compensation<sup>19</sup>;
- 1602 (12) the charging of tolls, fares (including penalty fares) and other charges, and the creation of summary offences in connection with non-payment<sup>20</sup>;
- 1603 (13) the making of byelaws by any person and their enforcement, including the creation of summary offences<sup>21</sup>;
- 1604 (14) the payment of rates<sup>22</sup>;
- 1605 (15) the transfer, leasing, discontinuance and revival of undertakings<sup>23</sup>;
- 1606 (16) the submission of disputes to arbitration<sup>24</sup>;
- 1607 (17) the imposition of requirements to obtain the consent of the Secretary of State<sup>25</sup> or, in relation to Wales, the Welsh Ministers<sup>26</sup>.

Such an order may make provision in relation to more than one scheme, system or mode of transport<sup>27</sup>. It may also apply, modify or exclude any statutory provision<sup>28</sup> which relates to any matter as to which such an order could be made<sup>29</sup>; and make such amendments, repeals and revocations of statutory provisions of local application as appear to the Secretary of State or, as the case may be, the Welsh Ministers to be necessary or expedient in consequence of any provision of the order or otherwise in connection with the order<sup>30</sup>.

The provisions that may be made by such an order include:

- 1608 (a) any provision that appears to the Secretary of State or, as appropriate, the Welsh Ministers to be necessary or expedient for giving full effect to: (i) any other provision of the order<sup>31</sup>; (ii) any provision of an earlier order<sup>32</sup>; or (iii) any provision which is contained in an Act of Parliament passed before 1 January 1993<sup>33</sup>, or in an

instrument made under an Act of Parliament before that time, and which is of a kind which could be included in an order under these provisions<sup>34</sup>; and  
 1609 (b) such supplemental and transitional provisions as appear to the Secretary of State or the Welsh Ministers to be necessary or expedient in connection with the order<sup>35</sup>.

An order may not extinguish any public right of way over land unless the Secretary of State or, as appropriate, the Welsh Ministers is satisfied that an alternative right of way has been or will be provided<sup>36</sup>, or that the provision of an alternative right of way is not required<sup>37</sup>.

Where an order is required under the Transport Act 1968 in relation to the classification of the waterways of the British Waterways Board<sup>38</sup>, or the maintenance of those waterways<sup>39</sup>, or in relation to the maintenance and use of other waterways<sup>40</sup>, so as to give effect to any proposal, no provision must be included in an order under the Transport and Works Act 1992<sup>41</sup> which would either remove that requirement or alter the requirements of the Transport Act 1968<sup>42</sup> relating to the orders so required under that Act<sup>43</sup>.

1    le an order under the Transport and Works Act 1992 s 3: see PARA 801. The Transport and Works Act 1992 s 5 and Sch 1 also apply to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

2    See the Transport and Works Act 1992 s 5(1). This provision is expressed to be without prejudice to the generality of s 3 (see PARA 801): see s 5(1). The Transport and Works Act 1992 s 5 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq.

3    'Railway' means a system of transport employing parallel rails which provide support and guidance for vehicles carried on flanged wheels, and form a track which either is of a gauge of at least 350 millimetres or crosses a carriageway (whether or not on the same level), but does not include a tramway: Transport and Works Act 1992 s 67(1). 'Vehicle' includes mobile traction unit: s 67(1). 'Tramway' means a system of transport used wholly or mainly for the carriage of passengers and employing parallel rails which provide support and guidance for vehicles carried on flanged wheels, and are laid wholly or mainly along a street or in any other place to which the public has access (including a place to which the public has access only on making a payment): s 67(1). 'Street' means a street within the meaning of the New Roads and Street Works Act 1991 s 48 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 9), together with land on the verge of a street or between two carriageways: Transport and Works Act 1992 s 67(1). 'Carriageway' has the same meaning as in the Highways Act 1980 (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 64): Transport and Works Act 1992 s 67(1).

4    'Trolley vehicle system' means a system of transport by vehicles constructed or adapted for use on roads without rails under electric power transmitted to them by overhead wires (whether or not there is in addition a source of power on board the vehicles): Transport and Works Act 1992 s 67(1).

5    le other transport systems within the meaning of the Transport and Works Act 1992 s 1(1) (railways etc): see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

6    Transport and Works Act 1992 Sch 1 para 1.

7    Transport and Works Act 1992 Sch 1 para 2.

8    As to the meaning of 'land' see PARA 14 note 21.

9    Transport and Works Act 1992 Sch 1 para 3. An order authorising a compulsory purchase is subject to special parliamentary procedure: see s 12; and PARA 808.

10   References in the Transport and Works Act 1992 to 'rights over land' include references to rights to do, or to place and maintain, anything in, on or under land or in the air-space above its surface: s 67(2).

11   Transport and Works Act 1992 Sch 1 para 4.

12   Transport and Works Act 1992 Sch 1 para 5.

13   As to the meaning of 'person' see PARA 13 note 29.

14 Transport and Works Act 1992 Sch 1 para 6.

15 Transport and Works Act 1992 Sch 1 para 7. This provision protects eg electricity, gas, water and sewerage undertakers, telecommunications operators and railway undertakers. As to the protective provisions for street authorities see the New Roads and Street Works Act 1991; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 406 et seq.

16 Transport and Works Act 1992 Sch 1 para 8.

17 Transport and Works Act 1992 Sch 1 para 9.

18 Transport and Works Act 1992 Sch 1 para 10.

19 Transport and Works Act 1992 Sch 1 para 11.

20 See the Transport and Works Act 1992 Sch 1 para 12.

21 Transport and Works Act 1992 Sch 1 para 13. A provision of an order relating to offences may not authorise the imposition on persons convicted of an offence of a term of imprisonment or of a fine exceeding level 3 on the standard scale: s 5(5). As to the standard scale see PARA 141 note 18. As to waterways byelaws see further PARA 720 et seq.

22 Transport and Works Act 1992 Sch 1 para 14.

23 Transport and Works Act 1992 Sch 1 para 15.

24 Transport and Works Act 1992 Sch 1 para 16.

25 As to the Secretary of State see PARA 15 note 1.

26 Transport and Works Act 1992 Sch 1 para 17. The functions of the Secretary of State under the Transport and Works Act 1992 s 5 (see the text to notes 27-45) and Sch 1, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

27 Transport and Works Act 1992 s 5(2).

28 'Statutory provision' means provision of an Act of Parliament or of an instrument made under an Act of Parliament: Transport and Works Act 1992 s 5(3).

29 Transport and Works Act 1992 s 5(3)(a).

30 Transport and Works Act 1992 s 5(3)(b).

31 Transport and Works Act 1992 s 5(4)(a)(i).

32 Transport and Works Act 1992 s 5(4)(a)(ii).

33 Ie the time when the Transport and Works Act 1992 Pt I (ss 1-25) was first wholly in force: see s 5(4)(a)(iii); the Transport and Works Act 1992 (Commencement No 3 and Transitional Provisions) Order 1992, SI 1992/2784, art 2(a), Sch 1.

34 Transport and Works Act 1992 s 5(4)(a)(iii).

35 Transport and Works Act 1992 s 5(4)(b).

36 Transport and Works Act 1992 s 5(6)(a).

37 Transport and Works Act 1992 s 5(6)(b).

38 Ie an order under the Transport Act 1968 s 104(3): see PARA 741. As to the British Waterways Board see PARA 725 et seq.

39 Ie an order under the Transport Act 1968 s 105(3): see PARA 741.

40 Ie an order under the Transport Act 1968 s 112: see PARA 828.

41     le an order under the Transport and Works Act 1992 s 3: see PARA 801.

42     le the requirements of the Transport Act 1968 ss 104, 105 (see PARA 741), s 112 (see PARA 828) or Sch 13 (see PARA 741).

43     Transport and Works Act 1992 s 5(7).

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### **803. Orders made by the Secretary of State without application.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may, without any application being made to them<sup>3</sup>: (1) make an order as to inland waterways<sup>4</sup> making any provision which appears to the Secretary of State or, as the case may be, the Welsh Ministers to be necessary or expedient, in the interests of safety, for the purpose of suspending or discontinuing any operations<sup>5</sup>, or in consequence of the abandonment or neglect of any works<sup>6</sup>; or (2) make an order as to inland waterways<sup>7</sup> repealing or revoking provisions which appear to the Secretary of State or, as the case may be, the Welsh Ministers to be spent<sup>8</sup>.

Where the Secretary of State or the Welsh Ministers proposes to make an order by virtue of these provisions, he or they must: (a) prepare a draft of the order<sup>9</sup>; (b) publish a notice of the intention to make the order, which notice must include such particulars as may be prescribed<sup>10</sup>, in the London Gazette and in a local newspaper circulating in the area (or each of the areas) in which the proposals contained in the draft order are intended to have effect<sup>11</sup>, and (c) give such further notices of the proposal as may be prescribed<sup>12</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The powers of the Secretary of State under the Transport and Works Act 1992 s 7, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. However, there was excepted from such transfer the rule-making powers under s 7(4) (see note 10) with the proviso that such powers were exercisable only with the agreement of the Assembly: see arts 2, 5(1), Schs 1, 2. These functions of the National Assembly for Wales are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 As to applications for orders see PARA 804. The Transport and Works Act 1992 s 7 also applies to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302. The Transport and Works Act 1992 s 7 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq.

4 I.e. an order under the Transport and Works Act 1992 s 3: see PARA 801. An order under s 7(1)(b) may include provision for the recovery by the Secretary of State or, as the case may be, the Welsh Ministers of the costs of making the order and of carrying its provisions into effect: s 7(2). See further, in relation to orders made under s 7, s 9 (proposals of national significance: see PARA 812); s 10 (objections: see PARA 806); s 11 (inquiries and hearings: see PARA 807); s 13 (making or refusal of orders: see PARA 809); s 14 (publicity for making or refusal of orders: see PARA 809); and s 15 (assimilation of procedures): see PARA 811).

5 Transport and Works Act 1992 s 7(1)(b)(i).

6 Transport and Works Act 1992 s 7(1)(b)(ii).

7 I.e. an order under the Transport and Works Act 1992 s 3: see PARA 801.

8 Transport and Works Act 1992 s 7(1)(c).

9 Transport and Works Act 1992 s 7(3)(a).

10 The power to make provision by rules under the Transport and Works Act 1992 s 6 (see PARA 804) in relation to applications includes power to make such corresponding provision as the Secretary of State (see note 2) considers appropriate in relation to proposals to make orders by virtue of s 7; and 'prescribed' means

prescribed by rules under s 6: s 7(4). As to the provision made see the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, SI 2006/1466, rr 20, 28, Sch 7.

11 Transport and Works Act 1992 s 7(3)(b) (substituted by SI 2006/958).

12 Transport and Works Act 1992 s 7(3)(c). See also note 10.

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## **B. PROCEDURE FOR MAKING ORDERS**

### **804. Applications for orders.**

The Secretary of State<sup>1</sup> may not make an order as to inland waterways<sup>2</sup> except on an application made to him in accordance with rules made by him<sup>3</sup>. However, in certain cases an order may be made without such application having been made<sup>4</sup>.

The Secretary of State may make rules as to: (1) the form of such an application<sup>5</sup>; (2) the documents and information that must be submitted with it<sup>6</sup>; (3) the giving and publication of notices of an application<sup>7</sup>; and (4) any other steps that must be taken before an application is made or in connection with the making of an application<sup>8</sup>. This power to make rules includes power: (a) to make provision for or in connection with requiring the Secretary of State in such cases or circumstances as may be prescribed in the rules to give to a person<sup>9</sup> who proposes to make an application an opinion on the information, if any, to be supplied in connection with that application<sup>10</sup>; and (b) to make rules as to the publicity to be given to any environmental information provided in relation to such an application<sup>11</sup>.

Any provision made by the rules as to the consultation that must be carried out before an application is made, or as to the provision of information by a relevant authority<sup>12</sup> to a person for the purposes of an application which the person proposes to make, may include provision requiring compliance with general or special directions given by the Secretary of State<sup>13</sup>. The rules may make different provision for different cases, and may include provision authorising the Secretary of State: (i) to dispense with compliance with rules that would otherwise apply<sup>14</sup>; or (ii) to require compliance with rules that would not otherwise apply, in any case where he considers it appropriate to do so<sup>15</sup>. The rules may also provide for fees of such amounts as may be determined by or in accordance with the rules to be payable to the Secretary of State on the making of applications<sup>16</sup>.

1 As to the Secretary of State see PARA 15 note 1. The rule-making powers conferred on the Secretary of State by the Transport and Works Act 1992 s 6(2)-(6) (see note 3 and the text to notes 5-16) were excepted from the functions under the Transport and Works Act 1992, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. However, those powers are exercisable by the Secretary of State only with the agreement of the Welsh Ministers: see art 5(1), Sch 2; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

2 An order made under the Transport and Works Act 1992 s 3: see PARA 801. The Transport and Works Act 1992 s 6 also applies to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

3 See the Transport and Works Act 1992 s 6(1). The power to make rules under s 6 is exercisable by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament: s 6(6). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the rules made see the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, SI 2006/1466. The rules make provision as to: (1) preliminary procedure and consultation: see rr 5, 8; (2) the preparation of environmental statements: see rr 6, 7; (3) the application for the order including the deposit of a copy and publicity for the application: see rr 9-14, Schs 1-3, 5, 6; and (4) information and notices including notice to other states likely to be affected: see rr 15-17. The rules also provide for the waiving of certain requirements: see r 18; fees: see r 19; for the Secretary of State to set later time limits: see r 26; for objections and representations to be made and heard: see rr 21-25; and specific provision as to applications relating solely to Wales: see r 28.

As to the powers in relation to applications under the Transport and Works Act 1992 s 6, see further s 8 (model clauses: see PARA 805); s 9 (proposals which are of national significance: see PARA 812); s 10 (objections to an application: see PARA 806); s 11 (inquiries and hearings: see PARA 807); s 13 (making or refusal of orders: see PARA 809); s 14 (notice of determination to applicants: see PARA 809); and s 15 (assimilation of procedures: see PARA 811). The Transport and Works Act 1992 s 6 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq.

4 The Transport and Works Act 1992 s 6(1) is expressed to be subject to s 7 (see PARA 803): see s 6(1).

5 Transport and Works Act 1992 s 6(2)(a).

6 Transport and Works Act 1992 s 6(2)(b).

7 Transport and Works Act 1992 s 6(2)(c).

8 Transport and Works Act 1992 s 6(2)(d). The power conferred on the Secretary of State by s 6(2) to make rules includes power to make rules for a case where an application has been made under s 6 and another member state is affected by the project in question, as to:

50 (1) the provision by the Secretary of State to the member state (or to authorities in, or the public of, the member state) of documents and information relating to the application (s 6A(1)(a) (s 6A added by SI 1998/2226));

51 (2) consultation by the Secretary of State with the member state in connection with the application (Transport and Works Act 1992 s 6A(1)(b) (as so added)); or

52 (3) notification by the Secretary of State to the member state of the decision, or of matters relating to the decision, on the application (s 6A(1)(c) (as so added)).

For these purposes, the cases where another member state is affected by the project in question are those cases where it appears to the Secretary of State that the project would be likely to have significant effects on the environment in another member state or where that other member state is likely to be significantly affected by the project and requests information relating to the application: s 6A(2) (as so added). As to the meaning of 'member state' see the Interpretation Act 1978 s 5, Sch 1; European Communities Act 1972 s 1(2), Sch 1 Pt II. 'Member state' in this context includes a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183): see the Transport and Works Act 1992 s 6A(3) (s 6A as so added; s 6A(3) added by SI 2000/3199). As to the rules made see further the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, SI 2006/1466, r 16.

9 As to the meaning of 'person' see PARA 13 note 29.

10 Transport and Works Act 1992 s 6(2A) (added by SI 1998/2226).

11 Transport and Works Act 1992 s 6(2B) (added by SI 2006/958).

12 'Relevant authority' means any authority in relation to which EC Council Directive 85/337 (OJ L175, 5.7.85, p 40) art 5(4) (as amended by EC Council Directive 97/11 (OJ L73, 14.03.1997, p 5) (authorities holding relevant information to make it available to the developer)) applies, and includes: Natural England, the Countryside Council for Wales, and a local planning authority within the meaning of the Town and Country Planning Act 1990 Pt I (ss 1-9) (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 28); Transport and Works Act 1992 s 6(7) (added by SI 1998/2226; amended by the Natural Environment and Rural Communities Act 2006 s 105, Sch 11 Pt 1 para 136, Sch 12; and by virtue of SI 2002/794). As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

13 Transport and Works Act 1992 s 6(3) (amended by SI 1998/2226).

14 Transport and Works Act 1992 s 6(4)(a).

15 Transport and Works Act 1992 s 6(4)(b).

16 Transport and Works Act 1992 s 6(5).



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### **805. Model clauses.**

The Secretary of State<sup>1</sup> may by order<sup>2</sup> prescribe model provisions<sup>3</sup> for incorporation in any draft orders which, in accordance with rules made under the Transport and Works Act 1992<sup>4</sup>, may be required to be submitted with applications<sup>5</sup> for orders as to inland waterways<sup>6</sup>.

1 As to the Secretary of State see PARA 15 note 1. The order-making powers conferred on the Secretary of State by the Transport and Works Act 1992 s 8 were excepted from the functions under the Transport and Works Act 1992, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. However, those powers are exercisable by the Secretary of State only with the agreement of the Welsh Ministers: see art 5(1), Sch 2; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

2 The power to make such orders is exercisable by statutory instrument: Transport and Works Act 1992 s 8(4). At the date at which this volume states the law, no such order had been made in relation to orders under s 3 (inland waterways: see PARA 801).

The Transport and Works Act 1992 s 8 also applies to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

3 The prescribing of a model provision under the Transport and Works Act 1992 s 8 does not of itself make it mandatory for a provision in the terms of the model to be incorporated in a draft order or in any order eventually made under s 3 (see PARA 801): see s 8(3).

4 Ie rules made under the Transport and Works Act 1992 s 6: see PARA 804.

5 Ie applications under the Transport and Works Act 1992 s 6: see PARA 804.

6 See the Transport and Works Act 1992 s 8(1). Different provisions may be prescribed under s 8 for different cases: s 8(2).

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## 806. Objections.

The Secretary of State<sup>1</sup> may make rules<sup>2</sup> as to:

- 1610 (1) the making of objections to an application<sup>3</sup> for an order as to inland waterways or to a proposal to make such an order<sup>4</sup> otherwise than by application<sup>5</sup>;
- 1611 (2) the information to be comprised within or submitted with an objection<sup>6</sup>;
- 1612 (3) the submission by the person making the application of written<sup>7</sup> representations or information in relation to objections<sup>8</sup>;
- 1613 (4) the submission of further written representations or information<sup>9</sup>;
- 1614 (5) such other matters relating to the consideration of objections as appear to the Secretary of State to be appropriate<sup>10</sup>.

The Secretary of State or, as the case may be, the Welsh Ministers<sup>11</sup> may not make a determination<sup>12</sup> in respect of an order without first taking into consideration the grounds of any objection in respect of which such rules have been complied with<sup>13</sup>. However, if an objection is withdrawn or appears to the Secretary of State or the Welsh Ministers to be frivolous or trivial<sup>14</sup>, or to relate to matters which fall to be determined by a tribunal concerned with the assessment of compensation<sup>15</sup>, the Secretary of State or the Welsh Ministers may make such a determination without further consideration of the objection<sup>16</sup>.

1 As to the Secretary of State see PARA 15 note 1. The functions of the Secretary of State under the Transport and Works Act 1992 s 10, other than the rule-making powers conferred on the Secretary of State thereunder, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. The functions so transferred are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. The rule-making powers under the Transport and Works Act 1992 s 10 are exercisable by the Secretary of State only with the agreement of the Welsh Ministers: see art 5(1), Sch 2; Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5. As to the meaning of 'Wales' see PARA 16 note 2.

2 The power to make rules under the Transport and Works Act 1992 s 10 is exercisable by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament: s 10(6). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. Rules under s 10 may make different provision for different cases, and may include provision authorising the Secretary of State or, as appropriate the Welsh Ministers to dispense with compliance with rules that would otherwise apply (s 10(5)(a)), or to require compliance with rules that would not otherwise apply, in any case where the Secretary of State or the Welsh Ministers considers it appropriate to do so (s 10(5)(b)). As to the rules made see the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, SI 2006/1466; and PARA 804. In relation to objections and representations, see especially rr 21-25.

3 Ie an application under the Transport and Works Act 1992 s 6: see PARA 804.

4 Ie by virtue of the Transport and Works Act 1992 s 7: see PARA 803.

5 See the Transport and Works Act 1992 s 10(1)(a). Where a person makes an objection in accordance with rules made under s 10 to an application under s 6 (see PARA 804), the Secretary of State or, as the case may be, the Welsh Ministers must send to that person a copy of any notice published pursuant to s 9(2): see s 9(3); and PARA 812. Further, the Secretary of State or the Welsh Ministers may give to that person, and to a person who makes an objection to a proposal to make an order by virtue of s 7 (see PARA 803), an opportunity of appearing before and being heard by an appointed person at a public local inquiry held under s 11: see s 11(2); and PARA 807. As to the meaning of 'person' see PARA 13 note 29.

- 6 Transport and Works Act 1992 s 10(1)(b).
- 7 As to the meaning of 'written' see PARA 22 note 1.
- 8 Transport and Works Act 1992 s 10(1)(c).
- 9 Transport and Works Act 1992 s 10(1)(d).
- 10 Transport and Works Act 1992 s 10(1)(e).
- 11 See note 1.
- 12 Ie a determination under the Transport and Works Act 1992 s 13(1): see PARA 809.
- 13 Transport and Works Act 1992 s 10(2). Section 10(2) does not apply where the Secretary of State or the Welsh Ministers causes an inquiry to be held under s 11(1) (see PARA 807) or causes an objection to be dealt with in accordance with s 11(2) (see PARA 807), but the Secretary of State or the Welsh Ministers must not make a determination under s 13(1) (see PARA 809) without first taking into consideration the report of the person holding the inquiry or, as the case may be, of the person appointed under s 11(2): s 10(4). The Transport and Works Act 1992 s 10 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq.
- 14 Transport and Works Act 1992 s 10(3)(a).
- 15 Transport and Works Act 1992 s 10(3)(b).
- 16 Transport and Works Act 1992 s 10(3).

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### 807. Inquiries and hearings.

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may cause a public local inquiry<sup>3</sup> to be held for the purposes of an application for an order as to inland waterways<sup>4</sup>, or a proposal by the Secretary of State or the Welsh Ministers to make such an order<sup>5</sup> otherwise than on application<sup>6</sup>. The Secretary of State or, as the case may be, the Welsh Ministers may give to a person<sup>7</sup> who makes an objection<sup>8</sup> an opportunity of appearing before and being heard by a person appointed by the Secretary of State or the Welsh Ministers for the purpose<sup>9</sup>.

Where an objection is made by a specified person<sup>10</sup> who informs the Secretary of State or, as appropriate, the Welsh Ministers in writing<sup>11</sup> that he wishes the objection to be referred to an inquiry or to be given an opportunity of appearing before and being heard by a person appointed for that purpose<sup>12</sup>, then, unless certain exceptions apply<sup>13</sup>, the Secretary of State or the Welsh Ministers must either cause an inquiry to be held or, if the Secretary of State or the Welsh Ministers so determines, give the objector an opportunity of appearing before and being heard by a person appointed<sup>14</sup> for that purpose<sup>15</sup>.

Rules have been made prescribing the procedure to be followed in connection with public local inquiries held under the above provisions<sup>16</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Transport and Works Act 1992 s 11, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 The provisions of the Local Government Act 1972 s 250(2)-(5) (attendance and evidence at, and costs of, inquiries: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) apply to an inquiry held under the Transport and Works Act 1992 s 11(1): s 11(5). However: (1) in its application by virtue of s 11(5), the Local Government Act 1972 s 250(4) has effect with the omission of the words 'and any amount' onwards (Transport and Works Act 1992 s 11(5)(a)); and (2) the power to make an order as to costs under the Local Government Act 1972 s 250(5) as applied by the Transport and Works Act 1992 s 11(5) is exercisable not only where the inquiry takes place but also where arrangements are made for it but it does not take place (s 11(5)(b)).

4 Ie an application under the Transport and Works Act 1992 s 6: see PARA 804.

5 Ie by virtue of the Transport and Works Act 1992 s 7: see PARA 803.

6 Transport and Works Act 1992 s 11(1).

7 As to the meaning of 'person' see PARA 13 note 29.

8 Ie in accordance with rules made under the Transport and Works Act 1992 s 10: see PARA 806.

9 Transport and Works Act 1992 s 11(2). The provisions of the Local Government Act 1972 s 250(4), (5) (costs: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 105) apply in relation to proceedings under the Transport and Works Act 1992 s 11(2) as they apply in relation to an inquiry under s 11(1) (see note 3): s 11(6).

10 The specified persons are: (1) any local authority for an area in which any works authorised by the proposed order are to be carried out (s 11(3), (4)(a)); and (2) where the proposals include the compulsory acquisition of land, any person who, if the Acquisition of Land Act 1981 Pt II (ss 10-15) (purchases by local and other authorities: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 557 et seq) applied to the

acquisition, would be entitled to a notice under s 12 (notice to owners, lessees and occupiers: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 560) (Transport and Works Act 1992 s 11(3), (4)(b)). For these purposes, 'local authority' means a county council, a district council, a London borough council, the Common Council of the City of London, the Council of the Isles of Scilly, a county borough council, and a Passenger Transport Executive: s 11(4) (amended by the Local Government (Wales) Act 1994 s 22(1), Sch 7 para 34(1)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55. As to passenger transport areas, Authorities and Executives generally see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 63.

11 As to the meaning of 'writing' see PARA 22 note 1.

12 Ie appointed in accordance with the Transport and Works Act 1992 s 11(2): see the text to notes 7-9.

13 Ie unless the Transport and Works Act 1992 s 10(3) applies: see PARA 806.

14 Ie in accordance with the Transport and Works Act 1992 s 11(2): see the text to notes 7-9.

15 Transport and Works Act 1992 s 11(3). After making a determination under s 13(1), the Secretary of State or the Welsh Ministers must give notice of that determination to every person who made an objection which was referred to an inquiry or hearing in accordance with s 11(3): see s 14(1); and PARA 809.

16 See the Transport and Works (Inquiries Procedure) Rules 2004, SI 2004/2018. The rules cover the preliminary action to be taken by the Secretary of State or the Welsh Ministers (see r 4) and by official bodies (see r 5), the procedure where the Secretary of State or the Welsh Ministers causes a pre-inquiry meeting to be held (see rr 6, 8, 11, 12), the service of documents (see rr 7, 24), the arrangement of a timetable for the inquiry (see rr 9, 23), the appointment of an assessor (see r 10), the date and notification of an inquiry (see r 13), appearances at an inquiry (see r 14), representation of official bodies (see r 15), proofs of evidence (see r 16), the procedure to be followed (see rr 17, 18, 20), site inspections (see r 19), notification of decisions (see r 21) and the procedure following the quashing of a decision (see r 22). In relation to any inquiry held by the Welsh Ministers the procedures of which are prescribed by these rules, and especially regarding any references to government policy and government departments therein, see the National Assembly for Wales (Transfer of Functions) Order 2000, SI 2000/253, art 6, Sch 4.

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### 808. Special parliamentary procedure.

An order as to inland waterways<sup>1</sup> authorising a compulsory purchase is subject to special parliamentary procedure<sup>2</sup> to the same extent as it would be by virtue of the Acquisition of Land Act 1981<sup>3</sup> if the purchase were authorised by an order<sup>4</sup> under that Act<sup>5</sup>. In relation to such an order which is subject to special parliamentary procedure, there are certain statutory modifications<sup>6</sup>.

1    le an order under the Transport and Works Act 1992 s 3: see PARA 801. The Transport and Works Act 1992 s 12 also applies to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

2    As to special parliamentary procedure see **PARLIAMENT** vol 34 (Reissue) PARA 912 et seq.

3    le by virtue of the Acquisition of Land Act 1981 s 18 or Sch 3 para 5 (National Trust land: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 603 et seq) or s 19 or Sch 3 para 6 (commons, open spaces etc: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 604 et seq): see the Transport and Works Act 1992 s 12(1). Orders made by the Welsh Ministers are subject to special parliamentary procedure to such extent as is provided for by the references under s 12, to the Acquisition of Land Act 1981 s 18 and Sch 3 para 5: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 Sch 11 para 30. As to the Welsh Ministers see PARA 16 note 5.

4    le an order under the Acquisition of Land Act 1981 s 2(1) (order authorising a compulsory purchase): see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 557.

5    Transport and Works Act 1992 s 12(1).

6    See the Transport and Works Act 1992 s 12(3). In relation to an order which is subject to special parliamentary procedure: (1) s 13(5) (see PARA 809) does not apply (s 12(3)(a)); (2) s 22 (see PARA 813) does not apply if the order is confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945 s 6 (see **PARLIAMENT** vol 34 (Reissue) PARAS 925-926) (Transport and Works Act 1992 s 12(3)(b)); and (3) in any other case, s 22(1) (see PARA 813) has effect as if for the reference to the day on which the notice required by s 14(1)(b) is published there were substituted a reference to the day on which the order comes into operation under the Statutory Orders (Special Procedure) Act 1945 (Transport and Works Act 1992 s 12(3)(c)).

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### **809. Making or refusing orders.**

Where an application has been made to the Secretary of State<sup>1</sup> or the Welsh Ministers<sup>2</sup> for an order as to inland waterways<sup>3</sup>, or where the Secretary of State or the Welsh Ministers propose to make an order otherwise than on application<sup>4</sup>, and (in either case) the relevant requirements of the Transport and Works Act 1992<sup>5</sup> in relation to any objections have been satisfied, the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>6</sup> may determine<sup>7</sup>:

- 1615 (1) to make an order<sup>8</sup> which gives effect to the proposals concerned without modifications<sup>9</sup>;
- 1616 (2) to make an order which gives effect to those proposals with modifications<sup>10</sup>;
- or
- 1617 (3) not to make an order<sup>11</sup>.

The power of the Secretary of State or the Welsh Ministers to make a determination includes power to make a determination in respect of some only of the proposals concerned, while making a separate determination in respect of, or deferring consideration of, others<sup>12</sup>. Where an application for an order has been<sup>13</sup> made to the Secretary of State or the Welsh Ministers and he or they consider that any of the objects of the order applied for could be achieved by other means, he or they may on that ground determine not to make the order<sup>14</sup>.

Where the Secretary of State or the Welsh Ministers propose to make an order which gives effect to the proposals concerned with modifications which will in the opinion of the Secretary of State or, as the case may be, the Welsh Ministers make a substantial change in the proposals, the Secretary of State or the Welsh Ministers: (a) must notify any person<sup>15</sup> who appears to them to be likely to be affected by the modifications<sup>16</sup>; (b) must give that person an opportunity of making representations about the modifications within such period as may be specified in the notice<sup>17</sup>; and (c) must before making the order consider any representations duly made<sup>18</sup>.

As soon as practicable after making a determination, the Secretary of State or, as the case may be, the Welsh Ministers must give notice of the determination to the person (if any) who applied for the order and to every person who made an objection which was referred<sup>19</sup> to an inquiry or hearing<sup>20</sup>, and publish a notice of the determination in the London Gazette<sup>21</sup>. The notice<sup>22</sup> of a determination to make an order must<sup>23</sup> give such particulars of the terms of the order as the Secretary of State or the Welsh Ministers consider appropriate, and in particular must state the name and address of the person who applied for the order<sup>24</sup>.

Where a determination relates to relevant applications or proposals<sup>25</sup> the notices<sup>26</sup> must state that, before the Secretary of State or, as the case may be, the Welsh Ministers made the determination<sup>27</sup>: (i) he or they considered the environmental statement<sup>28</sup>; (ii) he or they complied with any statutory obligations<sup>29</sup> in respect of any objection made in accordance with rules which relates to the environmental statement<sup>30</sup>; and (iii) he or they considered (or referred to an inquiry<sup>31</sup> or to a person appointed for the purpose<sup>32</sup>) any representation duly made (other than an objection) which relates to the environmental statement<sup>33</sup>.

Where the Secretary of State or the Welsh Ministers make a determination, the appropriate person<sup>34</sup> must publish a notice in a local newspaper circulating in the area, or in each of the

areas, in which the relevant proposals<sup>35</sup> are or were intended to have effect<sup>36</sup>. As soon as practicable after the making of an order, the person who applied for the order<sup>37</sup> must: (A) deposit in the office of the Clerk of the Parliaments<sup>38</sup> a copy of the order, and of any plan or book of reference prepared in connection with the application (or proposed order)<sup>39</sup>; and (B) deposit with each of the specified councils<sup>40</sup> in whose area works authorised by the order are to be carried out a copy of each of those documents, or of so much of them as is relevant to those works<sup>41</sup>. A council with which such documents are deposited must make them available for inspection free of charge at all reasonable hours<sup>42</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 As to the Welsh Ministers see PARA 16 note 5.

3 I.e. an application under the Transport and Works Act 1992 s 6: see PARA 804.

4 I.e. by virtue of the Transport and Works Act 1992 s 7: see PARA 803.

5 I.e. the requirements of the Transport and Works Act 1992 ss 1-12. As to the provisions relating to objections see s 10; and PARA 806.

6 The functions of the Secretary of State under the Transport and Works Act 1992 ss 13, 14 (see the text to notes 19-42), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2.

7 Transport and Works Act 1992 s 13(1). See also in relation to such determinations s 10(2)-(4): and PARA 806. The Transport and Works Act 1992 s 13 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq.

8 I.e. an order under the Transport and Works Act 1992 s 3: see PARA 801. The Transport and Works Act 1992 ss 13, 14 (see the text to notes 19-42) also apply to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302. Except in relation to an order which is subject to special parliamentary procedure (see s 12(3)(a); and PARA 808), such an order comes into operation on the date on which the notice required by s 14(1)(b) (see the text to note 21) is first published, or on such later date, if any, as may be specified in the order: s 13(5).

9 Transport and Works Act 1992 s 13(1)(a).

10 Transport and Works Act 1992 s 13(1)(b). See also note 8.

11 Transport and Works Act 1992 s 13(1)(c).

12 Transport and Works Act 1992 s 13(3). Accordingly, the power to make an order under s 3 (see PARA 801) includes power to make two or more orders on the same application: s 13(3).

13 I.e. under the Transport and Works Act 1992 s 6: see PARA 804.

14 Transport and Works Act 1992 s 13(2). This provision is without prejudice to s 13(3) (see the text to note 12): see s 13(2).

15 As to the meaning of 'person' see PARA 13 note 29.

16 Transport and Works Act 1992 s 13(4)(a).

17 See the Transport and Works Act 1992 s 13(4)(b). A notice or other document required or authorised to be served for the purposes of the Transport and Works Act 1992 may be served by post: s 66(1). Where the person on whom a notice or other document to be served is a body corporate, the notice or document is duly served if it is served on the secretary or clerk of that body: s 66(2). For the purposes of the Interpretation Act 1978 s 7 (see PARA 22 note 5) as it applies for the purposes of the Transport and Works Act 1992 s 66, the proper address of any person in relation to the service on him of a notice or document under s 66(1) above is, if he has given an address for service, that address, and otherwise: (1) in the case of the secretary or clerk of a body corporate, the registered or principal office of that body (s 66(3)(a)); (2) in any other case, his last known address at the time of service (s 66(3)(b)). Where a notice or other document is required or authorised to be served on a person as having any interest in, or as the occupier of, land and his name or address cannot be



ascertained after reasonable inquiry, the notice may be served by: (a) addressing it to him by name or by the description of 'owner', or as the case may be 'occupier', of the land (describing it) (s 66(4)(a)); and (b) either leaving it in the hands of a person who is or appears to be resident or employed on the land or leaving it conspicuously affixed to some building or object on the land (s 66(4)(b)). Section 66 must not be taken to exclude the employment of any method of service not expressly provided for by it: s 66(5). As to the meaning of 'land' see PARA 14 note 21.

18 See the Transport and Works Act 1992 s 13(4)(c).

19 In accordance with the Transport and Works Act 1992 s 11(3): see PARA 807.

20 Transport and Works Act 1992 s 14(1)(a). A notice under s 14(1)(a) must: (1) give the reasons for the determination and the considerations upon which it is based (s 14(2)(a) (s 14(2) substituted by SI 2006/958)); (2) give information about the public participation process (Transport and Works Act 1992 s 14(2)(b) (as so substituted)); and (3) give information regarding the right to challenge the validity of the determination and the procedures for doing so (s 14(2)(c) (as so substituted)). As to persons wishing to question the validity of an order see PARA 813.

21 Transport and Works Act 1992 s 14(1)(b). A notice under s 14(1)(b) must state: (1) the terms of the determination (s 14(2A)(a) (s 14(2A) added by SI 2006/958)); (2) that the notice under the Transport and Works Act 1992 s 14(1)(a) (see the text to notes 19-20) gives the information referred to in s 14(2) (see note 20) (s 14(2A)(b) (as so added)); and (3) where copies of the notice under s 14(1)(a) may be obtained (s 14(2A)(c) (as so added)). An order under s 3 (see PARA 801) comes into operation on the date on which the notice required by s 14(1)(b) is first published or on such later date as may be specified in the order: see s 13(5); and note 8.

22 In a notice under the Transport and Works Act 1992 s 14(1): see the text to notes 19-21.

23 In except where the order is made by virtue of the Transport and Works Act 1992 s 7: see PARA 803.

24 Transport and Works Act 1992 s 14(3).

25 In to any application under the Transport and Works Act 1992 s 6 (see PARA 804) for an order or any proposal to make an order by virtue of s 7 (see PARA 803) where the order would authorise: (1) works or other projects in a class listed in Annex I to EC Council Directive 85/337 (OJ L 175, 5.7.85, p 40) (amended by EC Council Directive 97/11 (OJ L 73, 14.3.97, p 5)) on the assessment of the effects of certain public and private projects on the environment; or (2) works or other projects in a class listed in Annex II to EC Council Directive 85/337 (OJ L 175, 5.7.85, p 40) (as so amended) which are, by virtue of their nature, size or location, likely to have significant effects on the environment: Transport and Works Act 1992 s 14(3B) (s 14(3A), (3B)-(3D) added by SI 1995/1541; Transport and Works Act 1992 s 14(3B) amended by SI 1998/2226).

26 In the notices under the Transport and Works Act 1992 s 14(1): see the text to notes 19-21.

27 Transport and Works Act 1992 s 14(3A) (as added: see note 25). The Secretary of State or the Welsh Ministers must send a copy of any notice to which the Transport and Works Act 1992 s 14(3A) applies to any person who made an objection to which head (ii) in the text refers, which was not referred to an inquiry or hearing in accordance with s 11(3) (see PARA 807), or to any person who made a representation to which head (iii) in the text refers: see s 14(3C) (as so added). If, in a case where s 14(3A) has effect, an order is to be made, the notices under s 14(1) (see the text to notes 19-21) must also contain a description of the main measures to avoid, reduce and, if possible, remedy the major adverse environmental effects: s 14(3AA) (added by SI 1998/2226).

28 Transport and Works Act 1992 s 14(3A)(a) (as added: see note 25). 'Environmental statement' means a statement: (1) which is required by virtue of rules made under s 6 (see PARA 804) to accompany an application under that section for an order, or to be prepared in connection with the publication of a notice of a proposal to make an order by virtue of s 7 (see PARA 803); and (2) which sets out particulars of the likely impact on the environment of the implementation of the order applied for or proposed: s 14(3D) (as so added).

29 In under the Transport and Works Act 1992 s 10: see PARA 806.

30 Transport and Works Act 1992 s 14(3A)(b) (as added: see note 25). The rules referred to are rules under s 10 (see PARA 806): see s 14(3A)(b) (as so added).

31 In under the Transport and Works Act 1992 s 11(1): see PARA 807.

32 In under the Transport and Works Act 1992 s 11(2): see PARA 807.

33 See the Transport and Works Act 1992 s 14(3A)(c) (as added: see note 25).

34 In relation to an application for an order under the Transport and Works Act 1992 s 3 (see PARA 801), 'appropriate person' means the person who applied for the order and, in relation to a proposal to make an order by virtue of s 7 (see PARA 803), 'appropriate person' means the Secretary of State or, as appropriate, the Welsh Ministers: see s 14(4A) (added by SI 2006/958).

35 In relation to an application for an order under the Transport and Works Act 1992 s 3 (see PARA 801), 'relevant proposals' means the proposals contained in the application and, in relation to a proposal to make an order by virtue of s 7 (see PARA 803), 'relevant proposals' means the proposals contained in the draft order prepared by the Secretary of State or, as appropriate, the Welsh Ministers pursuant to s 7: see s 14(4A) (as added: see note 34).

36 Transport and Works Act 1992 s 14(4) (substituted by SI 2006/958). The notice must state the information referred to in the Transport and Works Act 1992 s 14(2A) (see note 21): see s 14(4) (as so substituted).

37 Ie or, where the order is made by virtue of the Transport and Works Act 1992 s 7 (see PARA 803), the Secretary of State or, as appropriate, the Welsh Ministers.

38 As to the Clerk of the Parliaments see **PARLIAMENT** vol 78 (2010) PARA 855.

39 Transport and Works Act 1992 s 14(5)(a). Where a plan or book of reference is revised before the order is made, the reference in s 14(5)(a) is to the latest version: s 14(6).

40 The specified councils are district councils, London borough councils and the Common Council of the City of London; but are, in relation to Wales, county councils and county borough councils: Transport and Works Act 1992 s 14(7) (amended by the Local Government (Wales) Act 1994 s 22(1), Sch 7 para 34(2)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the London boroughs and their councils see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

41 Transport and Works Act 1992 s 14(5)(b).

42 Transport and Works Act 1992 s 14(8).

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### **810. Exercise of Secretary of State's or Welsh Ministers' functions by appointed person.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> may by regulations<sup>3</sup> prescribe classes of application<sup>4</sup> which are to be dealt with by a person appointed by the Secretary of State or, as appropriate, the Welsh Ministers for the purpose instead of by the Secretary of State or the Welsh Ministers<sup>5</sup>. The Secretary of State or the Welsh Ministers may if he or they think fit direct that an application which would otherwise fall to be determined by an appointed person is to be determined by the Secretary of State or, as the case may be, the Welsh Ministers<sup>6</sup>.

An order made on an application dealt with by an appointed person may not authorise the compulsory acquisition of land<sup>7</sup>, or the compulsory creation or extinguishment of rights over land (including rights of navigation over water)<sup>8</sup>. However, subject to this qualification, an appointed person has in relation to the application<sup>9</sup>: (1) the same powers and duties as the Secretary of State or the Welsh Ministers have<sup>10</sup> to make an order<sup>11</sup>; and (2) such other powers and duties conferred on the Secretary of State or the Welsh Ministers under or by virtue of the Transport and Works Act 1992<sup>12</sup> as may be specified in the regulations<sup>13</sup>. Where an application has been dealt with by an appointed person, any order made by him<sup>14</sup> is to be treated as made by the Secretary of State or, as the case may be, the Welsh Ministers<sup>15</sup>.

At any time before the appointed person has determined the application, the Secretary of State or, as appropriate, the Welsh Ministers may: (a) revoke his appointment<sup>16</sup>; and (b) appoint another person under these provisions to deal with the application instead<sup>17</sup>. Where such a new appointment is made, the consideration of the application must begin afresh, except to the extent that regulations provide otherwise<sup>18</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Transport and Works Act 1992 s 23, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the modification of the Transport and Works Act 1992 s 23(10) in relation to functions so exercisable by the Welsh Ministers see note 5.

3 The power to make regulations under the Transport and Works Act 1992 s 23 is exercisable by statutory instrument, subject, in the case of regulations made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 23(11). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516. As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. At the date at which this volume states the law no such regulations had been made.

4 As to applications see PARA 804.

5 Transport and Works Act 1992 s 23(1). Where a person appointed under s 23 is an officer of the Department for Communities and Local Government, the Department for Transport, the Department for Business, Enterprise and Regulatory Reform or the Welsh Office, his functions must be treated for the purposes of the Parliamentary Commissioner Act 1967 (see generally **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq):

- 53 (1) if he was appointed by the Secretary of State for the time being having general responsibility in transport matters in relation to England, as functions of the Department for Transport;
- 54 (2) if he was appointed by the Secretary of State for the time being having general responsibility in planning matters in relation to England, as functions of the Department for Communities and Local Government;
- 55 (3) if he was appointed by the Secretary of State for the time being having general responsibility in energy matters, as functions of the Department for Business, Enterprise and Regulatory Reform;
- 56 (4) if he was appointed by the Secretary of State for the time being having general responsibility in planning matters in relation to Wales, as functions of the Welsh Office: Transport and Works Act 1992 s 23(10) (amended by SI 2002/2626; SI 2006/1926; SI 2007/3224).

As to the meaning of 'England' see PARA 19 note 8. For the purpose of the functions under the Transport and Works Act 1992 s 23 transferred to the Welsh Ministers (see note 2) s 23(10) has effect as if the references to the Welsh Office were references to the Welsh Ministers and in relation thereto the reference to the Parliamentary Commissioner Act 1967 has effect as if it were a reference to the Government of Wales Act 1998 Sch 9 (Welsh Administration Ombudsman) (repealed): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 Sch 11 para 30. As to the ombudsman in Wales see now the Public Services Ombudsman (Wales) Act 2005; and **ADMINISTRATIVE LAW**.

6 Transport and Works Act 1992 s 23(2). Regulations may provide for the giving of publicity to any directions given by the Secretary of State or the Welsh Ministers under s 23(2): see s 23(8).

7 As to the meaning of 'land' see PARA 14 note 21.

8 Transport and Works Act 1992 s 23(4). As to the meaning of 'rights over land' see PARA 802 note 10.

9 For this purpose, any reference in any Act or instrument (including the Transport and Works Act 1992 and any instrument made under it) to the Secretary of State or the Welsh Ministers, or to anything done or authorised or required to be done by or to the Secretary of State or the Welsh Ministers, is to be construed, so far as the context permits and subject to regulations under s 23, as a reference to the appointed person: s 23(3).

10 Ie under the Transport and Works Act 1992 s 3: see PARA 801. The Transport and Works Act 1992 s 23 also applies to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

11 Transport and Works Act 1992 s 23(3)(a).

12 Ie under or by virtue of the Transport and Works Act 1992 Pt I (ss 1-25).

13 Transport and Works Act 1992 s 23(3)(b). The Tribunals and Inquiries Act 1992 applies to a local inquiry or other hearing by an appointed person as it applies to a statutory inquiry held by the Secretary of State or the Welsh Ministers, but as if in s 10(1) (statement of reasons for decisions: see **JUDICIAL REVIEW** vol 61 (2010) PARA 646) the reference to any decision taken by the Secretary of State or the Welsh Ministers were a reference to a decision taken by an appointed person: see the Transport and Works Act 1992 s 23(9) (amended by the Tribunals, Courts and Enforcement Act 2007 s 48(1), Sch 8 paras 20, 22(1), (2)). A local inquiry or other hearing held by an appointed person is a statutory inquiry for the purposes of the Tribunals, Courts and Enforcement Act 2007 Sch 7 (functions etc of Administrative Justice and Tribunals Council: see **ADMINISTRATIVE LAW**): see the Transport and Works Act 1992 s 23(9A) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 8 paras 20, 22(1), (3)).

14 Ie under the Transport and Works Act 1992 s 3: see PARA 801.

15 Transport and Works Act 1992 s 23(5). The Transport and Works Act 1992 s 23 must be read in conjunction with the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82: see PARA 814 et seq.

16 Transport and Works Act 1992 s 23(6)(a). If the Secretary of State or the Welsh Ministers exercises this power, he or they must give reasons to the appointed person for revoking his appointment: s 23(7).

17 Transport and Works Act 1992 s 23(6)(b). See also note 5.

18 Transport and Works Act 1992 s 23(6). Regulations may provide for the giving of publicity to any such appointment: see s 23(8).

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### **811. Assimilation of procedures.**

Where an application is made<sup>1</sup> for an order as to inland waterways (or where such an order is proposed by the Secretary of State or the Welsh Ministers<sup>2</sup>) relating to proposals for the purposes of which the giving of a consent, permission or licence under any enactment<sup>3</sup> (or the making or confirmation of an order under any enactment) is required<sup>4</sup>, the Secretary of State<sup>5</sup> may make regulations<sup>6</sup> for securing that, where that requirement would not be removed by the order to which the application or proposal relates:

- 1618 (1) the procedure for obtaining, or otherwise relating to, the consent, permission, licence, order or confirmation<sup>7</sup>; and
- 1619 (2) the procedure relating to the application or proposal<sup>8</sup>,

is wholly or partly assimilated (and in particular that proceedings relating to the one may be held concurrently with proceedings relating to the other)<sup>9</sup>. Such regulations may include provision: (a) excluding or modifying the application of any enactment<sup>10</sup>; (b) authorising the Secretary of State or, in relation to Wales, the Welsh Ministers<sup>11</sup> to give directions or take such other steps as may be appropriate for the purpose of securing the object of assimilation<sup>12</sup>.

Regulations have been made under these provisions modifying procedures where listed building consent or conservation area consent or where scheduled monument consent is required for the purposes of proposals included in an application<sup>13</sup> for an order as to inland waterways<sup>14</sup>. Likewise, regulations have been made modifying procedures where certain orders are required in relation to the classification and maintenance of the British Waterways Board's waterways or the maintenance and use of other waterways<sup>15</sup> is required for the purposes of proposals included in an application<sup>16</sup> for an order as to inland waterways or for the purposes of a proposal by the Secretary of State or the Welsh Ministers to make<sup>17</sup> such an order<sup>18</sup>.

1    le under the Transport and Works Act 1992 s 6: see PARA 804.

2    The Transport and Works Act 1992 s 15 applies to proposals by the Secretary of State or the Welsh Ministers to make orders by virtue of s 7 (see PARA 803) as it applies to applications under s 6 (see PARA 804): s 15(5). As to the Secretary of State see PARA 15 note 1. As to the Welsh Ministers see PARA 16 note 5.

3    As to the meaning of 'enactment' see PARA 14 note 31.

4    Transport and Works Act 1992 s 15(1).

5    The regulation-making powers conferred on the Secretary of State by the Transport and Works Act 1992 s 15, so far as exercisable in relation to Wales, are not transferred to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. However, those powers are exercisable by the Secretary of State only with the agreement of the Welsh Ministers: see art 5(1), Sch 2; Government of Wales Act 2006 Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2.

6    The power to make such regulations is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament: Transport and Works Act 1992 s 15(4). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516.

7    Transport and Works Act 1992 s 15(2)(a).

8    Transport and Works Act 1992 s 15(2)(b).

9 Transport and Works Act 1992 s 15(2).

10 Transport and Works Act 1992 s 15(3)(a).

11 The functions of the Secretary of State under the Transport and Works Act 1992 s 15 (except the regulation-making powers: see note 5), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30.

12 Transport and Works Act 1992 s 15(3)(b).

13 Ie an application under the Transport and Works Act 1992 s 6: see PARA 804.

14 See the Transport and Works Applications (Listed Buildings, Conservation Areas and Ancient Monuments Procedure) Regulations 1992, SI 1992/3138. As to listed building consent and conservation area consent see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1072 et seq. As to scheduled monument consent see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1013 et seq.

15 Ie where an order is required under the Transport Act 1968 s 104(3) (see PARA 741), s 105(3) (see PARA 741) or s 112 (see PARA 828).

16 Ie an application under the Transport and Works Act 1992 s 6: see PARA 804.

17 Ie by virtue of the Transport and Works Act 1992 s 7: see PARA 803.

18 See the Transport and Works Applications (Inland Waterways Procedure) Regulations 1993, SI 1993/1119.

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### ***C. SCHEMES OF NATIONAL SIGNIFICANCE***

#### **812. Schemes of national significance.**

Where an application<sup>1</sup> for an order as to inland waterways relates (wholly or in part) to proposals which in the opinion of the Secretary of State<sup>2</sup> or, in relation to Wales, the Welsh Ministers<sup>3</sup> are of national significance<sup>4</sup>, then, before the end of the period of 56 days beginning with the day on which he or they receive the application, the Secretary of State or, as the case may be, the Welsh Ministers must publish in the London Gazette a notice identifying the application and the proposals which in his or their opinion are of national significance<sup>5</sup>.

On, or as soon as practicable after, the day on which such notice is published, the Secretary of State or, as appropriate, the Welsh Ministers must:

- 1620 (1) publish a like notice in a local newspaper circulating in the area (or each of the areas) in which the proposals contained in the application are intended to have effect<sup>6</sup>; and
- 1621 (2) send a copy of the notice<sup>7</sup> to the applicant and to those persons<sup>8</sup> who objected to the application in accordance with rules made<sup>9</sup> as to the making of objections<sup>10</sup>.

The Secretary of State<sup>11</sup> must not make an order on the application unless each House of Parliament, on a motion moved by a minister of the Crown<sup>12</sup> which identifies the proposals referred to above, passes a resolution approving them at some time later than 56 days after the day of publication of the said notice<sup>13</sup>. An order made on the application must not include any provision that is inconsistent with a proposal approved by such a resolution unless that provision gives effect to modifications of the proposal which have themselves been approved by a resolution of each House of Parliament passed on a motion moved by a minister of the Crown<sup>14</sup>.

These provisions<sup>15</sup> apply, with certain modifications, in relation to an order which the Secretary of State or the Welsh Ministers make or propose to make<sup>16</sup> without an application<sup>17</sup>.

1    Ie an application made under the Transport and Works Act 1992 s 6: see PARA 804.

2    As to the Secretary of State see PARA 15 note 1.

3    The functions of the Secretary of State under the Transport and Works Act 1992 s 9, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales to be exercisable by the Assembly concurrently with the Secretary of State: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

4    Transport and Works Act 1992 s 9(1).

5    Transport and Works Act 1992 s 9(2).

6    Transport and Works Act 1992 s 9(3)(a) (substituted by SI 2006/958).



7 As to the service of documents see PARA 809 note 17.

8 le persons falling within the Transport and Works Act 1992 s 11(4): see PARA 807. As to the meaning of 'person' see PARA 13 note 29.

9 le rules made under the Transport and Works Act 1992 s 10: see PARA 806.

10 Transport and Works Act 1992 s 9(3)(b).

11 As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

12 The functions of a minister of the Crown under the Transport and Works Act 1992 s 9(4), (5) (see the text to note 14), so far as exercisable in relation to Wales, are not transferred to the Welsh Ministers: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. 'Minister of the Crown' is not defined in the Transport and Works Act 1992. As to the meaning of this expression in the Ministers of the Crown Act 1975 see PARA 188 note 22.

13 Transport and Works Act 1992 s 9(4). As to petitions against orders made relating to proposals which have been approved by each House of Parliament in accordance with s 9, see the Statutory Orders (Special Procedure) Act 1945 s 3(4A); and **PARLIAMENT** vol 34 (Reissue) PARA 918.

14 Transport and Works Act 1992 s 9(5). See also note 13.

15 le the Transport and Works Act 1992 s 9.

16 le by virtue of the Transport and Works Act 1992 s 7: see PARA 803.

17 The Transport and Works Act 1992 s 9 applies in relation to an order which the Secretary of State or the Welsh Ministers make or propose to make by virtue of s 7 (see PARA 803) as it applies in relation to an order for which an application is made to him or them, except that in such a case:

57 (1) s 9(2) and (3) (see the text to notes 5-10) do not apply (s 9(6)(a)); and

58 (2) s 9(4) (see the text to notes 11-13) applies as if the reference to the notice required by s 9(2) were a reference to the notice required by s 7(3) (see PARA 803) to be published in the London Gazette (s 9(6)(b));

and any proposals which in the opinion of the Secretary of State or the Welsh Ministers are of national significance must be identified as such in any notice required by or under s 7(3) (s 9(6)).

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## **D. VALIDITY OF ORDERS**

### **813. Questioning the validity of orders.**

If a person aggrieved<sup>1</sup> by an order as to inland waterways<sup>2</sup> desires to question the validity of it, or of any provision contained in it, on the ground:

- 1622 (1) that it is not within the powers of the Transport and Works Act 1992<sup>3</sup>; or
- 1623 (2) that any statutory requirement<sup>4</sup> has not been complied with<sup>5</sup>,

he may, within the period of 42 days beginning with the day on which the notice of the determination as to order is published<sup>6</sup>, make an application for the purpose to the High Court<sup>7</sup>. On any such application, the court:

- 1624 (a) may by interim order suspend the operation of the order (or of any provision contained in it) either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings<sup>8</sup>; and
- 1625 (b) if satisfied that the order or any provision contained in it is not within the powers of the Transport and Works Act 1992, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any statutory requirement as mentioned in head (2) above, may quash the order or any provision contained in it, either generally or in so far as it affects any property of the applicant<sup>9</sup>.

Subject to the above provisions<sup>10</sup>, an order may not, either before or after it has been made, be questioned in any legal proceedings whatever<sup>11</sup>.

<sup>1</sup> As to the meaning of 'person' see PARA 13 note 29. As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

<sup>2</sup> I.e. an order under the Transport and Works Act 1992 s 3: see PARA 801. The Transport and Works Act 1992 s 22 also applies to an order under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

<sup>3</sup> Transport and Works Act 1992 s 22(1)(a).

<sup>4</sup> I.e. any requirement imposed by or under the Transport and Works Act 1992 or the Tribunals and Inquiries Act 1992.

<sup>5</sup> Transport and Works Act 1992 s 22(1)(b) (amended by the Tribunals, Courts and Enforcement Act 2007 s 48(1), Sch 8 paras 20, 21).

<sup>6</sup> I.e. the notice required under the Transport and Works Act 1992 s 14(1)(b): see PARA 809.

<sup>7</sup> Transport and Works Act 1992 s 22(1). In relation to an order which is subject to special parliamentary procedure, s 22 is modified: see s 12(3); and PARA 808. As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

<sup>8</sup> Transport and Works Act 1992 s 22(2)(a).

9 Transport and Works Act 1992 s 22(2)(b) (amended by the Tribunals, Courts and Enforcement Act 2007 s 48(1), Sch 8 paras 20, 21).

10 le subject to the Transport and Works Act 1992 s 22(1), (2): see the text to notes 1-9.

11 Transport and Works Act 1992 s 22(3). As to judicial review of decisions expressed in this way to be final see **JUDICIAL REVIEW** vol 61 (2010) PARA 655.

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## **E. CONSIDERATION OF CONSERVATION OBLIGATIONS**

### **814. Conservation of natural habitats.**

The Conservation (Natural Habitats etc) Regulations 1994<sup>1</sup> have been made for the purpose of implementing, in Great Britain<sup>2</sup>, the Habitats Directive<sup>3</sup> and the Wild Birds Directive<sup>4</sup>. The Secretary of State<sup>5</sup> and the Welsh Ministers<sup>6</sup> must exercise their functions<sup>7</sup> relating to nature conservation, including those under the regulations, so as to secure compliance with the requirements of these Directives<sup>8</sup>; and they and every other competent authority<sup>9</sup> in the exercise of any of their functions, must have regard to the requirements of these Directives so far as they may be affected by the exercise of those functions<sup>10</sup>.

Certain provisions of the regulations are applied to orders as to inland waterways<sup>11</sup> made under the Transport and Works Act 1992<sup>12</sup>.

1    Ie the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716. The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, are discussed in detail elsewhere in this work: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 728 et seq. See also PARA 11.

2    As to the meaning of 'Great Britain' see PARA 22 note 5.

3    Ie EC Council Directive 92/43 (OJ L206, 22.7.92, p 7) of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

4    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(1) (amended by SI 1997/3055). The Wild Birds Directive is EC Council Directive 79/409 (OJ L103, 25.4.1979, p 1) on the conservation of wild birds.

5    As to the Secretary of State see PARA 15 note 1.

6    The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716 (with certain exceptions not relevant to this title) so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

7    As to the meaning of 'functions' see PARA 679 note 7.

8    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(2).

9    As to the meaning of 'competent authority' see PARA 11 note 7.

10   See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 3(4).

11   Ie orders made under the Transport and Works Act 1992 s 3: see PARA 801. The regulations are also applied to orders under s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

12   See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 79-82; and PARAS 815-818. As to the possible impact of domestic conservation legislation for the operation of inland waterways see *R (on the application of Triller and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580, [2005] 1 P & CR 495, [2004] All ER (D) 274 (Dec).



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### **815. Application of general requirements.**

The requirement to consider the effect on a European site<sup>1</sup> applies in relation to the making of an order as to inland waterways<sup>2</sup> under the Transport and Works Act 1992<sup>3</sup>. Where in such a case the Secretary of State<sup>4</sup> or the Welsh Ministers<sup>5</sup> consider that any adverse effects of the plan or project on the integrity of a European site would be avoided by making modifications to the proposals, he or they may make an order subject to those modifications<sup>6</sup>.

The requirement to review existing decisions and consents<sup>7</sup> applies to an order as to inland waterways unless the works to which the order relates have been completed before the site became a European site<sup>8</sup>. Where, on the review of such an order, the Secretary of State or, as the case may be, the Welsh Ministers consider that any adverse effects on the integrity of a European site of the carrying out (or, as the case may be, the continuation of the plan or project) would be avoided by a variation of the order, he or they may vary it accordingly<sup>9</sup>. In conjunction with the review of any such order, the Secretary of State or, as appropriate, the Welsh Ministers must review any direction deeming planning permission to be granted for the plan or project and may vary or revoke it<sup>10</sup>.

1    Ie the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 48-49: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748. As to the meaning of 'European site' see the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 2(1), 10; and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 729.

2    Ie an order under the Transport and Works Act 1992 s 3: see PARA 801. The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79 also applies to orders under the Transport and Works Act 1992 s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

3    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79(1) (amended by SI 2007/1843).

4    As to the Secretary of State see PARA 15 note 1.

5    The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

6    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79(2) (amended by SI 2007/1843).

7    Ie the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, regs 50-51: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 748.

8    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79(3) (amended by SI 2007/1843). As to the procedure on such reviews see PARA 816. As to the effect of such reviews see PARA 817. As to compensation for the revocation or variation of an order see PARA 818.

9    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79(4) (amended by SI 2007/1843).

10 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79(5). As to directions deeming planning permission see PARA 801 note 3.

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### **816. Procedure on review.**

Where the Secretary of State<sup>1</sup> or the Welsh Ministers<sup>2</sup> decide<sup>3</sup> to revoke or vary an order under the Transport and Works Act 1992<sup>4</sup> (or a direction deeming planning permission to be granted<sup>5</sup>) he or they must serve notice<sup>6</sup>:

- 1626 (1) on the person<sup>7</sup> (if any) on whose application the order was granted or, as the case may be, in whose favour the direction was made<sup>8</sup>; and  
 1627 (2) on any other person who in his or their opinion will be affected by the revocation or variation<sup>9</sup>,

informing them of the decision and specifying a period of not less than 28 days within which any person on whom the notice is served may make representations to him or, as appropriate, them<sup>10</sup>. The Secretary of State or, as the case may be, the Welsh Ministers must also serve notice on the local planning authority<sup>11</sup> and the appropriate nature conservation body<sup>12</sup> informing them of the decision and inviting their representations within the specified period<sup>13</sup>. The Secretary of State or the Welsh Ministers must consider whether to proceed with the revocation or variation, and must have regard to any representations<sup>14</sup> so made<sup>15</sup>.

If, within the specified period, a person on whom notice was served under head (1) or head (2) above, or the local planning authority, so requires, the Secretary of State or, as appropriate, the Welsh Ministers must, before deciding whether to proceed with the revocation or variation, give to them<sup>16</sup>, and to any other person on whom notice<sup>17</sup> was required to be served<sup>18</sup>, an opportunity of appearing before, and being heard by, a person appointed for the purpose<sup>19</sup>.

1 As to the Secretary of State see PARA 15 note 1.

2 The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 Ie in pursuance of the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79: see PARA 815.

4 As to such orders see PARA 801.

5 As to such directions see PARA 801 note 3.

6 The Town and Country Planning Act 1990 s 329 (service of notices: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 54) applies to notices and other documents required or authorised to be served under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716: see reg 108(1). Regulation 108(1) does not apply to the service of any notice required or authorised to be served under the Acquisition of Land Act 1981 as applied by the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716: reg 108(2).

7 As to the meaning of 'person' see PARA 13 note 29.

8 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(1)(a).

9 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(1)(b).



10 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(1).

11 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(2)(a). 'Local planning authority' means, except as otherwise provided, any authority having any function as a local planning authority or mineral planning authority under the Town and Country Planning Act 1990: Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 2(1). As to local planning authorities and mineral planning authorities see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 28-29.

12 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(2)(b). 'Nature conservation body' means Natural England or the Countryside Council for Wales, and also includes the Joint Nature Conservation Committee; and references to 'the appropriate nature conservation body' must be construed accordingly: see regs 2(1), 4 (substituted by SI 2007/1843). As to Natural England and the Countryside Council for Wales see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq. As to the Joint Nature Conservation Committee see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 523 et seq.

13 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(2).

14 In representations made under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(1) or (2): see the text to notes 1-13.

15 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(3). As to the effect of reviews see PARA 817. As to compensation for the revocation or variation of an order see PARA 818.

16 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(4)(a).

17 In under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(1) or (2): see the text to notes 1-13.

18 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(4)(b).

19 See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(4).

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### **817. Effect of review.**

The revocation or variation<sup>1</sup> of an order under the Transport and Works Act 1992<sup>2</sup> (or of a direction deeming planning permission to be granted<sup>3</sup>) takes effect upon service of the notices that are required<sup>4</sup> or, where there is more than one such notice and those notices are served at different times, upon the service of the last such notice to be served<sup>5</sup>.

Where the Secretary of State<sup>6</sup> or the Welsh Ministers<sup>7</sup> decide not to proceed with the revocation or variation, the order or direction has effect again from the time of that decision, and thereafter has effect as if:

1628 (1) any period specified in the order or direction for the taking of any action, being a period which had not expired prior to the date mentioned above<sup>8</sup>, were extended by a period equal to that during which the revocation or variation had effect<sup>9</sup>; and

1629 (2) there were substituted for any date specified in the order or direction as being a date by which any action should be taken, not being a date falling prior to that date<sup>10</sup>, such date as post-dates the specified date by a period equal to that during which the revocation or variation had effect<sup>11</sup>.

The revocation or variation<sup>12</sup> of an order under the Transport and Works Act 1992 (or a direction deeming planning permission to be granted) does not affect anything done under the order or direction prior to the revocation or variation taking effect<sup>13</sup>.

1    Ie pursuant to the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79: see PARA 815. As to the procedure on a review under reg 79 see PARA 816. As to compensation see PARA 818.

2    As to such orders see PARA 801.

3    As to such directions see PARA 801 note 3.

4    Ie required by the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 80(1): see PARA 816.

5    Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(1).

6    As to the Secretary of State see PARA 15 note 1.

7    The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

8    Ie the date mentioned in the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(1): see the text to notes 1-5.

9    Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(2)(a).

10    Ie that date mentioned in the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(1): see the text to notes 1-5.

- 11 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(2)(b).
- 12 le pursuant to the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79: see PARA  
815.
- 13 Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(3).

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### **818. Compensation for revocation or variation.**

Where a direction deeming planning permission to be granted is revoked or varied<sup>1</sup>, that permission is treated for the purposes of the provisions of the Town and Country Planning Act 1990 which relate to compensation<sup>2</sup> as having been revoked or modified by order<sup>3</sup> made under that Act<sup>4</sup>.

Where an order as to inland waterways under the Transport and Works Act 1992<sup>5</sup> is revoked or so varied<sup>6</sup>, the provisions of the Town and Country Planning Act 1990 which relate to compensation apply with certain modifications<sup>7</sup>. However, this provision does not have effect to confer any right to compensation for any expenditure, loss or damage for which compensation is payable by virtue of the provision<sup>8</sup> above<sup>9</sup>.

Where the Secretary of State or, as the case may be, the Welsh Ministers decide not to proceed with the revocation or variation of an order under the Transport and Works Act 1992 (or a direction deeming planning permission to be granted) any claim for compensation by virtue of the above provisions is limited to any loss or damage directly attributable to the order or direction ceasing to have effect or being varied for the duration of the period between the revocation or variation taking effect<sup>10</sup> and the Secretary of State or the Welsh Ministers deciding not to proceed with it<sup>11</sup>.

Where compensation is payable by virtue of these provisions, the question as to the amount of the compensation must be referred to and determined by the Lands Tribunal<sup>12</sup>, unless and to the extent that in any particular case the Secretary of State or the Welsh Ministers have indicated in writing<sup>13</sup> that such a reference and determination may be dispensed with<sup>14</sup>.

1    Ie pursuant to the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79: see PARA 815. As to such directions see PARA 801 note 3.

2    Ie for the purposes of the Town and Country Planning Act 1990 Pt IV (ss 107-118): see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 914 et seq.

3    Ie order made under the Town and Country Planning Act 1990 s 97: see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 541.

4    Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(1).

5    Ie an order under the Transport and Works Act 1992 s 3: see PARA 801. The Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82 also applies to orders under the Transport and Works Act 1992 s 1 (orders as to railways, tramways etc), as to which see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 302.

6    Ie pursuant to the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 79: see PARA 815.

7    See the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(2). In such a case the Town and Country Planning Act 1990 Pt IV (ss 107-118) applies as if: (1) the order had been planning permission granted on an application under that Act and had been revoked or modified by order under s 97 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 541) (Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(2)(a)); and (2) that Part provided that the Secretary of State or, as the case may be, the Welsh Ministers were the person liable to pay any compensation provided for by that Part (reg 82(2)(b)). The functions of the Secretary of State under the Conservation (Natural Habitats etc) Regulations 1994, SI

1994/2716, regs 79-82 so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the Secretary of State see PARA 15 note 1. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

8     le the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(1): see the text to notes 1-4.

9     Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(2).

10    le taking effect under the Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 81(1): see PARA 817.

11    Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(3).

12    As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

13    As to the meaning of 'writing' see PARA 22 note 1.

14    Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716, reg 82(4).

## **UPDATE**

### **818 Compensation for revocation or variation**

TEXT AND NOTES 12, 14--Reference to the Lands Tribunal is now to the Upper Tribunal: SI 1994/2716 reg 82(4) (amended by SI 2009/1307).

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### **(iii) Canal Works**

#### **A. CONSTRUCTION ETC UNDER SPECIAL ACT**

##### **819. Execution of canal works.**

The powers and obligations of a canal company are normally governed by the special Act under which it was formed<sup>1</sup>. If a time is fixed within which canal works are to be executed, no works adverse to the interests of any individual may be executed after the expiration of that time<sup>2</sup>, but if the Act which authorises the execution of works contains no limitation of time such works may be executed at any time after the passing of the Act<sup>3</sup>.

In the absence of negligence<sup>4</sup>, canal undertakers will not be liable for damage resulting from the exercise of their powers or be restrained by injunction when the execution of the works in exercise of statutory powers has not caused injury to any individual<sup>5</sup>. Damage caused by delay in repairing works authorised by a special Act may give rise to a claim for compensation<sup>6</sup>, but damage caused by failure to repair a wall adjoining a canal and not belonging to canal undertakers cannot be the subject of a claim in nuisance, although such a claim may be made in negligence where it can be proved that the canal undertakers failed to control their undertakings so as to prevent faulty navigation<sup>7</sup>.

1 As to special Acts see PARA 799.

2 *River Tone Conservators v Ash* (1829) 10 B & C 349; *Glamorganshire Canal Co v Blakemore* (1832) 1 Cl & Fin 262, HL.

3 *Thicknesse v Lancaster Canal Co* (1838) 4 M & W 472. However, where a company was cutting a canal under its powers through a plaintiff's land, and it had no funds to complete the authorised scheme, it was restrained from proceeding with the work: *King's Lynn Corp'n v Pemberton* (1818) 1 Swan 244.

4 As to the general principles of the law relating to the exercise of statutory powers by canal undertakers see PARA 781.

5 *Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430, HL (neglect in discharge of water from reservoir); *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, HL (floods caused by the canalisation of a river).

6 *Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430, HL (neglect in discharge of water from reservoir). See also *Ware v Regent's Canal Co* (1858) 3 De G & J 212; and *Blundy, Clark & Co Ltd v London and North Eastern Rly Co* [1931] 2 KB 334, CA.

7 *Boxes Ltd v British Waterways Board* [1971] 2 Lloyd's Rep 183, CA. As to liability to repair under public general Acts see PARA 826.

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## **820. Acquisition of land authorised under special Act for canals and works.**

Where canal undertakers are authorised by special Act<sup>1</sup> to acquire land for the purpose of constructing a canal and works, the land when acquired is vested in the undertakers in fee simple, but only for the purposes of that Act<sup>2</sup>, and they will be restrained from using the land for profit in any way not authorised<sup>3</sup>. Where undertakers exceed their powers, the ordinary courts have jurisdiction to interfere, even if the undertakers' special Act appoints a particular jurisdiction<sup>4</sup>.

Where a special Act contains a limitation on the time for acquisition of proprietary interests, then canal undertakers can only acquire those interests within the time specified<sup>5</sup>.

1 As to authorisation under special Act see PARA 799.

2 *Bostock v North Staffordshire Rly Co* (1855) 4 E & B 798.

3 See *Bostock v North Staffordshire Rly Co* (1856) 3 Sm & G 283, where a canal company was restrained from using a reservoir, made under the company's powers for the purposes of supplying water to the canal, for letting pleasure boats for hire or for holding regattas. As to the power of statutory corporations to dedicate land as a highway see *British Transport Commission v Westmorland County Council* [1958] AC 126, [1957] 2 All ER 353, HL.

4 *Shand v Henderson* (1814) 2 Dow 519, HL. Where a company has executed works in excess of its powers, but over 60 years have elapsed before any question of such excess is raised, the court may refuse relief: *A-G v Grand Junction Canal Co* [1909] 2 Ch 505.

5 *River Tone Conservators v Ash* (1829) 10 B & C 349.

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### **821. Construction of accommodation works.**

Canal undertakers may from time to time be compelled to construct such accommodation works as are provided for in their special Act<sup>1</sup>, and the decision of any tribunal authorised by that Act to decide as to the necessity of such works is final<sup>2</sup>.

1 As to authorisation under special Act see PARA 799.

2 *Birmingham Canal Navigation Co Proprietors v Hickman* (1892) 56 JP 598, CA, where the special Act provided that the company should construct such bridges over its canal as justices 'should from time to time judge necessary' for the use of occupiers of the adjoining land; and it was held that it was for the justices to decide whether a bridge was reasonably necessary, and, they having decided it was necessary, the company was bound to erect the bridge.



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## **822. Bridges associated with canals.**

When canal undertakers are empowered by their special Act<sup>1</sup> to construct a bridge for the use of the public in lieu of public rights interfered with by the construction of the canal, the undertakers are bound for all time to maintain the bridge in proper condition for the use of the public even if their Act may be silent on the subject of such maintenance<sup>2</sup>. If, in connection with a bridge which the undertakers are bound to maintain, fencing is reasonably necessary for public safety, the undertakers are bound to fence sufficiently, and are liable, apart from negligence, as for a nuisance, for injury caused by the want of such sufficient fencing<sup>3</sup>. However, the undertakers are not bound to fence as against persons merely permitted to pass alongside the canal<sup>4</sup>.

Canal undertakers erecting swing bridges to carry a highway over their canal must see that such bridges are not kept open for an unreasonably long time<sup>5</sup>, and that, while they are properly open, a member of the public runs no danger of walking unawares into the canal<sup>6</sup>. Responsibility for the maintenance of highways on bridges lies with the appropriate highway authority and such bridges are maintainable at public expense<sup>7</sup>.

1 As to special Acts see PARA 799.

2 *R v Kent Inhabitants* (1811) 13 East 220; *R v Lindsey Inhabitants* (1811) 14 East 317; *R v Kerrison* (1815) 3 M & S 526. The statute conferring the powers may be the sole guide to the liability; thus the obligations to repair may only extend to maintaining the bridge as originally constructed or taken over: see *A-G for Ireland v Lagan Navigation Co* [1924] AC 877, HL.

3 *Manley v St Helens Canal and Rly Co* (1858) 2 H & N 840, where a canal undertaking was held liable in nuisance for death caused by lack of fencing and lighting on a swivel bridge left open by the negligence of a third person. However, in a similar case, where contributory negligence was established against the person falling into the water, the undertakers' liability was reduced proportionately: see *Witherley v Regent's Canal Co* (1862) 12 CBNS 2.

4 *Binks v South Yorkshire Rly and River Dun Co* (1862) 3 B & S 244.

5 *Wiggins v Boddington* (1828) 3 C & P 544.

6 *Manley v St Helens Canal and Rly Co* (1858) 2 H & N 840.

7 See the Transport Act 1968 s 116; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 882.

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**823. Alteration of works to prevent interference with navigation.**

Persons who are entitled to rights of crossing a canal subject to a condition that the navigation of the canal is not to be obstructed may be compelled from time to time to alter their works if they interfere with navigation, even though the interference is not due to any negligence or default on their part<sup>1</sup>.

<sup>1</sup> *Rhymney Rly Co v Glamorganshire Canal Navigation Co* (1904) 91 LT 113, HL; *North Staffordshire Rly Co v Hanley Corpn* (1909) 26 TLR 20, CA.

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#### **824. Right to support.**

The owners of a canal made under statutory powers<sup>1</sup> are usually entitled to reasonable and necessary support for their canal from the adjacent land<sup>2</sup>. The right of such owners to support from the subjacent soil, and the right of the owners of the subjacent soil to work mines and minerals under the canal, depends in every case on the provisions of the special Act under which the canal was made or, if incorporated with it, one or other of the statutory mining codes<sup>3</sup>.

<sup>1</sup> As to authorisation under special Act see PARA 799.

<sup>2</sup> *North British Rly Co v Turners Ltd* (1904) 41 Sc LR 706, Ct of Sess; *Marquis of Linlithgow v North British Rly Co* 1912 SC 1327 (on appeal [1914] AC 820, HL).

<sup>3</sup> See PARA 492; and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 137 et seq. See also *Knowles & Sons v Lancashire and Yorkshire Rly Co* (1889) 14 App Cas 248, HL; *Chamber Colliery Co v Rochdale Canal Co* [1895] AC 564, HL; *Glamorganshire Canal Navigation Co v Nixon's Navigation Co Ltd* (1901) 85 LT 53, CA.

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### **825. Right to use of towing-path.**

The towing-path is part of the canal, and so when a special Act<sup>1</sup> gives the owners of land through which the canal passes the right to make and use wharfs on land adjoining the canal, provided the navigation is not obstructed, the owner of land adjoining the towing-path has the right to erect a wharf on his own property and to land goods on the towing-path, provided he does not interfere with the navigation<sup>2</sup>. Likewise, the grantees of an exclusive fishery have the right to use the towing paths and banks of the canal for the exercise of the right of fishery<sup>3</sup>.

1 As to authorisation under special Act see PARA 799.

2 *Monmouthshire Canal and Rly Co v Hill* (1859) 4 H & N 421.

3 *Staffordshire and Worcestershire Canal Navigation v Bradley* [1912] 1 Ch 91. See also **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 828.

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## **B. MAINTENANCE ETC**

### **826. Liability of railway company to maintain canals.**

A railway company<sup>1</sup> which owns or manages<sup>2</sup> a canal<sup>3</sup> is bound at all times to keep or maintain the canal and all the works appertaining to it in thorough repair, dredged and in good working condition; and it must preserve the supplies of water to it so that the whole canal may be kept open and navigable for the use of all persons<sup>4</sup> desiring to use and navigate it, without any unnecessary hindrance, interruption or delay<sup>5</sup>.

The statutory obligation to repair is not absolute and a railway company is not liable, except upon proof of negligence, for damage caused by the interruption of navigation by the canal falling into disrepair<sup>6</sup>.

1 'Railway company' includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament: Regulation of Railways Act 1873 s 3.

2 Actual management, even if ultra vires the statutory powers of the undertaking, is a sufficient management for this purpose: *Foster v Great Western Rly Co* (1877) 3 Ry & Can Tr Cas 14; and see *South Eastern Rly Co v Railway Comrs* (1880) 5 QBD 217, DC (on appeal (1881) 6 QBD 586, CA).

3 'Canal' includes any navigation which has been made under or upon which tolls may be levied by authority of Parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic: Regulation of Railways Act 1873 s 3.

4 'Person' includes a body of persons corporate or unincorporate: Regulation of Railways Act 1873 s 3.

5 Regulation of Railways Act 1873 s 17. The Regulation of Railways Act 1873 s 17 does not apply to any inland waterway which on 18 November 1968 was comprised in the undertaking of the British Waterways Board: see the Transport Act 1968 s 105(5). In the case of any canal which is not comprised in the undertaking of the board, the Secretary of State may by order direct that the Regulation of Railways Act 1873 s 17, if applicable to that canal, is to cease to apply to it: see the Transport Act 1968 s 112(1)(c); and PARA 828. As to the meaning of 'inland waterway' see PARA 720 note 3. As to the meaning of references to any right of navigation over a waterway or canal see PARA 741 note 13. Nothing in any order under s 112 (see PARA 828) must be construed as abrogating any rights of navigation which subsist otherwise than by virtue of the Regulation of Railways Act 1873 s 17; and in the Transport Act 1968 s 12(1) references to rights conferred by the Regulation of Railways Act 1873 s 17 do not include references to rights which are merely confirmed by it and which, if that enactment had not been passed, would subsist otherwise than by virtue thereof: see the Transport Act 1968 s 115(2). As to the meaning of 'person' see PARA 13 note 29. The Secretary of State is the Secretary of State for Transport: see PARA 719. As to the British Waterways Board see PARA 725 et seq.

In *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 All ER 567, [1956] 1 WLR 213, an application by the commission for stay of an action for failure to maintain the Kennet and Avon Canal in navigable condition pending the passing of a special Act limiting its liability as respects this canal was refused. (The liability to maintain the canal was limited by the British Transport Commission Act 1956 s 18; see also the preamble to that Act). Power to discontinue the maintenance of particular canals or parts of canals was commonly conferred on the commission and the British Waterways Board by their special Acts: see PARA 828.

6 *Blundy, Clark & Co Ltd v London and North Eastern Rly Co* [1931] 2 KB 334, CA, where it was held that there was no evidence of negligence on the part of a railway company which, on the appearance of cracks in the walls of a lock and subsidence of the soil at the side of the walls, failed to investigate the foundations, an operation which might have involved the closing of the canal for some months.

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## **827. Liability under special Act to repair canals.**

Where a canal company is obliged by its special Act<sup>1</sup> to repair a canal and to keep it in repair for the use of those members of the public who desire to use it and are prepared to pay the prescribed tolls, an injunction will be granted restraining the company from impeding navigation by failing to keep it in repair, but a mandatory order to repair will not be granted<sup>2</sup>. Where the construction and maintenance of a canal is permissive only, and part of it is closed to navigation for want of repair, reopening will not be enforced if the expense of so doing makes it unreasonable<sup>3</sup>.

When persons lawfully using a canal for hire suffer damage through the canal being out of repair, the canal undertakers are liable<sup>4</sup>; but the undertakers are not liable in the case of persons merely allowed to use the premises of the undertakers, but who are not using the premises on business or for the benefit of the undertakers<sup>5</sup>.

In order to found a claim for damages for the closing of a canal the claimant must show that he has thus been caused peculiar damage greater than that caused to the general public<sup>6</sup>. Any person who has property near a canal which he uses for the purposes of his business suffers such peculiar damage if, in consequence of the canal being unlawfully obstructed, he is put to greater expense in the conduct of his business, or suffers loss by the diminution of his business<sup>7</sup>.

1 As to authorisation under special Act see PARA 799.

2 *Lane v Newdigate* (1804) 10 Ves 192. As to the grant of a mandatory order (formerly known as an order of mandamus) see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq. As to the duty of the British Waterways Board to repair inland waterways vested in it see PARA 741. As to the power of the board to charge for its services and facilities and to make the use of those services and facilities subject to such terms and conditions as it thinks fit see the Transport Act 1962 s 43(3); and PARA 785. As to the British Waterways Board see PARA 725 et seq.

3 *Lord Rothschild v Grand Junction Canal Co* (1904) 91 LT 386.

4 *Shoebottom v Egerton* (1868) 18 LT 889. Just as a shopkeeper is liable for the safety of his premises to persons invited to enter his shop, so and to the same extent is a canal company bound to keep its premises in repair: *Lord Rothschild v Grand Junction Canal Co* (1904) 91 LT 386. As to general liability of an occupier of land for negligence see the Occupiers Liability Act 1957; and **NEGLIGENCE** vol 78 (2010) PARA 29 et seq.

5 *Gautret v Egerton* (1867) LR 2 CP 371.

6 *Blundy, Clark & Co Ltd v London and North Eastern Rly Co* [1931] 2 KB 334, CA.

7 *Blundy, Clark & Co Ltd v London and North Eastern Rly Co* [1931] 2 KB 334 at 362-363, 365, CA, per Greer LJ; *Gravesend Borough Council v British Railways Board* [1978] Ch 379 at 398, [1978] 3 All ER 853 at 870-871 per Slade J.

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**828. Powers for, and effect of, closing canals not comprised in the network of the board.**

In respect of any canal<sup>1</sup> which is not comprised in the undertaking of the British Waterways Board<sup>2</sup>, the Secretary of State<sup>3</sup> may by order direct all or any of the following<sup>4</sup>:

- 1630 (1) that any local enactment passed with respect to the canal is to cease to have effect so far as it confers any public or private right of navigation over it<sup>5</sup>;
- 1631 (2) that any such enactment is to cease to have effect in so far as it imposes a duty to maintain the canal for the purpose of navigation, including any duty to supply or maintain a supply of water for the canal for that purpose<sup>6</sup>;
- 1632 (3) that the statutory provision relating to the maintenance of canals by railway companies<sup>7</sup> is to cease to apply to that canal<sup>8</sup>.

Such an order may be made on the application of the person<sup>9</sup> who owns or manages the canal, on the application of the Environment Agency<sup>10</sup> or any local authority<sup>11</sup> in whose area the canal is situated, or without any application being made<sup>12</sup>.

The order must specify the person or body by whom any compensation is to be paid<sup>13</sup> as a result of the order having been made<sup>14</sup>, and may:

- 1633 (a) confer on a person specified in the order power to authorise any use of the canal which would have been authorised by a statutory right of navigation which by virtue of the order ceases to be exercisable as respects the canal<sup>15</sup>;
- 1634 (b) make provision<sup>16</sup>, in relation to the canal or any works connected therewith, for the maintenance by, or the transfer of the canal to, another body<sup>17</sup>;
- 1635 (c) include such incidental or supplementary provisions as the Secretary of State thinks fit<sup>18</sup>.

The making of any such order must comply with the statutory procedure<sup>19</sup> and is subject to annulment by a resolution of either House of Parliament<sup>20</sup>.

1 'Canal' includes any navigation which has been made under, or in respect of which tolls may be levied by virtue of, any enactment, and references to a canal include references to part of a canal: Transport Act 1968 s 112(6). As to the meaning of 'enactment' see PARA 14 note 31.

2 As to the British Waterways Board see PARA 725 et seq. As to the bodies which act as navigation authorities in England and Wales generally see PARA 718.

3 I.e. the Secretary of State for Transport: see PARA 719. In the case of an order made under the Transport Act 1968 s 112 in respect of any canal in Scotland which is not comprised in the undertaking of the British Waterways Board, any reference (however expressed) to the Secretary of State is to be construed as a reference to the Scottish Ministers: see s 112(6A) (added by SI 2000/3251). As to the Scottish Ministers see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 Transport Act 1968 s 112(1). Such orders, being of local effect, are not recorded in this work.

5 Transport Act 1968 s 112(1)(a). As to the meaning of references to a right of navigation over a canal see PARA 826 note 5.

6 Transport Act 1968 s 112(1)(b).

7 Ie the Regulation of Railways Act 1873 s 17: see PARA 826.

8 Transport Act 1968 s 112(1)(c).

9 As to the meaning of 'person' see PARA 13 note 29.

10 As to the Environment Agency see PARA 17.

11 As to the meaning of 'local authority' see PARA 720 note 5.

12 Transport Act 1968 s 112(2) (s 112(2) amended by the Water Act 1989 s 190, Sch 25 para 38; and by virtue of SI 1996/593).

13 Ie whether it is to be paid by the person who owns or manages the canal, a local authority, the Environment Agency or the Secretary of State: see the Transport Act 1968 s 112(3)(a) (amended by the Water Act 1989 Sch 25 para 38(2); and by virtue of SI 1996/593).

14 See the Transport Act 1968 s 112(3)(a) (as amended: see note 13). Any person who suffers loss by reason of the extinguishment of any private right because of an order under s 112, is entitled to compensation to be determined, in case of dispute, by the Lands Tribunal; and in determining the compensation the tribunal must take into account any contractual right offered by the person who owns or manages the canal in substitution for the right that is extinguished: see ss 112(4), 115(1)(b). As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. At the date at which this volume states the law, draft legislation proposes the abolition of the Lands Tribunal and its replacement by the Upper Tribunal (as to which see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) para 13A).

15 Transport Act 1968 s 112(3)(b).

16 Ie provision for purposes corresponding to those under the Transport Act 1968 s 109: see PARA 743.

17 Transport Act 1968 s 112(3)(c).

18 See the Transport Act 1968 s 112(3)(d). Such provisions may include provisions for applying the Public Health Act 1936 s 259 (see **NUISANCE** vol 78 (2010) PARA 156) and the Town and Country Planning Act 1990 s 215 (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 887) to the canal: see the Transport Act 1968 s 112(3)(d) (amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2). Canals closed for navigation under the Transport Act 1968 s 112 are deemed to be watercourses for the purposes of the Public Health Act 1936 s 259: see the British Transport Commission Act 1959 s 23. For the purposes of the Town and Country Planning Act 1990 s 215, each of those canals is deemed to be a vacant site, except where any part of them is changed pursuant to planning permission granted after its closure for navigation: see the British Transport Commission Act 1959 s 24(1).

19 Before making an order under the Transport Act 1968 s 112 the Secretary of State must comply with the requirements of Sch 13 applicable to that order and may then make the order as originally proposed or with such modifications as he thinks fit: Sch 13 para 1(1) (numbered as such by SI 2000/3251). Any reference in the Transport Act 1968 Sch 13 (however expressed) to the Secretary of State is to be construed as a reference to the Scottish Ministers: see Sch 13 para 1(2) (added by SI 2000/3251). In the case of a proposed order in respect of a canal or part of a canal which appears to the Secretary of State to be used to a significant extent for the purpose of navigation, the Secretary of State must consult with any organisation appearing to him to represent persons using it as aforesaid: Transport Act 1968 Sch 13 para 4. The Secretary of State must publish in the London Gazette (or, if the waterway is situated in Scotland, the Edinburgh Gazette), in a national newspaper and in one or more local newspapers circulating in the area in which the waterway is situated, and cause to be displayed in one or more places adjacent to the waterway, a notice containing a statement of the general effect of the proposed order, and that objections to the order can be made to him within such time (not being less than 28 days) and in such manner as is specified in the notice: Sch 13 para 5(1). The Secretary of State must consider any such objection which is duly made and not withdrawn, and, if he has caused an inquiry to be held in connection with the proposed order, the report of the person holding it: Sch 13 para 5(1). The holding of an inquiry is obligatory: (1) if an objection is duly made to the proposed order (and is not withdrawn) by a local authority or the Environment Agency (see Sch 13 para 5(2)(a) (amended by the Water Act 1989 s 190, Sch 25 para 38; and by virtue of SI 1996/593)); (2) in connection with any proposed order relating to a canal or part thereof which appears to the Secretary of State to have been used to a significant extent for the purpose of navigation at the time when notice of the proposed order was published, if an objection is duly made to the proposed order (and is not withdrawn) by any organisation appearing to him to represent a substantial number of persons using it as aforesaid at that time (see the Transport Act 1968 Sch 13 para 5(2)(b), (3)). As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.



20 See the Transport Act 1968 s 112(5). As to the annulment of statutory instruments see **STATUTES** vol 44(1) (Reissue) PARA 1516.

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**829. Duties of persons filling in canal basins not comprised in the network of the board.**

Any person<sup>1</sup> filling in any canal basin<sup>2</sup> (or part of one) not vested in or under the control of the British Waterways Board<sup>3</sup> but communicating either directly or indirectly with an inland waterway which is so vested or controlled must execute in connection with it all such works as may be necessary for: (1) damming off the basin and its site from the waterway so as effectively to prevent, so far as reasonably practicable, any future loss or leakage of water<sup>4</sup> from the waterway through or into the basin or its site<sup>5</sup>; (2) continuing the towpath of the waterway, if situated on the same side of the waterway as the basin, over and across the canal basin site on the same line and level, as nearly as may be, as the existing towpath on either side of the basin and for removing any bridge previously carrying such towpath over the entrance to the basin; and (3) fencing off such new portion of towpath from the remainder of the canal basin site<sup>6</sup>.

1 As to the meaning of 'person' see PARA 13 note 29.

2 As to the meaning of 'canal basin' in this respect see the British Transport Commission Act 1959 s 26(1), (4).

3 As to the British Waterways Board see PARA 725 et seq. As to the other bodies which act as navigation authorities in England and Wales see PARA 718.

4 As to the powers of the board under local Acts to require canal basins to be kept watertight see PARA 771.

5 The works under head (1) in the text must be completed to the satisfaction of an engineer appointed by the board before any part of the basin is filled in: see the British Transport Commission Act 1959 s 26(1), (3)(f) (amended by the Transport Act 1962 s 32(1), Sch 2 Pt III).

6 See the British Transport Commission Act 1959 s 26(1), (3)(a). When completed, any such new portion of towpath, its site and such fence vests in the board and is deemed for all purposes to form part of the inland waterway with which the former basin communicated: s 26(3)(h) (amended by the Transport Act 1962 Sch 2 Pt III). See further the British Transport Commission Act 1959 s 26(3)(b)-(e) (amended by the Transport Act 1962 Sch 2 Pt III).

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### **830. Requirement for independent canal companies to report stoppage of canals.**

Whenever a canal company<sup>1</sup> other than the British Waterways Board<sup>2</sup> intends to stop its canal for more than two days, it must report its intention to the Secretary of State<sup>3</sup>, stating the time the stoppage is intended to last; and when the canal has been re-opened it must also so report to him<sup>4</sup>.

1 'Canal company' includes any person being the owner or lessee of, or working, or entitled to charge tolls for the use of any canal in the United Kingdom constructed or carried on under the powers of any Act of Parliament: Regulation of Railways Act 1873 s 3 (definition applied by the Railway and Canal Traffic Act 1888 ss 1, 55). As to the meaning of 'canal' see PARA 826 note 3; and as to the meaning of 'person' see PARA 826 note 4: definitions as so applied.

2 The Railway and Canal Traffic Act 1888 s 39 does not apply to the British Waterways Board: see the Transport Act 1962 s 24(4). As to the British Waterways Board see PARA 725 et seq. As to the other bodies which act as navigation authorities in England and Wales see PARA 718.

3 The Railway and Canal Traffic Act 1888 s 39 refers to the Board of Trade, the functions of which are now exercisable by the Secretary of State for Transport. As to the Secretary of State for Transport see PARA 719. As to the Board of Trade see further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 505.

4 See the Railway and Canal Traffic Act 1888 s 39(3). A company failing to comply with this provision, and also any director, manager, and officer of the company who knowingly and wilfully authorises and permits the default, is liable, on summary conviction, to a fine of £5 for every day during which default lasts: see s 39(4).

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### **831. Secretary of State's power to inspect canals.**

Whenever the Secretary of State<sup>1</sup> has information that the works of any canal<sup>2</sup> are in such a condition as to be dangerous to the public, or to cause serious inconvenience or hindrance to traffic, he may direct some person to inspect the canal and report to him<sup>3</sup>.

1 The Railway and Canal Traffic Act 1888 s 41 refers to the Board of Trade, the functions of which are now exercisable by the Secretary of State for Transport. As to the Secretary of State for Transport see PARA 719. As to the Board of Trade see further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 505.

2 As to the meaning of 'canal' see PARA 826 note 3; definition applied by the Railway and Canal Traffic Act 1888 ss 1, 55.

3 See the Railway and Canal Traffic Act 1888 s 41.

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## **13. FERRIES**

### **(1) DEFINITION AND NATURE OF A FERRY**

#### **832. In general.**

Ferries are specifically excluded from the definition of 'highway' in the Highways Act 1980<sup>1</sup>, but at common law a ferry is considered to be a highway of a special description<sup>2</sup>. The Ferries (Acquisition by Local Authorities) Act 1919 enabled local authorities to acquire existing ferries by agreement and to continue to run them subject to the provisions of any Act of Parliament under which the ferry was established<sup>3</sup>.

1 In the Highways Act 1980, except where the context otherwise requires, 'highway' means the whole or a part of a highway other than a ferry or waterway: see the Highways Act 1980 s 328(1); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 7.

2 See *Huzzey v Field* (1835) 2 Cr M & R 432. As to the meaning of 'ferry' at common law see PARA 833.

3 See PARA 840.

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### **833. Meaning of 'ferry' at common law.**

There are two kinds of ferry which exist at common law: (1) a ferry which is a highway over water uniting two highways<sup>1</sup> on land; and (2) a ferry from town to town<sup>2</sup>. In the case of a highway-to-highway ferry the termini cannot be varied to any substantial extent, but in a town-to-town ferry the termini can be varied within the boundaries of the town<sup>3</sup>. A ferry may be created for one way only, the owners of opposite banks each having a ferry<sup>4</sup>.

The right to charge tolls is usually incident to a ferry<sup>5</sup>, and a right of ferry is primarily a toll franchise<sup>6</sup>.

A ferry exists in connection with the use of a highway<sup>7</sup>. There must be a line of way on land, coming to a landing place on the water's edge, or, where the ferry is from or to a town, from or to one or more landing places in the town<sup>8</sup>.

1 As to the meaning of 'highway' at common law see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1.

2 *Huzzey v Field* (1835) 2 Cr M & R 432; *Newton v Cubitt* (1862) 12 CBNS 32 (affd (1863) 13 CBNS 864, Ex Ch); *Londonderry Bridge Comrs v M'Keever* (1890) 27 LR Ir 464, Ir CA; *Cowes UDC v Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co Ltd* [1905] 2 KB 287. In order to establish a right of ferry from town to town, the town must be of a certain size, ie a 'vill' rather than a mere district: see *Cowes UDC v Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co Ltd* (above).

3 *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL. See also *General Estates Co Ltd v Beaver* [1913] 2 KB 433 (affd [1914] 3 KB 918, CA).

4 See PARA 850 note 8.

5 See PARA 846.

6 See PARA 835. As to grants of franchises see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 890.

7 A ferryman working from a highway is not entitled to land his passengers on private property over which the public does not have a right of way: *Bournemouth-Swanage Motor Road and Ferry Co v Harvey & Sons* (1930) 144 LT 132, CA. As to private rights of way see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 156 et seq.

8 *Newton v Cubitt* (1862) 12 CBNS 32; affd (1863) 13 CBNS 864, Ex Ch. In Jacob's Law Dictionary, a ferry is stated to be a liberty by prescription of the King's grant to have a boat for passage upon a river for carriage of horses and men for reasonable tolls. See also *Webb's Case* (1608) 8 Co Rep 45b at 46b.

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### **834. Right of ferry independent of ownership of land.**

A right of ferry is wholly unconnected with the ownership or occupation of land<sup>1</sup>; and it is not necessary that a ferry owner should have any property in the soil of the river over which he has a right of ferry<sup>2</sup>, or that he should be the owner of the landing places of the ferry, it being sufficient that they are in a public highway or that otherwise he has a right to land upon them<sup>3</sup>. The ferry owner does not occupy the highway over the river, but has merely a right to make a special use of it<sup>4</sup>.

A ferry detached altogether from real property is not rateable, but where the ferry owner occupies the landing places he is rateable in respect of them and, although the tolls are not rateable, the existence of the tolls cannot be wholly excluded in relation to the value of the landing places<sup>5</sup>.

1 *Newton v Cubitt* (1862) 12 CBNS 32 (affd (1863) 13 CBNS 864, Ex Ch); *Peter v Kendal* (1827) 6 B & C 703.

2 *Ipswich Inhabitants v Browne* (1581) Sav 11, Ex Ch. As to the ownership of the soil in tidal waters see PARA 71; and in non-tidal waters see PARA 74 et seq.

3 *Peter v Kendal* (1827) 6 B & C 703, disapproving in this respect *Ipswich Inhabitants v Browne* (1581) Sav 11, Ex Ch; Com Dig, Piscary (B). See also PARA 838. If the approach to a ferry is a highway, the adjoining owner has a right of access to it for all purposes and toll free except when using the ferry: *East Riding of Yorkshire County Council v Company of Proprietors of Selby Bridge* [1925] Ch 841 at 846. However, the owner of the ferry may own the landing places subject to the highway over them to the ferry (see PARA 838), and there is a right to charge a toll in respect of an approach to the ferry otherwise than from the highway: see *Robinson v Balmain New Ferry Co Ltd* [1910] AC 295, PC.

4 *R v Nicholson* (1810) 12 East 330. As to ferries as highways see PARAS 832, 833.

5 See **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 29.

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## (2) CREATION OF FERRIES

### 835. Creation of ferry by grant or statute.

A ferry is a franchise and is created by royal grant<sup>1</sup> or by Act of Parliament<sup>2</sup>, as was done in the case of the Woolwich ferry<sup>3</sup>. It can be acquired by prescription at common law, which presumes a grant prior to 1189<sup>4</sup>, or by proof of facts from which a modern grant can be inferred<sup>5</sup>.

If there is already an existing ferry between two towns in the hands of any person, the grant of another ferry between the same towns is void<sup>6</sup>.

A grant of a ferry may be in more or less extensive terms<sup>7</sup>. A grant of 'all our ferriages and passages' over a certain river only applies to existing ferries and does not confer on the grantee a right to create new ferries over the same river<sup>8</sup>.

1 As to the Crown's right to grant a ferry with a toll see Bac Abr, Prerogative (F) 1; 2 Roll Abr 171; Com Dig, Prerogative (D 48); Vin Abr, Prerogative (M b) 18. As to grants of franchises see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 890.

2 It is primarily a toll franchise: see *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 78, 91, HL, per Lord Parker of Waddington. No grants of the Crown creating ferries have been found before 1330: *Hammerton v Earl of Dysart* (above) at 72, 82. See also *Letton v Goodden* (1866) LR 2 Eq 123; *Londonderry Bridge Comrs v M'Keever* (1890) 27 LR Ir 464, Ir CA. If the Act does not confer an exclusive right of ferry, the owner may not prevent anyone carrying passengers near the ferry: *Bournemouth-Swanage Motor Road and Ferry Co v Harvey & Sons* [1930] AC 549, HL. There is no exclusive right of ferry or power to charge tolls in the case of ferries provided for long-distance routes across country (see PARA 836), or in the case of the Woolwich ferry (see the Metropolitan Board of Works (Various Powers) Act 1885 s 19).

3 See the Metropolitan Board of Works (Various Powers) Act 1885 ss 14-24; and **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 258. The duty of the Secretary of State under s 16 to work a ferry-boat across the River Thames has been transferred to Transport for London: see the Greater London Authority Act 1999 s 257; and **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 258.

4 Ie beyond the time of legal memory, which dates from the beginning of the reign of Richard I.

5 *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL. See Hale's de Jure Maris, Part I cap 2 (Hargrave's Law Tracts 1), cited in *A-G v Simpson* [1901] 2 Ch 671 at 717, CA (on appeal sub nom *Simpson v A-G* [1904] AC 476, HL); *Layzell v Thompson* (1927) 96 LJCh 332, CA; PARA 850 note 3; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 82.

6 *Pim v Curell* (1840) 6 M & W 234.

7 *Matthews v Peache* (1855) 5 E & B 546. See also *Hemphill v M'Kenna* (1845) 8 ILR 43.

8 *Londonderry Bridge Comrs v M'Keever* (1890) 27 LR Ir 464, Ir CA.



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**836. Ferries for long-distance footpaths etc.**

A highway authority<sup>1</sup> may provide and operate ferries for the purpose of long-distance routes for journeys across country on foot, on horseback or on a bicycle not being a motor cycle, but without any exclusive right of ferry and without disturbance of an existing exclusive right of ferry<sup>2</sup>.

1 As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

2 See the National Parks and Access to the Countryside Act 1949 ss 51-53; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 696-698.

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### **837. Provision, maintenance and improvement of road-ferries.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup>, or a local highway authority<sup>3</sup> may provide and maintain<sup>4</sup> new road-ferries<sup>5</sup>, and any highway authority<sup>6</sup> may improve<sup>7</sup> any road-ferry which it has so provided<sup>8</sup>.

1 As to the Secretary of State see PARA 15 note 1. As to the Secretary of State in relation to the Highways Act 1980, and as a highway authority, see also **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49.

2 The functions of the Secretary of State under the Highways Act 1980 s 24, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5. As to the Welsh Ministers as a highway authority see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49.

3 As local highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 56.

4 'Maintenance' includes repair, and 'maintain' and 'maintainable' are to be construed accordingly: Highways Act 1980 s 329(1). As to maintenance see further **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 272.

5 Highways Act 1980 s 24(4). 'Road-ferry' means a ferry connecting the termination of a highway which is, or is to become, a highway maintainable at the public expense with the termination of another highway which is, or is to become, such a highway: s 329(1). As to the meaning of 'highway' see PARA 832 note 1. As to highways maintainable at the public expense see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 248.

6 As to highway authorities see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 49 et seq.

7 'Improvement' means the doing of any act under powers conferred by the Highways Act 1980 Pt V (ss 62-105) (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 484 et seq) and includes the erection, maintenance, alteration and removal of traffic signs, and the freeing of a highway or road-ferry from tolls: s 329(1). For the purposes of the Highways Act 1980 and of any other enactment relating to highways, the widening of the carriageway of a highway is not to be treated as being otherwise than an improvement by reason only of the fact that it involves diminution or removal of a footway thereon: s 332. As to the meaning of 'enactment' see PARA 14 note 31. As to tolls see PARAS 846-847.

8 See the Highways Act 1980 s 105. Functions under s 105 can be contracted out, ie may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the local highway authority whose functions they are: see the Local Authorities (Contracting Out of Highway Functions) Order 1999, SI 1999/2106, art 2, Sch 1 para 1; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 58.

### **UPDATE**

### **837 Provision, maintenance and improvement of road-ferries**

NOTE 8--For 'SI 1999/2106, art 2, Sch 1 para 1' read 'SI 1999/2106, art 2, Sch 1 para 1(aa)'. SI 1999/2106, art 2, Sch 1 para 1(aa) replaced: Contracting Out (Highway Functions) Order 2009, SI 2009/721, art 3, Sch 1 para 1(cc).

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### **(3) TRANSFER AND EXTINGUISHMENT OF FERRIES**

#### **838. Conveyance.**

A ferry, being an incorporeal hereditament<sup>1</sup>, is transferable by deed<sup>2</sup>. If the owner of the ferry owns also the soil of the landing places they will be included in the conveyance, but ownership of the soil is not necessary if there is a right to embark and disembark passengers and goods<sup>3</sup>.

A right of ferry may pass under a conveyance of land with its 'profits and commodities' where the owners of the land have enjoyed the ferry as far as living memory goes<sup>4</sup>.

1 *Peter v Kendal* (1827) 6 B & C 703; *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL. See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 17.

2 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 10.

3 *Peter v Kendal* (1827) 6 B & C 703; and see PARA 834. As a ferry is a continuation of a public highway, it may perhaps be more correct to say that the right to use the landing places is a right of the public and not of the ferry owner: see *East Riding of Yorkshire County Council v Company of Proprietors of Selby Bridge* [1925] Ch 841.

4 *R v Great Northern Rly Co* (1849) 14 QB 25. As to general words implied in conveyances see the Law of Property Act 1925 s 62; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236. As to disturbances of rights see PARAS 848-851.

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### 839. Lease.

As a ferry is an incorporeal hereditament<sup>1</sup>, a lease of it must be by deed<sup>2</sup>; and, as rent in the proper sense cannot at common law be reserved out of such a hereditament<sup>3</sup>, there cannot be any distress in respect of it<sup>4</sup>. The amount reserved by the lease may be recoverable, although not as rent, in a claim for breach of contract<sup>5</sup>.

A lease of a ferry which exists only one way across a river is good, even though the lease describes the ferry as existing both ways<sup>6</sup>.

Where a ferry is appurtenant to land it may pass under a lease of the land with its 'profits and commodities'<sup>7</sup>.

1 See PARA 838 note 1.

2 *Bird v Higginson* (1835) 2 Ad & El 696 (affd (1837) 6 Ad & El 824, Ex Ch); *Mayfield v Robinson* (1845) 7 QB 486; *Peter v Kendal* (1827) 6 B & C 703. In *Peter v Kendal*, no point as to the insufficiency of an oral lease was raised at the trial, the plaintiff relying upon a subsequent surrender of the lease. See also *Anguish v Ebdon* (1830) cited in Gunning on Tolls 111, where in an action for tolls a nonsuit was applied for on the ground that the plaintiff had leased the tolls for a number of years. The nonsuit was refused as, the lease not being under seal, no interest in law passed under it. Cf *R v Fladbury Inhabitants* (1839) 10 Ad & El 706 at 709 (poor law settlement). See further **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 10.

3 Co Litt 47a, 142a. Such a rent may be reserved by the Crown, or by statute by a subject: *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch 295 at 315, CA, per Davey LJ.

4 *Gardiner v Williamson* (1831) 2 B & Ad 336 (tithes). See further **DISTRESS** vol 13 (2007 Reissue) PARA 907 et seq.

5 Co Litt 47a. See *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL; *A-G v Emerson* [1891] AC 649, HL.

6 *Pim v Curell* (1840) 6 M & W 234. As to ferries for one way only see PARA 833.

7 *R v Great Northern Rly Co* (1849) 14 QB 25. See also *Forth Ferries Ltd v Assessor for Fife* 1952 SC 491, where an agreement described as a lease of a right of ferry was held not to include a lease of a pier which, under the agreement, the lessees were entitled to use in connection with the ferry.

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#### **840. Acquisition of ferry by local authority.**

With the consent of the Secretary of State<sup>1</sup> or, in relation to Wales, the Welsh Ministers<sup>2</sup> a local authority<sup>3</sup> may purchase or accept the transfer of any existing ferry<sup>4</sup> which is within the authority's area or which serves the inhabitants of that area, and the owner may sell or transfer the ferry upon such terms as may be agreed between them<sup>5</sup>. On the acquisition of a ferry the authority must make regulations, to be confirmed by the Secretary of State or, as appropriate, the Welsh Ministers, for the protection from injury of passengers and the general public<sup>6</sup>.

Subject to the provisions of any Act of Parliament under which the ferry was established and to the rights of any other persons<sup>7</sup>, the authority may work, maintain and improve the ferry and charge such tolls<sup>8</sup> as were legally chargeable before the sale or transfer, or may free the ferry from tolls<sup>9</sup>. The authority has the same rights and powers as the owner of the ferry possessed and is subject to the same obligations and liabilities<sup>10</sup>. The local authority may join with any other local authority in acquiring, working, maintaining or improving a ferry, or may contribute to the expenses thereof<sup>11</sup>. A local authority may borrow for these purposes<sup>12</sup>; and a county council or a district council may give financial assistance to a ferry service<sup>13</sup>.

1 The Ferries (Acquisition by Local Authorities) Act 1919 s 1 refers to the Minister of Transport. The functions of that minister are now vested in the Secretary of State for Transport: see PARA 719 note 2. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

2 The functions of the Secretary of State under the Ferries (Acquisition by Local Authorities) Act 1919 (except s 3: see note 10), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. These functions are now vested in the Welsh Ministers: see the Government of Wales Act 2006 s 162(1), Sch 11 para 30. As to the meaning of 'Wales' see PARA 16 note 2. As to the Welsh Ministers see PARA 16 note 5.

3 'Local authority' means and includes a county council, a county borough council, and the council of any urban district: see the Ferries (Acquisition by Local Authorities) Act 1919 s 1(6) (amended by the Local Government Act 1972 s 272(1), Sch 30). The Ferries (Acquisition by Local Authorities) Act 1919 applies to the passenger transport executive for a passenger transport area as if the executive were a local authority for that area: Transport Act 1968 s 10(5) (amended by the Transport Act 1985 ss 57(6), 139(2), Sch 3 para 2(a), Sch 7 para 7, Sch 8). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to passenger transport executives see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 64.

4 'Existing ferry' means any ferry legally established by Act of Parliament or otherwise at the date of the purchase or transfer, and includes all boats or other vessels, landing stages, approaches, apparatus, plant and other property used in connection with the ferry: Ferries (Acquisition by Local Authorities) Act 1919 s 1(4).

5 Ferries (Acquisition by Local Authorities) Act 1919 s 1(1). For the purpose of exercising his or their functions under the Ferries (Acquisition by Local Authorities) Act 1919, the Secretary of State or, as the case may be, the Welsh Ministers may hold local inquiries: s 1(4A) (added by the Statute Law (Repeals) Act 1993 s 1, Sch 2 Pt II para 20).

6 See the Ferries (Acquisition by Local Authorities) Act 1919 s 2. Offenders against such regulations are liable on summary conviction to a fine not exceeding level 1 on the standard scale or a lesser amount as may be prescribed by the regulations: see s 2 (amended by virtue of the Criminal Justice Act 1982 s 46). As to the standard scale see PARA 141 note 18.

7 As to the meaning of 'person' see PARA 13 note 29.

8 As to persons who are exempt from the payment of tolls see PARA 847.

9 See the Ferries (Acquisition by Local Authorities) Act 1919 s 1(2) (amended by the Local Government Act 1972 ss 186(6), 272(1), Sch 30).

10 See the Ferries (Acquisition by Local Authorities) Act 1919 s 1(2) (as amended: see note 9). Crown rights, and particularly those in the foreshore, are preserved: see s 3.

11 See the Ferries (Acquisition by Local Authorities) Act 1919 s 1(3). Any difference which may arise between any local authorities which are acting jointly or jointly bearing any expenses is to be determined by the Secretary of State or, as appropriate, the Welsh Ministers, or by an arbitrator appointed by him or them, and such determination is final and binding: see s 1(3). The provisions of the Arbitration Act 1996 Pt I (ss 1-84) apply to any such arbitration: see s 94; and **ARBITRATION** vol 2 (2008) PARA 1209.

12 Ferries (Acquisition by Local Authorities) Act 1919 s 1(8) (amended by the Local Government Act 1933 s 307, Sch 11 Pt IV). As to borrowing by local authorities see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 594 et seq.

13 See PARA 842.

## **UPDATE**

### **840 Acquisition of ferry by local authority**

NOTE 3--Transport Act 1968 s 10(5) amended: Local Transport Act 2008 Sch 4 para 4.

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#### **841. Extinguishing or relinquishing a ferry.**

In early times a ferry might be extinguished or relinquished by *scire facias*<sup>1</sup> or by a writ *ad quod damnum*<sup>2</sup> and an inquisition thereon followed by a licence from the Crown<sup>3</sup>. However, the procedure by the writ *ad quod damnum* has in modern days fallen into disuse and a ferry is generally extinguished or relinquished by an Act of Parliament<sup>4</sup>. The remedy by *scire facias*, on the other hand, is still available<sup>5</sup>.

1    le a proceeding for the purpose of rescinding or repealing Crown grants, charters and franchises.

2    le 'at what loss?', or 'what damage would the extinguishment or relinquishment cause?'. This was an original writ issuing out of Chancery to a sheriff directing him to summon a jury to inquire whether the proposed step would be detrimental to the public; if the jury found in the negative the Crown might grant a licence authorising the extinguishment or relinquishment.

3    *Paine v Partrich* (1691) Carth 191; 1 Hawk PC, c 76 s 3; *R v Montague* (1825) 4 B & C 598.

4    *R v Montague* (1825) 4 B & C 598; *Royal v Yaxley* (1872) 36 JP 680, where a ferry owner procured an Act of Parliament giving him leave to substitute a bridge for the ferry. See also *North and South Shields Ferry Co v Barker* (1848) 2 Exch 136, where, by the Act, on the purchase of an ancient ferry and the completion of a new one the former became extinct. In *Peter v Kendal* (1827) 6 B & C 703, the interest of the lessee of a ferry was held to be surrendered on his becoming the employee of the ferry owner and working the ferry at certain wages.

5    *Peter v Kendal* (1827) 6 B & C 703; *A-G (at the relation of Allen) v Colchester Corpn* [1955] 2 QB 207, [1955] 2 All ER 124; and see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 264. An information in the nature of *quo warranto* which formerly lay against one who was alleged to claim unlawfully an exclusive right of ferry was abolished by the Administration of Justice (Miscellaneous Provisions) Act 1938 s 9 (repealed by the Supreme Court Act 1981 s 152(4), Sch 7).

#### **UPDATE**

#### **841 Extinguishing or relinquishing a ferry**

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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## **(4) OWNER'S RIGHTS AND LIABILITIES**

### **(i) Maintenance and Continuation of a Ferry**

#### **842. Duty to keep ferry available.**

A ferry, being a monopoly, is not granted for the benefit of the ferry owner, but for the benefit of the public, so that the public may be certain of finding the means of transit across a river<sup>1</sup>. In return for the monopoly the ferry owner must give attendance at all reasonable hours<sup>2</sup>, keep a reasonable and sufficient number of men and craft in proper order and take reasonable and uniform tolls. He must carry all peaceable wayfarers who are willing to pay his toll<sup>3</sup>. If there is no obligation to give attendance or to keep up boats, there is no monopoly of a ferry<sup>4</sup>.

The owner cannot relieve himself of his duties as a ferry owner by building a bridge<sup>5</sup>. Where a person is authorised by Act of Parliament to build and maintain a bridge and take toll from such members of the public as pass over it, and from time to time, whilst the bridge is under repair, to keep a ferry and take the like toll, he may not keep and maintain the ferry only and leave the bridge unrepaired<sup>6</sup>.

A county or district council may give financial assistance for the provision, improvement or continuance of a ferry service which in its opinion will benefit persons in rural areas<sup>7</sup>.

1 *Dibden v Skirrow* [1907] 1 Ch 437 at 444 per Neville J; affd [1908] 1 Ch 41, CA. It is not a monopoly within the Statute of Monopolies (see **COMPETITION** vol 18 (2009) PARA 363): *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL. As to the definition and nature of ferries see PARAS 832-834.

2 This does not necessarily mean at all hours of the day and night. The test of reasonableness requires a balance to be struck between the extent of the demand for ferry services at particular hours coupled with the inconvenience and hardship likely to be caused to the public if certain services are discontinued: *Gravesham Borough Council v British Railways Board* [1978] Ch 379, [1978] 3 All ER 853. As to the penalty for neglect of a ferry see PARA 843.

3 *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 103, HL, per Lord Sumner; Hale's de Jure Maris, Part I cap 2 (Hargrave's Law Tracts 1), cited in *A-G v Simpson* [1901] 2 Ch 671 at 717-718, CA, per Stirling LJ (on appeal sub nom *Simpson v A-G* [1904] AC 476, HL); 16 Vin Abr 26, Nuisance (G) 4; *Letton v Goodden* (1866) LR 2 Eq 123 at 131 per Kindersley V-C. As to tolls see PARAS 846-847.

4 *Londonderry Bridge Comrs v M'Keever* (1890) 27 LR Ir 464, Ir CA. Ferry boats of a ferry vested by Parliament in a statutory body may not be used for purposes other than ferrying: *Dundee Harbour Trustees v Nicol* [1915] AC 550, HL.

5 *Paine v Partrich* (1691) Carth 191.

6 *Nicholl v Allen* (1862) 1 B & S 934, Ex Ch.

7 See the Transport Act 1968 s 34(1) (amended by the Local Government Act 1972 s 272(1), Sch 30; Transport Act 1985 s 139(2), (3), Sch 7 para 10, Sch 8; and by virtue of the Local Government Act 1972 ss 1, 179(1)-(3)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to the power of the Secretary of State to make grants for public transport purposes see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 536.



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### **843. Penalty for neglect.**

A ferry owner is liable to a fine if he does not keep his ferry in readiness and in good repair<sup>1</sup>, or to a claim by a person who has suffered special damage by neglect of the ferry owner's duties<sup>2</sup>; but the court will not make a declaration that the owner of the ferry is bound to operate the ferry or grant a mandatory injunction to compel him to do so<sup>3</sup>.

Another consequence of such neglect may be that the Crown may by proceedings in the nature of *scire facias*<sup>4</sup> annul the grant of the ferry, and if necessary vest it in some other person<sup>5</sup>. However, neglect does not of itself destroy the franchise of a ferry<sup>6</sup>.

1 *Prior of Nedeport (or St Neots) v Weston* (1443) YB 22 Hen 6, fo 14, pl 23; 2 Roll Abr 140, pl 4; Com Dig, Piscary (B); but see *Churchman v Tunstal* (1659) Hard 162; Hale's de Jure Maris, Part I cap 2 (Hargrave's Law Tracts 1), cited in *A-G v Simpson* [1901] 2 Ch 671 at 717-718, CA, per Stirling LJ (on appeal sub nom *Simpson v A-G* [1904] AC 476, HL); *Paine v Partrich* (1691) Carth 191; *Pim v Curell* (1840) 6 M & W 234. For examples of ancient indictments see 1 Public Works in Medieval Law xxvi; 2 Public Works in Medieval Law 306, 308; Selden Soc Publications, vols 32, 40.

2 *Paine v Partrich* (1691) Carth 191. See also *Blissett v Hart* (1744) Willes 508; *A-G v Colchester Corpn* [1955] 2 QB 207, [1955] 2 All ER 124. The extortion of a toll from an inhabitant of a town entitled to be carried toll-free would be special damage sufficient for a claim: *Paine v Partrich* (above). For the liability to special damage for charging an unreasonable toll see PARA 846.

3 *A-G (at the relation of Allen) v Colchester Corpn* [1955] 2 QB 207, [1955] 2 All ER 124. See further *Gravesham Borough Council v British Railways Board* [1978] Ch 379, [1978] 3 All ER 853, where Slade J considered that a mandatory injunction might be granted in exceptional circumstances. As to the grant of a mandatory order (formerly known as an order of mandamus) see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

4 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 264.

5 *Peter v Kendal* (1827) 6 B & C 703; and see PARA 841.

6 *Peter v Kendal* (1827) 6 B & C 703. As to ferries as franchises see PARA 835.

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#### **844. Tenant's duty.**

Where a ferry is leased<sup>1</sup>, the duty of maintaining the ferry and the ferry service will depend upon the terms of the lease, but neglect by the tenant to serve the public will render him liable to be fined, and the franchise may be revoked<sup>2</sup>. He will also be liable in contract or in tort at the suit of any person who has suffered special damage<sup>3</sup>.

1 As to leases of ferries see PARA 839.

2 See *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 102-103, HL, per Lord Sumner; *City of London v Vanacre* (1699) 12 Mod Rep 270. As to the penalty for neglect see PARA 843. As to ferries as franchises see PARA 835.

3 See PARA 843.

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#### **845. Liability in respect of carriage.**

The liability of a ferry owner in respect of goods carried by him is similar to that of a common carrier<sup>1</sup>.

It is a question of fact whether a ferry owner himself undertakes to land goods as well as to carry them across a river; and, if a contract to land is established, there will be a further question as to what amounts to a landing, and whether a slip provided for it is sufficient and suitable<sup>2</sup>. A contract to put on board or land animals or goods cannot be implied from the mere fact that the boat is a ferry boat<sup>3</sup>.

A landing place provided by a ferry owner must be safe, and where loss or damage is caused to goods or animals by reason of its not being so he is liable for that loss or damage<sup>4</sup>. The ferry owner cannot relieve himself from liability for the loss or damage by a notice not brought to the attention of the owner of the goods or animals<sup>5</sup>.

Even though his boat is run for the convenience of the public<sup>6</sup>, a ferry owner should not venture to cross the water in a dense fog, where other traffic may be in his course, if the circumstances are such that he cannot make the passage without committing a breach of the regulations for preventing collisions; if he does so, he takes upon himself the responsibility for injury to life or property which such a proceeding involves<sup>7</sup>.

A ferry boat within the definitions of 'vessel' or 'ship' in the Acts relating to merchant shipping<sup>8</sup> will, unless specially excluded, be subject to the provisions of those Acts<sup>9</sup>. Accordingly if it is a British ship<sup>10</sup> it must, unless exempt from registration, be registered<sup>11</sup>, and if it is a passenger steamer carrying more than 12 passengers, it must be surveyed once at least in each year<sup>12</sup>.

Compulsory pilotage provisions do not apply to ships less than 20 metres in length<sup>13</sup>.

1 *Southcote's Case* (1601) 4 Co Rep 83b; *Barcroft's Case* (prior to 1648) cited in Aleyn 93. As to common carriers see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 3 et seq.

2 As to the definition and nature of ferries see PARAS 832-834.

3 *Walker v Jackson* (1843) 10 M & W 161.

4 *Willoughby v Horridge* (1852) 12 CB 742, where a horse in the charge of its owner was injured by a defective side-rail on the landing slip.

5 *Walker v Jackson* (1843) 10 M & W 161.

6 See PARA 842.

7 *The Lancashire* (1874) LR 4 A & E 198; *The Tranmere* [1920] P 454. As to the regulations for preventing collisions at sea see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 715 et seq.

8 See eg the definitions in the Merchant Shipping Act 1995 s 313(1); the Shipping and Trading Interests (Protection) Act 1995 s 9(2); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 72, 229.

9 As to the provisions of the Acts relating to merchant shipping see **SHIPPING AND MARITIME LAW**.

10 See the Merchant Shipping Act 1995 s 1; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 230 et seq.

11 See the Merchant Shipping Act 1995 Pt II (ss 8-23); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 245 et seq.

12 See the Merchant Shipping (Survey and Certification) Regulations 1995, SI 1995/1210, regs 2, 4 (reg 2 amended by SI 1996/3188, SI 2004/302: Merchant Shipping (Survey and Certification) Regulations 1995, SI 1995/1210, reg 4 substituted by SI 2000/1334, and amended by SI 2000/2687); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 600 et seq.

13 See the Pilotage Act 1987 s 7(3); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 570.

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## (ii) Tolls

### 846. Tolls as incident to franchise.

As incident to the franchise of a ferry, a ferry owner has the right to demand and receive tolls<sup>1</sup>. However, a ferry owner may be obliged by custom to carry the inhabitants of a town free, and a claim lies at the instance of any such inhabitant forced to pay a toll contrary to the custom<sup>2</sup>.

The amount of the tolls need not, and generally does not, appear in the instrument granting the ferry, but must be reasonable<sup>3</sup>. What is a reasonable toll appears to be a question for the court<sup>4</sup>. Where a right to tolls is granted without the amount being fixed, the grantee may demand such amount as appears to him to be reasonable; but the demand of an unreasonable toll would expose him to proceedings at the instance of a private individual forced to pay it, or of the Crown<sup>5</sup>. Long usage and acquiescence in payment of a toll are prima facie evidence of its reasonableness<sup>6</sup>.

A variation in the toll does not destroy the franchise of a ferry. Indeed, a single variation may be evidence of the right of the person who demands it, as presumably without such a right he would not have raised the toll; but repeated variations are evidence of usurpation<sup>7</sup>.

In the case of a statutory ferry, the power to revise the amount of the tolls may be in the discretion of the undertakers, or the tolls may only be subject to a requirement that they are to be reasonable in amount, or there may be in the statute provision for the undertaker to apply to the Secretary of State<sup>8</sup> for an order revising the toll<sup>9</sup>. A local authority<sup>10</sup> or a passenger transport executive<sup>11</sup> operating a ferry undertaking may from time to time revise the charges as seems to it to be appropriate, and may if it thinks fit determine not to continue to charge for the ferry<sup>12</sup>.

1 Hale's de Jure Maris, Part I cap 2 (Hargrave's Law Tracts 1), cited in *A-G v Simpson* [1901] 2 Ch 671 at 717-718, CA, per Stirling LJ (on appeal sub nom *Simpson v A-G* [1904] AC 476, HL). As to ferries as franchises see PARA 835. As to the definition and nature of ferries see PARAS 832-834.

2 *Paine v Partrich* (1691) Carth 191.

3 Hale's de Jure Maris, Part I cap 2 (Hargrave's Law Tracts 1), cited in *A-G v Simpson* [1901] 2 Ch 671 at 717-718, CA, per Stirling LJ (on appeal sub nom *Simpson v A-G* [1904] AC 476, HL).

4 2 Co Inst 222; *Gard v Callard* (1817) 6 M & S 69 (mill).

5 *Stamford Corpn v Pawlett* (1830) 1 Cr & J 57; affd sub nom *Pawlett v Stamford Corpn* 1 Cr & J 400, Ex Ch (fair or market). It seems that the payment of an extortionate sum would be sufficient special damage to entitle the individual paying it to maintain a claim against the toll owner: *Paine v Partrich* (1691) Carth 191 (payment by one of the inhabitants of a town discharged of toll by custom).

6 *Gard v Callard* (1817) 6 M & S 69.

7 *Trotter v Harris* (1828) 2 Y & J 285. See also *Peter v Kendal* (1827) 6 B & C 703, where, in an action by a ferry owner for disturbance of ferry, it was held unnecessary to allege or prove a fixed sum for toll. As to a lease of tolls see *Anguish v Ebdon* (1830) cited in Gunning on Tolls 111. As to disturbance of rights of ferry see PARA 848 et seq. As to tolls in respect of highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 210-215. As to tolls in respect of markets and fairs see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) PARA 1028 et seq.

8     le the Secretary of State for Transport: see the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 13 (definition amended by SI 1959/1768). The Act refers to the Minister of Transport. As to the devolution of functions from that minister to the Secretary of State for Transport see PARA 719 note 2. As to the Secretary of State for Transport see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 509.

9     See the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6 (amended by the Transport Act 1962 ss 52(3), 95(1), Sch 12 Pt I; Harbours Act 1964 s 63(3), Sch 6; Local Government (Scotland) Act 1973 s 150, Sch 18 Pt II para 25; Local Government etc (Scotland) Act 1994 s 180(1), Sch 13 para 43; and by virtue of SI 1959/1768). This provision does not apply to ferries acquired by local authorities under the Ferries (Acquisition by Local Authorities) Act 1919 (see PARA 840): see the Transport Charges etc (Miscellaneous Provisions) Act 1954 s 6(1)(c) (amended by the Local Government (Scotland) Act 1973 s 150, Sch 18 para 25; and the Local Government etc (Scotland) Act 1994 s 180(1), Sch 13 para 43).

10    'Local authority' means a county council, district council, London borough council or parish council, and in relation to Wales means a county council, county borough council or community council: Local Government Act 1972 s 270(1) (definition amended by the Local Government Act 1985 s 102(2), Sch 17 and the Local Government (Wales) Act 1994 s 1(5)). As to local government areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

11    As to passenger transport executives see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 64.

12    See the Local Government Act 1972 s 186(6).

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### 847. Exemption from tolls.

The Sovereign and the servants and vehicles of the Crown are at common law exempt from customary tolls<sup>1</sup>. They are also exempt from tolls under any enactment unless it contains a provision specially binding the Crown<sup>2</sup>, and where the right to receive tolls in respect of a ferry has been granted by Act of Parliament, the Crown's prerogative right of exemption is not restricted by the fact that the Act contains a specific exemption in favour of certain classes of Crown servants or by the fact that the Crown's rights in other particulars are restricted by the Act<sup>3</sup>.

Members of the regular forces on duty, and their vehicles, goods and animals, are exempt from duties or tolls for embarking or disembarking on any pier, wharf, quay or landing place in the United Kingdom<sup>4</sup>. This exemption extends to members of the reserve and auxiliary forces and visiting forces<sup>5</sup>. Moreover, in the case of ferries acquired by local authorities<sup>6</sup>, nothing in the Ferries (Acquisition by Local Authorities) Act 1919<sup>7</sup> extends so as to authorise any tolls to be demanded or received: (1) from any person<sup>8</sup> when on duty in the service of the Crown or the service of a visiting force, or for any animal, vehicle or goods being the property of or used in the service of the Crown or a visiting force; or (2) from any police officer acting in the execution of his duty<sup>9</sup>.

1 Vin Abr Prerogative T 2; *Anon* (1457) Jenk 83. The exemption also appears to extend to private horses and carriages of the Sovereign when used by her permission although not used in her service: see *Westover v Perkins* (1859) 2 E & E 57. As to tolls see PARA 846.

2 *R v Cook* (1790) 3 Term Rep 519; *Weymouth Corp'n v Nugent* (1865) 6 B & S 22; *Cooper v Hawkins* [1904] 2 KB 164, DC. However, the exemption does not apply to a ferry where there is no exclusive right of ferry and no duty to maintain or continue it: see *A-G v Londonderry Bridge Comrs* [1903] 1 IR 389. The Crown's exemption has been said not to extend to tolls traverse: see *Nyali Ltd v A-G* [1956] 1 QB 1 at 34, [1955] 1 All ER 646 at 665, CA, per Parker LJ (affd without considering the question of the royal prerogative [1957] AC 253, [1956] 2 All ER 689, HL). As to tolls traverse see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 210. As to the definition and nature of ferries see PARAS 832-834.

3 *A-G v Cornwall County Council* (1933) 97 JP 281.

4 See the Army Act 1955 s 184; Air Force Act 1955 s 184 (both repealed by the Armed Forces Act 2006, s 378(2), Sch 17. However, the Armed Forces Act 2006 s 382 provides that the Army Act 1955 and the Air Force Act 1955 expire at the end of one year beginning with the day on which the Armed Forces Act 2006 is passed (8 November 2006), unless continued in force by an Order in Council (but not beyond the year 2011). The Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2008, SI 2008/1780, art 2 continues those Acts in force until 8 November 2009. See further **ARMED FORCES** vol 2(2) (Reissue) PARA 32. As to the meaning of 'United Kingdom' see PARA 22 note 5.

5 The exemption is applied to visiting forces by the Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, art 12(2), Sch 6, and it is applied to the reserve land, air and marine forces by the Reserve Forces Act 1996 s 124 (repealed as from a day to be appointed by the Armed Forces Act 2006 ss 358, 378(2), Sch 14 para 51, Sch 17). At the date at which this volume states the law no such day had been appointed. See further **ARMED FORCES** vol 2(2) (Reissue) PARA 32.

6 As to the meaning of 'local authority' see PARA 840 note 3.

7 As to the acquisition of ferries under the Ferries (Acquisition by Local Authorities) Act 1919 see PARA 840.

8 As to the meaning of 'person' see PARA 13 note 29.

9 Ferries (Acquisition by Local Authorities) Act 1919 s 4 (amended by the Revision of the Army and Air Force Acts (Transitional Provisions) Act 1955 ss 3, 5(2), Sch 2 para 8, Sch 4; Theft Act 1968 s 33(3), Sch 3; Office Act 1969 s 141, Sch 11 Pt II).

## **UPDATE**

### **847 Exemption from tolls**

NOTE 5--Appointed day for the repeal of the Reserve Forces Act 1996 s 124 is 31 October 2009: SI 2009/1167.



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### (iii) Disturbance of Rights of Ferry

#### 848. What is a disturbance.

It is a disturbance of the rights of a ferry owner for another person to set up a ferry so near to his that his profits are diminished<sup>1</sup>. However, the ferry owner's rights are only commensurate with his obligations, and, as he is obliged to carry across water by ferry only, it is no disturbance of his rights if another person erects a bridge and so diminishes or destroys the ferry owner's profits<sup>2</sup>; and it seems that the ferry owner may not maintain a claim for disturbance if the traffic carried by the person of whose acts he complains is a new and different kind of traffic for which the convenience of the public requires a new passage<sup>3</sup>.

A person may disturb a ferry even though he charges no toll<sup>4</sup>; and an employer may be liable for a disturbance of a ferry by his employee whom he has engaged to ply for hire in the river where the ferry is<sup>5</sup>.

1 See *Prior of Nedeport (or St Neots) v Weston* (1443) YB 22 Hen 6, fo 14, pl 23; 2 Roll Abr 140, pl 4; 16 Vin Abr 26, pl 4; Com Dig, Piscary (B); 3 Bl Com (14th Edn) 219; *Blissett v Hart* (1744) Willes 508; *Huzzey v Field* (1835) 2 Cr M & R 432. As to the matters to be considered in ascertaining whether there is a disturbance of the franchise right see *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 91 et seq, HL, per Lord Parker of Waddington, and at 104 et seq per Lord Sumner. As to the definition and nature of ferries see PARAS 832-834. As to ferries as franchises see PARA 835. As to the remedy for disturbance see PARA 849.

2 *Hopkins v Great Northern Rly Co* (1877) 2 QBD 224, CA, overruling dicta on this point in *R v Cambrian Rly Co* (1871) LR 6 QB 422; *Dibden v Skirrow* [1907] 1 Ch 437 (affd [1908] 1 Ch 41, CA). In *Hopkins v Great Northern Rly Co* (above), the plaintiff failed on another ground also, namely that, as the railway bridge had been built under the authority of an Act of Parliament and the injury to the ferry was caused, not by its construction, but by its subsequent working, the ferry had not been injuriously affected within the meaning of the Lands Clauses Consolidation Act 1845 s 68 and the Railways Clauses Consolidation Act 1845 s 6. See the observations on the cases cited above in *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 102, HL, per Lord Sumner. However, it is clear that an incorporeal hereditament, such as the franchise of a ferry, is 'land' within the meaning of the Lands Clauses Consolidation Act 1845 ss 3, 68 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 511): *Great Western Rly Co v Swindon and Cheltenham Rly Extension Co* (1884) 9 App Cas 787, HL.

3 *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 107, HL, per Lord Sumner ('The principle is to inquire whether the new traffic is de facto part of the burthen and obligation of the old ferry. If it is not, the owner of the old ferry has no right in it . . . On the other hand, a public that is part of the burthen of the old ferry is not new traffic, though as it grows it may compel the ferryman to adapt his ferry to take a larger business'). In that case it was held that traffic created by the opening of a public park was new traffic which the old ferry had enjoyed not because it belonged to it naturally, but because there was no other way across until the new ferry was made, and that the diversion of it by the new ferry was not a disturbance of the old ferry. See also *Cowes UDC v Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co Ltd* [1905] 2 KB 287; *General Estates Co Ltd v Beaver* [1913] 2 KB 433 (affd [1914] 3 KB 918, CA).

4 *Leamy v Waterford and Limerick Rly Co* (1856) 7 ICLR 27. As to tolls see PARAS 846-847.

5 *Huzzey v Field* (1835) 2 Cr M & R 432.

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#### **849. Remedy for disturbance.**

The ferry owner's remedy for a disturbance of his rights<sup>1</sup> is a claim in the nature of a claim on the case for nuisance, or, in a proper case, an injunction or declaration of title<sup>2</sup>.

Where a ferry owner is not bound to keep and maintain the ferry ready at all reasonable times for the benefit of the public, the reason for the monopoly ceases, and he will not be entitled to the court's assistance in a claim for disturbance<sup>3</sup>. Where there is a general right of ferry, the imposition by Act of Parliament of a penalty in the case of boats of a certain tonnage disturbing the ferry does not limit the general right, but merely adds a cumulative remedy as regards such boats<sup>4</sup>.

If the ferry is leased<sup>5</sup>, the tenant is primarily the person to institute proceedings for disturbance<sup>6</sup>, but if the disturbance is such that the reversion may be injured, the ferry owner may take action either on his own behalf or in conjunction with the tenant<sup>7</sup>.

1 As to what is a disturbance see PARA 848. As to evidence of right of ferry in disturbance claims see PARA 850. As to defences to a claim for disturbance see PARA 851.

2 See the authorities cited in PARA 848 note 1; and *Churchman v Tunstall* (1659) Hard 162, where the court at first dismissed the ferry owner's claim to suppress a new ferry, as seeking to establish a monopoly, but in 1662 the same court decreed that the new ferry should be suppressed. See also *Huzzey v Field* (1835) 2 Cr M & R 432. As to injunctions see *Cory v Yarmouth and Norwich Rly Co* (1844) 3 Hare 593; *Anon* (1750) 1 Ves Sen 476 (application for injunction before defendant's answer refused); *Letton v Goodden* (1866) LR 2 Eq 123 (injunction refused, plaintiff being under no obligation to keep up ferry); *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL (declaration and injunction refused); *Cowes UDC v Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co Ltd* [1905] 2 KB 287 (where an injunction and damages were claimed).

3 3 Bl Com (14th Edn) 219; *Letton v Goodden* (1866) LR 2 Eq 123; *Londonderry Bridge Comrs v M'Keever* (1890) 27 LR Ir 464, Ir CA. As to monopoly rights see *Bournemouth-Swanage Motor Road and Ferry Co v Harvey & Sons* [1930] AC 549, HL. As to the definition and nature of ferries see PARAS 832-834.

4 *North and South Shields Ferry Co v Barker* (1848) 2 Exch 136.

5 As to leases of ferries see PARA 839.

6 *Peter v Kendal* (1827) 6 B & C 703. For instances of actions by tenants see *Pim v Curell* (1840) 6 M & W 234; *Huzzey v Field* (1835) 2 Cr M & R 432; *Newton v Cubitt* (1862) 12 CBNS 32; *Trotter v Harris* (1828) 2 Y & J 285; *Cowes UDC v Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co Ltd* [1905] 2 KB 287.

7 *Jones v Llanrwst UDC* [1911] 1 Ch 393; *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL.

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### **850. Evidence of right of ferry in a claim for disturbance.**

It is sufficient for a ferry owner in a claim for disturbance of his ferry<sup>1</sup> to prove that a right of ferry<sup>2</sup> exists and that he was in possession at the time the claim was made<sup>3</sup>. If that possession has been for a long period, neither a legal origin of the franchise of the ferry, nor proof of payment of a fixed sum for ferriage, need be proved<sup>4</sup>, nor is it necessary to prove that sufficient men and boats were kept ready for the carriage of passengers or goods<sup>5</sup>, or that the ferry owner owns the soil of the landing places, if he has the use of them<sup>6</sup>, or that the defendant in setting up a rival ferry intended to defraud the ferry owner<sup>7</sup>.

Where a right of ferry both ways is claimed, but proved in respect of one way only, the ferry owner may have judgment in respect of that way<sup>8</sup>.

In cases involving a public right in which all the Queen's subjects are concerned, such as the right to a ferry, a verdict and final judgment between other parties, where proofs were given on both sides, and where the proceedings were not collusive, may be given in evidence<sup>9</sup>. However, if in the proceedings between other parties the court merely made an interim order, reserving final judgment for a future time, the interim order is not evidence<sup>10</sup>.

1 As to what is disturbance see PARA 848. As to the remedy for disturbance see PARA 849. As to defences to a claim see PARA 851.

2 As to the definition and nature of ferries see PARAS 832-834.

3 *Peter v Kendal* (1827) 6 B & C 703; *Layzell v Thompson* (1927) 96 LJCh 332 at 338, CA, per Sargant LJ; *Trotter v Harris* (1828) 2 Y & J 285, where user of 35 years was held sufficient. The court will presume a legal origin for a ferry where the exclusive right of ferry has existed in a series of owners for many years, and it is no answer that at times the river bed is dry land or that one terminus of a point to point ferry is a highway if the other affords access to a highway: *Layzell v Thompson*; *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL. See also *General Estates Co Ltd v Beaver* [1913] 2 KB 433; affd [1914] 3 KB 918, CA.

4 *Trotter v Harris* (1828) 2 Y & J 285. As to ferries as franchises see PARA 835.

5 *Blissett v Hart* (1744) Willes 508.

6 *Peter v Kendal* (1827) 6 B & C 703, not following on this point *Ipswich Inhabitants v Browne* (1581) Sav 11 at 14, Ex Ch; Com Dig, Piscary B.

7 *Blacketer v Gillett* (1850) 9 CB 26.

8 *Giles v Groves* (1848) 12 QB 721. Ferries may be created for one way only, the owners of opposite manors each having a ferry (eg the ferries between Gorleston and Yarmouth): see *General Estates Co Ltd v Beaver* [1913] 2 KB 433; affd [1914] 3 KB 918, CA.

9 *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL. See also *Hemphill v M'Kenna* (1845) 8 ILR 43.

10 *Pim v Curell* (1840) 6 M & W 234; *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL; and see **CIVIL PROCEDURE** vol 12 (2009) PARA 1159.

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### **851. Defences to a claim for disturbance.**

Neglect of duty is no answer to a claim for disturbance of a ferry<sup>1</sup>. However, a defendant in such a claim may show that his ferry was set up to accommodate a new and different kind of traffic<sup>2</sup>; or that there has been a change of circumstances creating new highways on land which would carry with it a right to continue these across the water; or that the public cannot be served by the old ferry<sup>3</sup>; or that he carries his traffic to a town different from that to which the ferry owner carries his<sup>4</sup>; or that the Act under which the ferry was constituted does not confer an exclusive right of ferry<sup>5</sup>.

1 *Peter v Kendal* (1827) 6 B & C 703. As to the definition and nature of ferries see PARAS 832-834. As to what is a disturbance see PARA 848. As to evidence in a claim for disturbance see PARA 850. As to the remedy for disturbance see PARA 849.

2 *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL; *Cowes UDC v Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co Ltd* [1905] 2 KB 287; and see *Dixon v Curwen* [1877] WN 4 (ferry on inland lake). See also PARA 848 note 3.

3 *Newton v Cubitt* (1862) 12 CBNS 32 (affd 13 CBNS 864, Ex Ch); *Hopkins v Great Northern Rly Co* (1877) 2 QBD 224, CA.

4 *Tripp v Frank* (1792) 4 Term Rep 666. See also *Matthews v Peache* (1855) 5 E & B 546.

5 *Bournemouth-Swanage Motor Road and Ferry Co v Harvey & Sons* [1930] AC 549, HL.